REPUBLIC OF NAMIBIA NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 396/2009

In the matter between

NARCISSUS LOUIS JANUARIE	**APPLICANT**

And

REGISTRAR OF THE HIGH COURT	**1ST RESPONDENT**
DEPUTY SHERIFF – REHOBOTH	**2ND RESPONDENT**
REGISTRAR OF DEEDS – REHOBOTH	**3RD RESPONDENT**

Neutral citation: *Januarie v Registrar of High Court & others (I 396/2009) [2013] NAHCMD 170 (19 June 2013)*

Coram: **Smuts, J**

Heard on: 29 May 2013

Delivered on: 19 June 2013

Flynote: Application for recusal – principles restated – double requirement of reasonableness – apprehension of bias not reasonable nor reasonability held – application dismissed.

ORDER

The applicant's application for recusal is dismissed with costs.

JUDGMENT

SMUTS, J

[1] The applicant on 11 December 2012 filed an application to review and set aside decisions taken by the three respondents relating to the sale in execution of immovable property in Rehoboth and the subsequent registration of the property transfer. The first and second respondents oppose that review. After affidavits were exchanged, the application was referred to case management. This review application is the latest attempt by the applicant in his opposition to the sale of his home in execution following default judgment granted against him on 19 May 2009

[2] On April 2013 the applicant brought an application for my recusal, which was heard on 29 May 2013. At a case management on 17 April 2013, I directed that the matter be heard on 29 May 2013. I also directed that the respondents seeking to oppose the application are to file answering affidavits by 7 May 2013. The second respondent filed an answering affidavit on the morning of 8 May 2013. The applicant contended that the second respondent was in contempt of court. Even though he acknowledged that he was not prejudiced by the late filing, he asked me not to receive it and to commit the second respondent for contempt. Mr Phatela who appeared for the second respondent applied from the bar for condonation for the late filing of the affidavit. I have had careful regard to the applicant's affidavit in this recusal application and propose to deal with the issues raised in it and without regard to the answering affidavit. It is accordingly not necessary for me to deal with issue as to whether condonation should be granted or not.

[3] Mr Boonzaier who appeared for the first respondent said that he abided the decision of the court. The third respondent did not oppose the application.

[4] A number of issues are raised in the applicant's founding affidavit alleging bias on my part which concluded that it would be impermissible for me to sit on the review application and demanding my recusal.

[5] When the matter was called, I pointed out to the applicant that I had on 25 and 26 September 2012 presided in an interlocutory application relating to the same matter brought by him seeking to stay the sale in execution of the property in question. I also

pointed out that most of the issues raised in his affidavit in this recusal application had predated that interlocutory application and asked him to address me on that. Some of them in fact were in fact raised in what was termed an “open memorandum” filed in the course of the hearing of that interlocutory application during an adjournment on 26 September 2012 by an organisation known as the Namibia Home Owners Association and signed by a certain Ms Erica Beukes, referred to as its leader. In the memorandum, it is stated that the applicant is a member of that organisation. The memorandum in question was also styled as an objection to my presiding in the interlocutory matter. It referred to the position that I had occupied as a chairperson of the board of directors of Standard Bank Namibia Limited (Standard Bank) which I had held until 31 January 2011, immediately before my appointment to the High Court on 1 February 2011. In the course of that interlocutory application, I had expressly asked the applicant if he wished to make any application as a consequence of the memorandum which had been placed on the court file. He elected not to do so. My position as chairperson of that board is however raised in this application for recusal.

[6] In response to pointing out that many of the other issues raised in his affidavit in this recusal application predated the hearing of 25-26 September 2012 the applicant said that he mainly relied in his application for my recusal upon what had occurred at the previous interlocutory application.

[7] It is accordingly necessary to refer to that earlier ruling and what had transpired in the course of that application.

