NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 739/2012

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA (MINISTER OF SAFETY AND SECURITY)	**PLAINTIFF/RESPONDENT**
and	
ISAI IPINGE	**DEFENDANT/APPLICANT**

Neutral citation: *The Government of the Republic of Namibia (Minister of Safety and Security) v Ipinge* (I 739-2012) [2013] NAHCMD 303 (29 October 2013)

Coram: UNENGU, AJ

Heard: 20, 22 March; 22 May and 8 July 2013

Delivered: 29 October 2013

Flynote: Applications and motions – application for recusal – Applicant failed to prove requirements of reasonableness – application dismissed.

Summary: The applicant through his legal representative applied for my recusal as the presiding judge, contending that a reasonable apprehension of bias does exists due to the fact that I have attended management meetings with Chiefs of directorates in the Ministry of Justice including Government Attorneys, then, whose office is representing the plaintiff in the matter. Application dismissed with costs as applicant failed to prove requirements of reasonableness.

ORDER

The application is dismissed with costs.

JUDGMENT

UNENGU AJ:

[1] Through his legal representative, the applicant has applied for my recusal from further adjudicating on his matter.

[2] On resumption of the trial of this matter on 8 July 2013, Mr Ipumbu, who is the legal representative for the applicant launched an application for my recusal with costs, supported by an affidavit deposed to by himself in his capacity as the applicant's legal representative.

[3] He states the reason(s) for my recusal in paragraph 3 of the affidavit as follows:

'I confirm that I was employed at the Ministry of Justice in the capacity as a Deputy Coordinator of the SADC Legal Sector Coordinating Unit effective from 1 August 2000 until 31 August 2006. At that time, it was a custom that the heads of various Directorate (sic) in the Ministry of Justice attend monthly management meetings. I confirm that, during that material time, Honourable Acting Justice Unengu, was Chief: Lower Courts. By virtue of his former position, he used to attend monthly management meetings together with other heads of the Directorates, *inter alia*, Government Attorney, Chief of Legal Advice and Co-ordinator of the SADC Legal Sector Coordinating Unit. I further confirm that I also used to stand in for my Co-ordinator at the Management meetings of the Ministry of Justice whenever she was not available.'

[4] Mr Ipumbu continues as follows in paragraph 4 of his affidavit: 'I confirm that the Honourable Acting Justice Unengu, by virtue of his previous position, as Chief of Lower Courts had a long standing working relationships with the Ministry of Justice under which the Directorate of Civil Litigation (Office of the Government Attorney) falls. *In casu*, the plaintiff in the main case is the Government of the Republic of Namibia which is represented by the Office of the Government Attorney, whereby the former government attorneys to wit: Adv Ernstine Vicky ya Toivo, Ray Goba used to attend the Management meetings with Acting Justice Unengu'.

[5] It is clear from the above allegations as stated in his affidavit that Mr Ipumbu is relying on my relationship with the Ministry of Justice then as Chief: Lower Courts, for my recusal.

[6] In addition to the above-mentioned allegations, he also, in paragraph 8 of the affidavit alleges that I dismissed the application for absolution from the instance in the matter, despite the fact that the respondent did not prove its case.

[7] Briefly the background of the matter is stated here-under. The respondent has sued the applicant, Mr Isai Ipinge, a former police officer in the employment of the Ministry of Safety and Security for an amount of N$48 196.82 which money was

erroneously paid to him as monthly remunerations for the period January 2005 until June 2010 which period the applicant did not work for the respondent as he was already dismissed from work in December 2004 due to absence from work for a period exceeding 30 days.

[8] The respondent, during the trial, called and led evidence of two witnesses, the Commander of the Unit where the applicant was attached and secondly, the immediate supervisor of the applicant who worked with him on shifts of Unit B.

[9] After the respondent's case, Mr Ipumbu applied for absolution from the instance – which application I dismissed with costs and indicated that my reasons for the dismissal of the application will be included in the main judgment at the end of the trial. This happened on the 20th of March 2013. Thereafter, the matter was postponed until 22 March 2013 at 10h00 for the applicant's case, because the 21st of March was a public holiday.

[10] On 22 March 2013 when the matter was called, but before Mr Ipumbu could call the applicant to testify, Ms Fredericks, counsel for the respondent informed the Court that she intended to file an application to re-open the respondent's case. After a few deliberations and addresses from both sides, I granted a postponement in favour of the applicant for counsel to acquaint himself with the contents of the application for the re-opening of the respondent's case, until July 2013 at 10h00.

[11] I must mention also that, was it not for the application to re-open the respondent's case, Mr Ipumbu was ready to proceed with his client's case. On page 62 of the record in paragraphs 10 to 20 thereof, Mr Ipumbu addressed the Court as follows:

'Yes My lord. My Lord I still confirm my appearance on behalf of the defendant in this matter and we are ready to proceed with the defendant's case. However, there is this Application. My Lord as His Lordship may see, this document before here is dated today, 22nd March 2013. It was filed at 10:00, now it is just 10:10. I just got it 3 minutes ago, I did not even read it. I do not know the content of it. I cannot even speculate the content of it'.

