REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 35/2013

In the matter between:

HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES **APPLICANT**

And

NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY **RESPONDENT**

***In re*:**

In the *ex parte* application of:

IN RE: DECLARATION OF RIGHTS IN CASE NO: 244/2007 (HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES V NAMIBIA FINANCIAL INSITITUTIONS SUPERVISORY AUTHORITY & ANOTHER) PURSUANT TO SUPREME COURT JUDGMENT IN CASE NO: SCR1/2008 (HENDRIK CHRISTIAN t/a HOPE FINANCIAL SERVICES V NAMIBIA FINANCIAL INSITITUTIONS SUPERVISORY AUTHORITY & 2 OTHERS)

Neutral citation: *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority* (A 35/2013) [2015] NAHCMD 65 (10 February 2016)

Coram: GEIER J

Heard: **28 January 2016**

Delivered: **10 February 2016**

Released: 08 March 2016

Application for recusal – entitlement of a respondent and legal practitioners to participate in a recusal application – In the context of a recusal application the applicant had inter alia raised an objection in regard to the entitlement of the respondent to oppose the recusal application, which he perceived to be personal in nature and only between him and the judge.

The Court held that a respondent has a general right to participate and be heard in a recusal application not only by virtue of the general entitlement of a party to pending proceedings to be heard at all stages of the proceedings but also because such party continues to retain a recognisable interest in the outcome of a matter in which it has become a party.

The court held further that, on the specific facts of the matter, where the applicant had also imputed unethical and untoward conduct on the part of the respondent's legal practitioners that this was an attack on their personal integrity, as legal practitioners, on its own, that entitled them to a response. The court thus held that the recusal issue revolving around the events of 22 July 2015 were thus not simply between the court and the applicant.

When the respondent's instructing legal practitioner then filed an answering affidavit, on the merits, on behalf of the respondent, he did so also to defend his- and instructed counsels professional integrity which, co-incidentally, also vindicated the actions of the court.

As officers of the court, counsel, in any event had a duty to respond to the recusal application – and - in particular – this imposed on them the duty to put the record straight, thereby enabling the court to make independent findings on the facts.

Court thus holding that the filing of the answering affidavit in the recusal application by the respondent's legal practitioners was in the circumstances neither reckless nor irresponsible and that such conduct was duty- bound – also by virtue of their role as officers of the court.

Application for recusal – communication by a party's legal practitioners with the court in the absence of the other party - One of the grounds on which the application for recusal was founded was based on alleged discussions which the presiding judge allegedly had, with respondent's counsel, prior to a set hearing in a court room in the absence of the applicant –

On the evidence the court found that there had been no such discussions and that the judge was merely in the process of checking whether the recording mechanism in the court was functioning properly and that he did not communicate with respondent's counsel other than by acknowledging their greetings.

On the application of the applicable legal test to this factual matrix the court held that this ground of recusal had to fail.

Court holding further that no reasonable objective and informed person would, on the underlying facts, i.e where a Judge simply for unrelated reasons happens to be in a courtroom and is merely greeted by the parties, reasonably apprehend that the court has not or will not bring an impartial mind to bear on the case. To find otherwise would be absurd as then any form of greeting or acknowledgement of each other's presence, for instance also if the Judge would by chance meet counsel in the street or in the corridors of the court and acknowledge such counsel' presence through a greeting, in the absence of the other party, would be able to found a recusal application.

Court holding further that the conclusion that had to be drawn was that applicant's advanced apprehension was not that of a reasonable person and that this advanced ground was contrived and was simply not a reasonable one.

Court concluding, also after considering the other grounds of recusal, that the application had no merit and thus had to be dismissed with costs.

ORDER

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1. The application for recusal is dismissed with costs.

2. The applicant is to pay the respondent's wasted costs pertaining to the recusal application, on an attorney and own client scale, such costs to include the costs of one instructed- and one instructing counsel.

3. The main application is set down for hearing on **12 May 2016** at **10h00**.

4. All points *in limine*, as well as the issue of wasted costs relating to the postponement of the matter on 22 July 2015 are to be heard on that date.