<u>The interlocutory application of September 2012</u>

[8] The interlocutory application was brought by the applicant as one of urgency. It was set down on 25 September 2012. But it was only served on the respondent cited in it, Nedbank Namibia Limited, on the previous day, namely 24 September 2012. It sought to stay the sale in execution of the immovable property registered in the applicant’s name which the applicant had used as security in the form of a mortgage bond for a loan which he had obtained from Nedbank. That bank had called up the loan and obtained judgment by default against the applicant and the immovable property was

declared executable. This had in turn resulted in a warrant of execution and thereafter a sale in execution set for 27 September 2012.

[9] The interlocutory application for stay was thus brought on the very eve of the sale. The application was opposed by Nedbank, represented by Mr Phatela who appeared in court 25 September 2012 when the matter was called. Given the very short service of the application upon the respondent, he sought time on behalf of the respondent to file an answering affidavit. He indicated that not much time would be needed. After canvassing how much time was needed, I stood the application down until 14h15 on 25 September 2012 to afford the respondent time to file an answering affidavit. To ensure that the applicant would have sufficient time to read it and be able to prepare argument at 14h15, I said that the answering affidavit should be filed by 10h30 that morning. As it turned out the respondent was not able to do so. I was informed at 14h15 by the applicant that he had only received the answering affidavit at noon. As a consequence he asked that it should not be received it at all. I declined that request.

[10] I pointed out that the purpose of stating that the affidavit should be served by 10h30 was to enable him to have sufficient time to read it. I then granted the applicant further time to consider the answering affidavit and postponed the matter to the following morning, 26 September 2012. When the matter was then called on 26 September 2012, the applicant asked for more time. He indicated that some pages of the answering affidavit had only been provided to him at around 17h00 on the previous afternoon. He also said he wanted to see a doctor and wanted more time to consider the answering affidavit. Mr Phatela confirmed that four pages of the affidavit had not been provided with the initial copy served upon the applicant and stated that the full answering affidavit had been served upon him at 16h40 on the previous afternoon and handed up a return of service to show that. The applicant requested that the matter stand down to 14h15. I however granted an extension until 12h00 on 26 September 2012.

[11] Before the resumption of the hearing at 12h00 on 26 September 2012, a very full replying affidavit was filed by the applicant, dealing with material raised in the answering affidavit. It also raised new matter. Early on 26 September 2012, the “open memorandum” prepared with that court heading and case number was filed at the

registry from the organisation I have referred to. When the matter resumed at 12h00 on 26 September 2012, I asked the applicant if he had any application to make as a consequence of the matter contained in a memorandum as it had said that he was one of its members. He said that he did not have an application to make and that he was not aware that the memorandum had been placed on the court file. As I have said the memorandum referred to my previous position as Chairperson of Standard Bank. It also alleged that there had been illegalities with regard to the establishment of the Legal Assistance Trust which operates the Legal Assistance Centre. It also made further allegations which it contended arose from the alleged illegality which I refer to below.

[12] I then proceeded to hear argument in the interlocutory application. I asked the applicant to address me on the delay which had occurred in bringing the application to stay the sale in execution. It was common cause that the applicant had been aware of the pending sale for some time and the fact that the Registrar's office had taken the view that his appeal challenging the default judgment had lapsed. It would appear from the papers filed that the applicant accepted that view as he had filed an application for condonation to the Supreme Court to deal with the lapsing of the appeal and seeking condonation for his non-compliance with the rules. It was also accepted by the applicant in argument that the appeal had lapsed. This meant that a suspension of the judgment appealed against by him would not arise and that Nedbank as plaintiff in that action would be entitled to proceed with execution in the absence of an order to the contrary effect.

[13] The applicant's founding affidavit and the considerable amplification in reply did not however properly explain why the applicant had waited until shortly before the sale in execution to bring the application. I referred the applicant to a judgment of this court in *Bergmann v Commercial Bank of Namibia*[1] which made it clear that when an application of that nature is to be brought on the basis of urgency, the proceedings should take place as soon as reasonably possible after the cause of action had arisen and that parties should not create their own urgency by failing to take steps in advance of an event like a sale in execution.