[12] The only problem Mr Ipumbu had on the 22nd of March 2013 is the short notice of the application for the re-opening of the respondent's case. He wanted sufficient time to read the application and possibly to prepare himself to address the Court properly with regard the application. He did not know the contents of the application – it was filed the same day at 10h00 when the Court resumed, therefore, he needed more time to prepare himself for the application. The Court granted a postponement with costs in favour of the applicant, because I was of the view that it was just and fair under the circumstances to do so as it was not his fault that the trial could not proceed.

[13] However, before 8 July 2013, the day for the hearing of the application to re-open the case for the respondent, Mr Ipumbu filed this application for my recusal on the grounds stated above.

[14] Smuts, J, set[1] out and extensively dealt with the law applicable to recusal applications in his judgment, which I agree with and in my view also applicable to the present application. He quotes from a South African Constitutional Court case[2] where the following principles were summarised. '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. On all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principal of our Constitution that Courts must be independent and impartial. And fundamental to our judicial system is that our 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 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'. (Emphasis added)

[1] See Januarie v Registrar of High Court & Others (I 396/2009 (2013) NAHCMD 17 (18 June 2013) (unreported)
[2] Bernet v Absa Bank 2011 (3) SA 92 (6C)

[15] In his judgment, Smuts, J also referred to the decision in *SARFU and Others v President of the South Africa and Others*[3] where it was said:

'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 submission 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 officers, for whatever reasons, was not or will not be impartial'.

[16] The *SARFU* matter above, was also referred to by Mr Ipumbu in his submission for the recusal, but, before making reference to the *SARFU* matter, he also quoted from the matter of *Council of Review, SADF and others v Mönning and Others*[4].

[17] Following the *Mönning* decision, counsel contended that the right of recusal is derived from a number of rules of natural justice designed to ensure that a person before court whether civil or criminal should have a fair hearing. However, counsel left out an important part of the decision that a person should not be tried by a court concerning which there are reasonable suspicions of bias. (Emphasis added)

[18] Again, Mr Ipumbu correctly submitted that the test for recusal is objective and that the *onus* of establishing that the judge has not or will not bring and impartial mind to bear on the adjudication of the case, rests on the applicant. In the B*ernerts'* case above, it is stated that the test for recusal is whether there is a reasonable

[3] 1999 (A) SA 147
[4] 1999(3) SA 482 at 491

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.

[19] There is also a presumption of judicial impartiality which is not easily discharged, but requires cogent or convincing evidence to be rebutted by the applicant for recusal. The applicant, according to the *Januarie v Registrar of the High Court and others* matter, in paragraph 16 of the judgment, Smuts, J quoting from the *Bernet* case said, that the double unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be, even a strongly and felt anxiety – is not enough. The quotation further states that the court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable.

[20] Considering the authorities referred to above, I am of the view that the applicant did not establish his apprehension of bias he is holding, to have met the legal standards of reasonableness expected of a reasonable litigant. This is born out of the fact that when the trial of this matter started, Mr Ipumbu was aware that I used to attend management meetings with Chiefs of different directorates in the Ministry of Justice before 2006, but did not raise any objection for me presiding over the matter. That, despite the fact that he had all the relevant facts in his possession. He also did not apply for my recusal already at the start of the trial of the matter – but waited until the respondents' case was closed, after hearing evidence of two witnesses called by the respondent.

[21] After the respondent's case, Mr Ipumbu, on behalf of his client applied for absolution from the instance which was refused. Still Mr Ipumbu was quiet. He did not mention or suggested any possibility of applying for my recusal based on the ground that I have attended management meetings of the Ministry of Justice with Mrs Vicky ya Toivo and Mr Ray Goba who were at the time the Government Attorney and Acting Government Attorney respectively.

[22] The ruling on the application for absolution was made on the 20th of March 2013 when the matter was postponed until 22 March 2013 to continue with the

applicant's case. On 22 March 2013, the trial did not go ahead due to the fact that the respondent launched an application to re-open its case. The matter was as a result postponed to the 22nd of May 2013 to afford Mr Ipumbu the opportunity to read the affidavit of the respondent and to prepare himself for the application. It is only on this day when Mr Ipumbu decided to apply for my recusal, even though on 22 March 2013 he had indicated to the Court (on page 62) that they were ready to proceed with the applicant's case. Further, it would seem that Mr Ipumbu either deliberately or through ignorance failed to disclose the fact that my position has changed from the Chief: Lower Court to Chief Magistrate years ago through an amendment to the Magistrate's Act[5] making me a judicial officer.

[23] There is further no explanation given by Mr Ipumbu in his founding affidavit why he had waited until almost at the end of the trial to apply for the recusal while he had in his possession all the relevant information about my attendance of the so-called management meetings of the Ministry of Justice in my capacity as Chief: Lower Courts, almost seven (7) years ago. I do not think that the alleged apprehension of bias is reasonable and reasonably held by Mr Ipumbu to satisfy the requirements of this type of application as is illustrated in the authorities referred to above. Therefore, and for the aforesaid reason, I find that the applicant failed to discharge the onus resting on him on a balance of probabilities with regard the reasonableness of his apprehension of bias. His apprehension of bias under the circumstances of this matter is not reasonable and not reasonably held, and therefore the application is dismissed with costs.

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PE Unengu

Acting

[5] Act 3 of 2003 as amended

APPEARANCE:

For the applicant: Mr T Ipumbu

of Titus Ipumbu Legal Practitioners

For the respondent: Ms L Fredericks

of Government Attorneys