JUDGMENT

GEIER J:

[1] The applicant to this Recusal Application has a history of bringing recusal applications, so it was pointed out by counsel for the respondent. Counsel underscored this submission as follows:

'In the *Namibia Financial Institutions Supervisory Authority v Christian*[1] matter the applicant also brought an application for recusal but at a late stage. The application was not before court to be heard. In the judgment in that matter reference was made to previous applications for recusal in the ongoing dispute between the parties, against the Honourable Mr Justice Parker on 2 November 2007 and the Honourable Mr Justice Manyarara on 20 November 2007.[2]

In the *Christian t/a Hope Financial Services* matter[3] the applicant again brought an application for recusal.

In *Christian v Metropolitan*[4] the applicant also brought an application for recusal.

In each of these matters the applications were dismissed as having no substance. The applicant should by now be well aware of the principles relating to applications for recusal and that the present application has no merit. It seems to be common course for the applicant if he is dissatisfied with the way a matter is proceeding that an application for recusal is brought. This is *mala fide.* It is submitted that this application is further simply a stratagem to again delay the final adjudication of the main application.'

[2] Also in this case, the applicant continues in this vein as the application, now before the court, is the applicant's third in these pending proceedings.

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[1] *Namibia Financial Institutions Supervisory Authority v Christian* 2011 (2) NR 537 (HC)
[2] *Namibia Financial Institutions Supervisory Authority v Christian* at [8] & [9] and [43] & [55]
[3] *Christian t/a Hope Financial Services v Chairman of Namibia Financial Institutions Supervisory Authority and Others* 2009 (1) NR 22 (HC) at [22]
[4] *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 (SC) at [32]; [33]

[3] Can the applicant succeed this time, or is this further attempt *mala fide* and simply a stratagem for again delaying the finalisation of this matter, as counsel for the respondent has argued?

[4] The latest quest by Mr Christian, the applicant in this matter, was founded on the following allegations:

> '8. The grounds for recusal
>
> The grounds for recusal are informed by the following averments of facts:
>
> 8.1 On 15 February 2013, I launched an *ex parte* application under Case No. A35/2013 – Declaration of Rights.
> 8.2 The relief sought is for an order in the following terms:
>
> 8.2.1 Declaring that the Supreme Court judgment in Case No. SCR1/2008, relating to a power of attorney filed without a resolution of an artificial person (NAMFISA), is wholly apposite, *mutatis mutandi*, to the rescission proceedings under Case No. A 244/2007 instituted on 12th September 2007;
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> 8.2.2 Declaring that the passage from *Selma Patricia Tödt v Claude Walter Ipser*, Case 104/1991 in the Supreme Court of South Africa (Appellate Division), relating to the type of cases in which a judgment is void, is wholly apposite, *mutatis mutandis*, to the rescission judgment in Case No. A244/2007 obtained on 5th October 2007;
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> 8.2.3 Declaring that the defect of lack of authorization of LorentzAngula Inc. brings the rescission judgment in Case No. A244/2007 into the category that attracts *ex debito justitiae*, i.e., to have it set aside by right;

8.2.4 Declaring the rescission a deprivation of applicant's vested right in the default judgment obtained from this Honourable Court in Case No. I 2232/2007 on 7th September 2007;

8.2.5 Declaring all other proceedings consequent to the rescission void;

8.2.6 Granting the applicant further and/or alternative relief as the Court may deem fit to restore the status quo ante as at 7th September 2007.

9. On 15 February 2013 the *ex parte* application was served on NAMFISA as an interested party. The previous Rule 6(4)(b) which deals with the procedure to oppose such application provides as follows:

"*Any person having an interest which may be affected by a decision on an application being brought* ***ex parte****, may deliver notice of an application by him for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which he desires to be heard, whereupon the registrar shall set such application down for hearing at the same time as the application first mentioned".*

10. It is trite that it is not a requirement that an application for declaratory order should have an opponent, an applicant having an interest in the order sought may bring such application ex parte.