[1]2001 NR 48 (HC)

[14] Mr Phatela had also pointed out in argument that the balance of convenience favoured the respondent in that interlocutory application because there had been no denial by the applicant that the amount which had been advanced was not owing to Nedbank. Having carefully considered the arguments advanced by the applicant and Mr Phatela, I declined in the exercise of my discretion to condone the non-compliance with the rules of court and to hear the matter as one urgency, given the self created and self induced nature of the urgency with which the application had been brought. I accordingly struck the matter from the roll with costs.

[15] Having set out what occurred in that application and the ruling made, I turn to refer to the applicable legal principles concerning recusal.

Principles governing recusal applications

[16] The applicant contends that he has a reasonable likelihood or apprehension of bias if I were to preside in the review application. The principles applicable to recusal were, with respect, recently succinctly summarised by the South African Constitutional Court in *Bernert v Absa Bank*[2] in the following way:

[1] '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 officer has in the outcome of the case. Or it may arise from the conduct or utterances 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 Constitution that courts must be independent and impartial.[3] And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.

The test for recusal which this Court has adopted is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court.'[4]

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[2] 2011 (3) SA 92 (CC).

[3] Supra at par 28-29.

[4] Supra at par 48.

[17] The court in Bernert then referred to the proper approach to an application for recusal articulated in one of its previous decisions in *SARFU and Others v President of South Africa & Others*[5] as:

'It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. 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. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

[18] This approach in SARFU was followed and cited with approval in the Supreme Court in *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others*[6] and in this court in *Christian v Chairman of Namfisa.*[7]

[19] The presumption of impartiality and double-requirement of reasonableness, accepted by the Supreme Court in *Christian* and set out in the SARFU matter, was, with respect, articulately explained by Cameron J in the South African Constitutional Court in *Commercial Catering and Allied Workers' Union and Others v Irvin & Johnson*[8] in the following way:

> '[12] Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two 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.

[5] 1999 (4) SA 147 (CC) at 175

[6] 2008 (2) NR 753 (SC).

[7] 2009 (1) NR 22 (HC).

[8] 2000 (3) SA 705 (CC) at par 12-17, excluding footnotes, and cited with approval by Van Niekerk, J in *Christian v Chairman of Namfisa* supra at par 22.

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.

[13] 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. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. Impartiality requires, in short, a mind open to persuasion by the evidence and the submissions of counsel; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding.

. . .

[14] The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. 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* 1999 (4) SA 915 (SCA), 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] It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance . . . .

[16] The double unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.

[17] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised. In South Africa, [as in Namibia] adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from the evils and immorality of the old order remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of Judges and magistrates that ill-founded and misdirected challenges to the composition of a Bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance.'

[20] Ngobo, CJ in Bernert concluded with reference to the nature of the enquiry:

[2] 'Ultimately, what is required is that a judicial officer confronted with a recusal application must engage in the delicate balancing process of two contending factors. On the one hand, the need to discourage unfounded and misdirected challenges to the composition of the court and, on the other hand, the pre-eminent value of public confidence in the impartial adjudication of disputes. As we said in *SACCAWU*, in striking the balance, a court must bear in mind that it is "'as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance'. This balancing process must, in the main, be guided by the fundamental principle that court cases must be decided by an independent and impartial tribunal, as our Constitution requires.'[9]

[21] These principles, followed by the courts in Namibia,[10] reflect the position in Namibia.

Application of the principles

[22] The balancing act which this court should is to engage in entails considering the factual grounds raised by the applicant in the context whether they establish double requirement of reasonableness in the apprehension of bias as set out above.

[9]Supra at 37.
[10]*Christian v Chairman, Namfisa & Others* 2009(1) NR 22 (HC); See Generally *Christian v Metropolitan Life Namibia Retirement Fund and Others* 2008 (2) NR 753 (SC).

Previous interlocutory proceedings

[23] I have set out the factual circumstances and background to the ruling made in the previous interlocutory proceedings which the applicant primarily relies upon in support of this recusal application. The applicant's contention is that, by receiving the respondent's answering affidavit on 25 September 2012 when the matter resumed at 14h15, demonstrated bias because I had said that the affidavit was to be served on him at 10h30 and it was only served at noon.