11. On 22 February 2013, the matter was set down in the motion Court roll.

12. NAMFISA failed to deliver a notice of application for leave to oppose, but it was represented by Adv. Van Vuuren on 22 February 2013 on the strength of a notice of intention to oppose, which is applicable to applications other than an *ex parte* application.

13. It was thus surprising that the Honourable Mr. Justce Geier allowed Adv. Van Vuuren or NAMFISA to participate in the proceedings of an *ex parte* application, in total disregard of Rule 6(4)(b) of the Rules of the Court. This constitutes a ground of recusal in that this act tended to show the Honourable Mr. Justice Geier was clearly predisposed to favour NAMFISA.

14. The Court ordered: *"That the matter is removed from the roll" and "That answering papers or any application which the respondent may wish to file should be filled within 14 days from 22 February 2013".*

15. The above order was granted outside the Rules of this Court and tended to show that the Honourable Mr. Geier favoured NAMFISA, which constitutes a ground of recusal.

16. Decision *per* incuriam of the judicial oath and of law

When the provisions of section 5(2) of Act 3 of 2001 were placed before him to give a proper interpretation thereof the Honourable Mr. Justice Geier refused to do so – and decided to refrain from doing so. This is nothing less than failure to perform his judicial function, it is a right inherent in the Court to do so.

17. This decision constitutes a failure on the part of the judge to adhere to the judicial oath which he has taken at the appointment.

18. The Honourable Mr. Justice Geier ex parte discussions with Adv. Barnard and Mr. Philander before hearing

Furthermore, what happened on 22 July 2015 is not excusable whereby the Honourable Mr. Geier and the Legal practitioners Adv. Barnard and Mr. Philander, representing NAMFISA, were engaged in *ex parte* discussions in Court A before the hearing of the matter. Mr. Jacobus Josob witnessed the *ex parte* discussions at 09h50 in Court A.

19. Neither Honourable Mr. Justice Geier nor the NAMFISA's legal representatives denied the above situation or explained the *ex parte* discussions. This heightened the applicant's suspicion of bias on the part of Hon. Justice Geier.

20. The mere presence of the Honourable Mr. Justice Geier in the Court room with the legal practitioners representing NAMFISA before the hearing of the case vitiated the proceedings and

fairly aroused the suspicion that the course of justice had been improperly interfered with, and *'not only* must *justice be done but it should manifest and undoubtedly be seen to be done'*.

21. For this reason alone, the Honourable Mr. Justice Geier should not hear the matter any further and should recuse himself.

22. The Court order dated 18 August 2015

The Court order dated 18 August 2015 reads as follows:

"Having the applicant in person and Mr Barnard, on behalf of the respondent and having read the documents filed of record and due to the xxxx contained in paragraph 3.5 of the respondent's status report dated 11 August 2015:

IT IS ORDERED THAT:

1. The main application is set down for hearing on 22 October 2015 at 10h00.

2. Also the applicant's points *in limine* as well as the issue of wasted costs relating to the postponement of the matter on 22 July 2105 are to be heard on that date.'

23. The directions given by the impugned judgment/order were per *incuriam* of the binding procedural fair play and in breach of the Rules of procedural fair play and tainted with irrationality. It is unheard of that a court hears points *in limine* after the merits of the main application; and not before. To do so, would prejudice and deprive the applicant of a fair hearing. The applicant is apprehensive about the procedural irregularity as justice Smuts did the same: Justice Smuts suggested that the points and the merits be heard instead of adjudicating on the points first. In the end, Justice Smuts disregarded the applicant's points *in limine* when giving the Court order, on which NAMFISA is wrongly advised to rely.

25. *Exceptio Suspecti Judicis*

It is respectfully submitted that the importance and the interesting nature of void judgment is not understood and appreciated by the Honourable Mr. Justice Geier, in that he has failed to recognize that there are three (3) exceptions to the general rule, where a party simply can disregard a void judgment without it being formally set aside.

26. The same applies to the doctrine *ex debito justitiae,* which importance and interesting nature is not fully understood and appreciated by the Honourable Judge – that the Court has the inherent power a to act *ex debito justitiae* to correct its own errors/mistakes.'[5]

[5] Mr Philander, the legal practitioner of record of the respondent, who deposed to the answering affidavit, on behalf of the respondent, stated:

'3. The dissatisfaction of the applicant with the procedure followed by the court to date is no ground for recusal. Argument will be addressed to the Honourable Court in this regard.