[24] The applicant's approach overlooks the fact that the interlocutory application itself was brought on such short notice, the day before the hearing. The respondent in that application is a large corporate entity and would need time to consider its position and authorise any opposition. But more importantly, there was absolutely no prejudice to the applicant in receiving the affidavit – he was afforded ample time to consider the affidavit and made use of that time to file a lengthy replying affidavit and the application could still be heard before the scheduled sale. But also importantly, the applicant himself did not apply for my recusal on the ground that I had received the affidavit. On the next day when the matter resumed he instead filed his replying affidavit. This despite being expressly asked if he had any application to make following the filing of the memorandum which sought to object against me presiding in the application.

[25] In the circumstances, it is clear to me that the applicant's apprehension of bias with reference to those proceedings – the sole ground raised by him in argument – is not reasonably held.

[26] Although the applicant stated that he placed his reliance only on that ground in argument, his application does refer to other matter which I turn to deal with.

Position as Chairperson of Standard Bank

[27] My position prior to my appointment as non executive chairperson of the board of Standard Bank Namibia Limited was also raised in the recusal application. Standard Bank was not a party to these or the interlocutory proceedings. Another commercial

bank, Nedbank Namibia Limited, was cited as a party in the interlocutory application – but not in these proceedings.

[28] My position as non executive chairperson ceased prior to commencing judicial office. There is no allegation of any further ongoing relationship or connection to Standard Bank or a shareholder because I do not hold any shares in that bank or its parent company. Nor do I hold any shares in Nedbank Namibia Limited or its parent company.

[29] There is reference in the applicant's affidavit to my sitting in a matter where Standard Bank was a party. It is not explained quite how doing so could give rise to a reasonable apprehension of bias in this matter. I presided in that case some time after I had relinquished my position as non executive chairperson of Standard Bank. But also importantly in the context of this matter, my erstwhile position at Standard Bank was raised in the memorandum in the interlocutory application and the applicant elected not to apply for my recusal on that ground then.

[30] Previously occupying that position of an entity which is not before this court or having a direct or substantial interest in the interlocutory or review application, would also not in my view give rise to a apprehension of bias on the part of the applicant reasonably held.

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[31] There is reference to the fact that I had recused myself in another matter involving a certain Terence Noble where Standard Bank was a party and my recusal was sought. It is not explained how the mere fact of my recusal in another matter which is not stated as having any bearing upon this matter can give rise to a reasonable apprehension of bias being reasonable or being reasonably held.

Legal Assistance Trust

[32] The applicant further contends in his founding affidavit that he would 'not obtain a fair trial before Smuts, J as a result of publicly known serious allegations of inter alia

money laundering and tax evasion against you (Smuts, J).' These allegations are not specified in his affidavit. Nor is their relevance to the review application anywhere explained.

[33] They would appear to refer to the allegations made in the memorandum filed in the interlocutory application, placed in the court file where the following is stated by Ms Erica Beukes, in the memorandum:

> 'Erica Beukes investigated Smuts, the Legal Assistance Trust, and the Legal Assistance Centre and found that he was running a massive money laundering scam and tax evasion through the LAT and LAC.'

[34] That organisation contends that the Legal Assistance Trust (LAT) which operates and funds the Legal Assistance Centre (LAC) was illegal because the trust was not registered when it was constituted in 1988. It is correct that I was the founder of the LAT and founding director of the LAC and that the former raised funds for the latter. The organisation asserts that, as a consequence of the alleged illegalities surrounding the establishment of the LAT by not registering it, LAT fund raising for the LAC's activities as a public interest law centre was fraudulent and amounted to money laundering and tax evasion. As becomes apparent from what is set out below, these assertions, based upon the alleged illegality, are unfounded as they are based on the entirely false premise of non registration amounts to illegality.