4. In paragraph 18 of the founding affidavit the allegation is made that Adv. Barnard and I engaged in *ex parte* discussions with the Honourable Geier J in Court A prior to the hearing of the matter. The further allegation is that Mr Josob witnessed these alleged discussions.

5. I unequivocally state that this is not the truth. Adv. Barnard and I greeted the judge. We had no further communication. The judge was in the process of checking whether the recording mechanism was functioning properly and did not communicate with us other than acknowledging our greetings.

6. The allegation in paragraph 19 of the founding affidavit that neither the Honourable Geier J, nor Adv. Barnard and I denied the above situation or explained the *ex parte* discussions, is untruthful. In paragraph 5.5 in the founding affidavit to the previous application the allegation is only that the honourable Geier J and Adv. Barnard and I were present in Court A before the hearing. No allegation is made of any discussion. That was also the issue at the appearance before court on 22 October 2015. There was thus no opportunity to deny or explain the alleged

[5] See Founding affidavit

ex parte discussions. In any event, the respondent's position in respect of the averments by the applicant is evident from the status report it had to file with court as per the Court Order of 22 July 2015.

7. The honourable court is humbly requested to dismiss the application for recusal with costs on a scale as between attorney and client, including the cost of instructing and instructed counsel.'

[6] In reply, the applicant then alleged that:

'3. The respondent explicitly states that it will not oppose this recusal application, and accordingly informed both the Court and the applicant.

4. It is, thus, surprising that the Honourable Mr Justice Geier put up an impassioned plea for the respondent's participation in the recusal application which tend to show that he relies on the respondent to put up for his defence in the recusal application.

5. The Court, at the conclusion despite Adv. Barnard's unexpectedly concurrence with the Honourable Mr Justice Geier's impassioned plea for the respondent on 17 November 2015, the respondent's express submission, it will not oppose this recusal application dissolved into thin air without the respondent's authorization and/or instruction.

6. It is submitted that the there is no factual or legal foundation for the respondent to put up defence for objections made against the Honourable Mr Justice Geier, it is personal in nature.

7. The respondent did not address the matters raised in the applicant's founding affidavit.

8. The respondent placed emphasis on the *ex parte* discussion with the Honourable Mr Justice Geier, on 22 July 2015 but failed to understand that the mere presence of the Honourable Mr Justice Geier with Adv. Barnard and Mr Philander vitiated the proceedings and such appearance fairly aroused the suspicion that the course of justice had been improperly

interfered with, and that not only must justice be done but it “should manifestly and undoubtedly be seen to be done”.’

[7] The following further relevant allegations can be extracted from the replying papers:

‘12.1 It is respectfully submitted that bias may not actually or probably be within the mind of the Honourable Mr Justice Geier when he entered the A-Court on 22 July 2015 but his presence together with Adv. Barnard and Mr Philander, placed him in a situation which led to the reasonable fear that he may have been infected with bias.

12.2 Mr Philander admitted that the Honourable Mr Justice and Adv. Barnard and himself were in Court –A before the hearing on 22 July 2015. The mere presence of the Honourable Mr Justice Geier at Court A at that point in time vitiated the proceedings. Whether Geier J was checking the recording system is irrelevant.

12.3 Finally, it is necessary to mention that the Honourable Mr Justice Geier “must not only be impartial but must be seen to be impartial”.

13.1 I find it strange that Mr Philander involved himself in ‘litigation’ which is personal in nature and in fact between the Honourable Mr Justice Geier and the applicant by requesting for the dismissal of the recusal application, and asked to be awarded costs.

13.2 It appears that Mr Philander was very little understanding of the purpose of awarding of costs, which is to award costs to a successful litigant to indemnify his or her expenses to which he or she been put through having been unjustly compelled to initiate or defend litigation, as the case may.

13.3 Despite the respondent’s decision not to oppose the recusal application, Mr Philander on the ‘recommendation’ of the Honourable Mr Justice Geier put up defend on behalf of the Honourable Mr Justice Geier.

13.4 The Honourable Court is humbly requested to order that Mr Philander to pay costs *de bonis propriis* in that he acted in an irresponsible and reckless manner by misleading the Court and deceiving his 'own client' the respondent.'

[8] The written heads of argument filed by applicant contain in essence the same arguments as made in the founding papers. It was again reiterated that the initial opportunity granted to the respondent to be heard showed bias in favour of NAMFISA and that the failure to interpret Section 5 (2) of Act 3 of 2001 constituted a valid ground for recusal and that the mere presence of the presiding Judge in the court room with respondent's counsel vitiated the proceedings.

[9] A further bone of contention, on which the application was based, was the court's interlocutory order, made on 18 August 2015, through which the court directed that the main application, as well all points in *limine* and the remaining costs issue would be set down for hearing, at the same time, on the 22nd of October 2015. The applicant perceived this to be a procedural irregularity on account of which he should not be made to suffer a wrong as same was prejudicial to him. This perceived procedural irregularity was now advanced as a ground for recusal.

[10] The applicant alleges further that the court does not understand the importance and nature of void judgments and that the court fails to recognise the three exceptions to the general rule in terms of which a party can simply, and with impunity, disregard a void judgment without same first being formally set aside.

[11] He submitted further that the same goes for the doctrine *ex dibito justitiae* which the court has not fully understood and which gives the court the power to simply correct its own mistakes.

[12] He again argued that the decision to allow NAMFISA to participate in his *ex-parte* application without an application for leave to oppose reveals partiality and that the

same should be said for the court's failure to regulate what should be heard on October 22 which ruling is in conflict with a Supreme Court decision case SC 1/2008 and particularly with paragraph 6 of that judgment.

[13] Mr Barnard on behalf of the respondent, after citing the applicable case law and after summarising the applicant's case, submitted:

'9. In paragraph 28.1 the applicant still maintains that the main application should be heard without the respondent being afforded an opportunity to oppose and state its case. It is submitted that the persistence by the applicant with this approach underscores the *mala fides* of the applicant with this application. The attempts by the applicant to deny the respondent an opportunity to be heard is a violation of the constitutional principle of a fair trial. The right to be heard is such a basic right that the applicant cannot but be fully aware thereof and appreciate the basic unfairness and fallaciousness of his conduct. His complaint that the refusal by the court to exclude the respondent from the hearing is indicative of bias is so devoid of any substance that it is *mala fide,* vexatious and frivolous.

10. It is submitted that the procedure adopted by the applicant, wanting to exclude the respondent from proceedings, is nothing but an ill-conceived stratagem by the applicant to attempt to evade the order of this court prohibiting any legal action against the respondent in the matter Namibia Financial Institutions Supervisory Authority v Christian and Another 2011 (2) NR 537 (HC).

11. In paragraphs 28.3 and 28.5 the applicant expresses his dissatisfaction with the procedures adopted by court. This complaint is without any substance whatsoever. A party cannot prescribe to court the procedures to be followed. A judge determines and controls the procedure in his court, even more so with the advent of case management. The court has an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice. This inherent power is not derived only from the need to make the court's order effective and to control its own procedures, but also to act fairly where no specific law provides

directly for a given situation.[6]

12. It is trite law that the Rules exist for the court, not the court for the Rules and that a court will not become the slave of rules designed and intended to facilitate it in doing justice. A court may draw on its inherent powers to relax the Rules or to apply it as it deems fit.[7]

13. Once the need for joinder becomes apparent, a court has no discretion and will not allow a matter to proceed until the interested party has been afforded an opportunity to be joined. This basic principle was pointed out to the applicant in the judgment by the court in this matter on 28 January 2014. (record p. 695 [50] – [51] Yet, the applicant obstinately elects to ignore both the principle and the judgment by the court. This deliberate election is *mala fide,* frivolous and vexatious.