[35] The LAT's trust deed has served before this court, its constitutional predecessor and the Supreme Court on no less than three occasions, in matters upon which a total eight different judges of this court and the Supreme Court have sat.

[36] In August 1989, the LAT applied for a declaratory order to the effect that enrolled attorneys employed by it were entitled to sign process.[11] That application was necessitated by the stance taken by the Administrator-General (in pre-independent Namibia) and the South African Minister of Defence at the time. These respondents had taken the point that the LAC's attorneys were not permitted to sign process and they opposed the application. It was heard by a full bench comprising Berker JP (as he then was), Strydom, J (as he then was) and Hendler, J.

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[11] *Legal Assistance Trust v Administrator-General for South West Africa and Another*, case no A 238/1989,heard on 28 August 1989.

[37] One of the points taken by the respondents was that they did not admit that the LAT was a duly constituted trust because the deed of trust was not attached to the founding papers. In reply it was pointed out that all the trustees were duly and orally appointed and that the LAT was constituted by the initial oral appointment of trustees by the founder. It was further expressly stated in reply that, in accordance with the law, the registration of the trust was not required by virtue of s2 of the Trust Moneys Protection Act, 34 of 1934. The trust deed was also placed before the court.

[38] In the course of oral argument and at the suggestion of the court, the application became settled and the respondents undertook to no longer object to the validity of LAC attorneys signing process. The question of the validity of the establishment of the LAT and the fact that it was not required to be registered was not contested by the respondents after the explanation given in reply. Nor was this issue raised by the court. This is because s2 of the Trust Moneys Protection Act, 1934 only requires the registration of trusts where trustees are appointed in a written instrument in the following terms:

> ‘Every trustee appointed by written instrument operating *inter vivos* and executed after the commencement of this Act shall lodge such instrument with the Master of a copy thereof certified as correct by a person approved of the Master or by a notary and shall from time to time lodge with the Master any written variation of such instrument or a copy thereof likewise certified.’

[39] A trustee is also defined in that Act as:

> ‘A person appointed by written instrument operating either *inter vivos* or by way of testamentary disposition whereby moneys are settled upon him to be administered by him for the benefit, whether in whole or in part, of any other person.’[12]

[40] It is accordingly clear, as was by implication accepted by a full bench of this court, registration of a trust would not be required for the validity or legality of a trust where trustees were or are orally appointed. That is also what the Act in plain language provides.

[12] S1 (the definitions section)

[41] The LAT's deed of trust also served before a full bench of this court in a review of a decision of the Taxing Master disallowing disbursements incurred by the LAC.[13] The terms of the trust deed were of importance in determining whether the disbursements should have been allowed. The trust deed specifically refers to the oral appointment of the trustees. The full bench of this court (comprising Mtambanengwe, J and Teek, J) upheld the decision of the Taxing Master. Their decision was also upheld on appeal to the Supreme Court.[14] In neither this court nor the Supreme Court was the legality of the trust questioned by virtue of the oral appointment of trustees. There was correctly no suggestion that the mode of appointment would affect the validity or legality of the trust itself.

[42] The underlying premise upon which Ms Beukes' allegations of money laundering and tax evasion are based is that the LAT is illegal because it was not registered at the time. This premise is simply entirely wrong and without any basis in law. Not only does it fail to take into account the express wording of the Act but it also demonstrates a fundamental misconception of the nature of trusts and how they are established.

[43] Having exposed the fatally flawed premise of illegality, it follows that the allegations if wrong doing which Ms Beukes considers flows from it are as a consequence entirely unfounded.

[44] It further follows that such unfounded and incorrectly based assertions cannot themselves found a reasonably held apprehension of bias. Nor can the making of baseless remarks by a litigant imputing improper conduct against a judge found an application for recusal. Plainly litigants cannot, by directing unfounded allegations of illegal or improper conduct at presiding officers, use their own conduct of making unfounded allegations as a basis to seek the recusal of the presiding officers. No system of administration of justice can tolerate such a state of affairs.