14. In paragraph 28.2 the applicant is not satisfied with the interpretation by the honourable court of the provisions of section 5(2) of the Namibian Financial Institutions Supervisory Authority Act 3 of 2001 regarding the temporary appointment of Lilly Brand as chief executive officer in the absence of the appointed chief executive officer. The applicant refuses to acknowledge the provisions of section 29 of this Act despite this being pointed out to the applicant in these papers and the fact that this court has ruled on the propriety of the temporary appointment of Lilly Brand as chief executive officer in the absence of the chief executive officer.[8]

15. In paragraph 28.3 the applicant maintains that a power of attorney relied upon by the respondent was invalid. The honourable court did find in the interim application for leave to oppose the main application that the deponent for the respondent had not proved its authority. However, subsequent to the judgment the respondent has placed ample facts before court of the existence of a valid resolution and has passed further resolutions ratifying any previous actions. In an interlocutory application for condonation for late filing of the notice of intention to defend the authority issue was fully canvassed and argued. The court granted condonation and by implication found that the representatives of the respondent were duly authorized. This issue is thus no longer open for debate. (record p. 1006)

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[6] *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* 2010 (2) NR 703 (HC) at [26] and [27]
[7] *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* 2013 (3) NR 664 (SC) at [67]
[8] *Namibia Financial Institutions Supervisory Authority v Christian* 2011 (2) NR537 (HC) at [39]

16. If the applicant is aggrieved by the orders the court makes he can lodge and appeal should it be appropriate in the circumstances. Dissatisfaction with an order of court is no ground for an application for recusal.[9]

17. Finally, in paragraph 28.4 the applicant alleges that the honourable Mr Justice Geier and the legal practitioners for the respondent had discussions in court prior to the hearing of the matter on 22 July 2015. As the applicant himself was not present at the time, he relies on observations by Mr Josob. Mr Josob filed a confirmatory affidavit.

18. The vexed allegation that there were discussions prior to the hearing of the matter are soundly refuted by the legal practitioner for the respondent in answer. Where a court is faced with material disputes of fact in the papers for the applicant and the papers for the respondent the version of this respondent should prevail upon an application of the Plascon-Evans Rule.[10]

19. It is submitted that once the relevant facts are determined by application of the Plascon-Evans Rule, the relevant facts must establish a case for the relief applied for on a balance of probabilities. Should the allegation by the applicant that the alleged discussions took place survive the application of the Plascon-Evans rule, the allegation can still not be accepted. There is no reason why the version of the applicant, who bears the onus, can be preferred above that of the respondent.

20. The applicant purports to be seriously aggrieved by the alleged discussion between the presiding judge and legal practitioner for the respondent on 22 July 2015 prior to the hearing, to the extent that he based his application for recusal upon this alleged discussion. Yet, shortly

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[9] *Ndeitunga v Kavaongelwa* unreported judgment in the High Court under case number I 3967/2009 delivered by the honourable Damaseb JP on 21 November 2013 at par 14 and authorities at footnote 9. *Ndeitunga v Kavaongelwa* (I 3967/2009) [2013] NAHCMD 350 (21 November 2013) reported on the SAFLII website at http://www.saflii.org/na/cases/NAHCMD/2013/350.html

[10] *Beukes v The President of the Republic of Namibia* (A 427/2013) [2015] NAHCMD 62 (17 March 2015) at [29] reported on the SAFLII website at http://www.saflii.org/na/cases/NAHCMD/2015/62.html ; *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* 2013 (3) NR 664 (SC) at [99] – [102] and *Republican Party of Namibia and Others v Electoral Commission for Namibia and Others* 2010 (1) NR 73 (HC) at p. [108]

after the alleged discussion, on 30 July 2015 the applicant filed a document headed "**THE HEARING ON 22 JUNE 2015**". (record p. 1352) In this document he stated "I refer to the above matter and wish to respond to the happenings which might have improperly interfered with course of justice …". In this document reference is made to the fact that the honourable Mr Justice Geier and the legal practitioners for the respondent were present in court at the same time prior to the hearing on 22 July 2015. (record p. 1353) No allegation is made of any discussions.