<u>Sikunda v Government of Namibia</u>[15]

[13]In *Hameva and Another v Minister of Home Affairs*
[14]*Hameva and Another v Minister of Home Affairs* 1996 NR 380 (SC)
[15]2001 NR 67 (HC)

[45] The applicant also referred to this reported judgment of the High Court in support of his application for recusal. He says that I and my the colleagues in the Society of Advocates had shown disrespect for the then Judge-President and states that I

'as a 'shareholder' in the Namibian newspaper and your colleagues, in another white owned newspaper Die Republikein placed possibly contemptuous statements which give the impression that a black judge (even if he is a Judge-President) is incompetent. As a black person, I have no confidence that the hearing will be fair before Smuts, J.' (sic)

[46] During argument I asked the applicant to explain the relevance of this judgment to these proceedings. He was unable to do so. This is understandable as the conclusion he draws does not follow from the stated premises or that judgment.

[47] As is apparent from the reported judgment, the presiding judge in that matter was the subject of widespread criticism quoted in full in his judgment. A statement by the Society of Advocates and editorials in the two major national daily newspapers were quoted in full in that judgment. The presiding judge invited the parties to address him on the question as to whether he should recuse himself. The applicant whom I had represented in the main application and on appeal did not apply for the recusal of the presiding judge. There is no reference in the judgment to shareholding in the Namibian. Nor is it factually correct. (I was at the time one of the trustees of a charitable trust which held shares in the company which publishes The Namibian.) The reference to my 'colleagues' at 'another while owned newspaper' is also not explained in the affidavit. There is also nothing in the reported judgment to support this reference. Nor is there any basis in fact for it. There was no suggestion in the judgment, and correctly so, that I had written or had a part in either editorial. Nor was I the author of the statement by the Society of Advocates, issued under the hand of another member. (By reason of my involvement in the Sikunda matter I would have been precluded from issuing that statement and did not do so.) The fact that the presiding judge was criticised by others (which did not give rise to any contempt proceedings), and moved him to recuse himself even though neither side had sought that, can have no bearing on this matter and the position of the applicant in these proceedings.

[48] The insinuation made in his founding affidavit does not arise from that judgment in any way at all and based upon incorrect assumptions cannot give rise to a reasonable apprehension of bias or one reasonably held.

Chairperson of Nedbank

[49] The final issue raised in the applicant's affidavit is that the non executive chairperson of Nedbank Namibia Limited, Mr Theo Frank SC, is a member of the Bar and a colleague and a friend of mine. Whilst it is correct that default judgment was obtained by Nedbank against the applicant, it was on the basis of default of a loan secured by a bond which the applicant had defaulted on. As was pointed out in the interlocutory application, the applicant did not contest his liability for his loan to Nedbank.

[50] The applicant does not assert that its non executive chairperson had anything to do with the uncontested loan or the litigation against him. His name does not feature at all in those proceedings. Furthermore the applicant did not think that he should even cite Nedbank as a respondent in the review proceedings (from which he seeks my recusal) and did not do so. Nor was this issue raised when I presided in the interlocutory application where Nedbank was indeed cited as a party. No explanation is given for that.

[51] It is also clear that this issue raised by the applicant would not give rise to a reasonable apprehension of bias or one being reasonably held.

Conclusion

[51] I have in some detail referred to the primary basis for this application for recusal – accepting the answering affidavit in the interlocutory application. Even though they were not raised in argument, I have also referred to the other grounds raised in the founding affidavit. I have found that the none of the grounds advanced, considered on their own or even together, gives rise to a reasonable apprehension of bias on my part in the context of the double requirement of reasonableness set out above.

[52] I accordingly dismiss the applicant's recusal application with costs

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DF SMUTS

Judge

APPEARANCE

FOR THE APPLICANT:	N.L. Januarie
	In Person
FOR THE 1ST RESPONDENT:	Mr Boonzaier
Instructed by:	Government Attorney
FOR THE 2ND RESPONDENT:	Mr Phatela
Instructed by:	Dr Weder, Kauta & Hoveka Inc.