21. The applicant filed a further document on 14 August 2015 headed "**APPLICANT'S PROPOSAL ON THE WAY FORWARD IN THIS MATTER"**. (record p. 1303) In paragraph 8 of this document reference is again made to the alleged "…presence of the Honourable Mr Justice Geier and the purported legal representatives of the respondent, Adv. Barnard and Mr Philander in the same court room before the scheduled hearing at 10h00…". Once again, no allegation is made of any discussion.

22. On 21 October 2015 the applicant delivered an *ex parte* application to the full court for an order that the honourable judge be interdicted from hearing the matter. (record p 1329) In the founding affidavit to the earlier application sworn to by the applicant on 21 October 2015, once again allegations are made only of the presence of the honourable Mr Justice Geier and the legal practitioners for the respondent in court at the same time prior to the hearing. (record p. 1333 para 5.5; p. 1340 para 28) In that affidavit also no allegation is made of any discussions.

23. In the founding affidavit to the present application attested to on 16 November 2015 the facts change. For the first time an allegation is made that there were discussions between the honourable Mr Justice Geier and the legal practitioners for the respondent. It is submitted that if there in fact had been such discussions, the applicant would have pounced on these all important facts to support the earlier application. The applicant would have referred to these alleged discussions from the outset in the notices shortly after 22 July 2015. The applicant would not have remained silent and for the first time referred to the alleged discussions in the affidavit in support of the present application for recusal.

24. It is submitted that upon determining the balance of probabilities, the version on behalf of the respondent is far more believable than that of the applicant. As the onus rests on the

applicant and there are two mutually destructive versions, the applicant can only succeed if it satisfies the court on a preponderance of probabilities that its version is true and accurate and therefore acceptable, and the version of the respondent is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the allegations by the applicant against the general probabilities. The estimate of the credibility of the deponents will therefore be inextricably bound up with a consideration of the probabilities of the case, and if the balance of probabilities favours the applicant, then the court will accept its version as being true. If however the probabilities are evenly balanced in the sense that they do not favour the case for the applicant any more than they do the case for the respondent, the applicant can only succeed if the court nevertheless believes it and is satisfied that its evidence is true and the version on behalf of the respondent if false.'

[14] After so exposing the applicant's above mentioned history of recusal applications, it was submitted in conclusion:

'30. … that the application is devoid of merit to the extent that the conclusion is inescapable that the applicant is *mala fide* and that the application is frivolous and vexatious. The application for recusal is brought at a late stage aimed at delaying the hearing of the matter on the merits. The applicant is well acquainted with the law relating to applications for recusal and should have known that the application has no merit. In the application for recusal the applicant again relies on the stratagem for the main application, attempting to have the court adjudicate the main application without hearing the respondent and avoiding the judgment of this court prohibiting the applicant from instituting any legal proceedings against the respondent. The applicant, with his knowledge and experience, cannot argue that the main application and this application for recusal is *bona fide* and proper. This application for recusal and the structure of the main application is an abuse of process. It is confirmation of the contempt the applicant has for the law and the courts of Namibia. This justifies a special cost order as ill-founded and misdirected applications such as this are to be discouraged.'

THE GROUNDS FOUNDED ON THE EFFECT OF VOID JUDGEMENTS AND THE DOCTRINE EX DEBITO JUSTITIAE

[15] If one then considers these grounds on which this application is based, it emerges that some of the points, such as the effect of a void judgment and whether or not a party is at liberty to ignore same, were disposed of already in a reasoned judgment given by the court.[11] Nothing needs to be added in this regard.

THE GROUNDS BASED ON THE JOINDER OF THE RESPONDENT TO THE EX PARTE PROCEEDINGS INITIATED BY APPLICANT

[16] The manner in which NAMFISA, the respondent, came to be joined was dealt with in the court's judgment delivered on 28 January 2014. Also here nothing needs to be added.

[17] The particular manner as to how it came about that NAMFISA was allowed to participate in the initial motion court hearing conducted on 22 February 2013 was set out and dealt with in the referred to judgment which reflects also the transcript of the proceedings which culminated in the complained of resultant order.

[18] What was lost on the applicant, who obviously fails to appreciate the import of the order, issued on 22 February 2013, was that the order was never granted outside the Rules of Court. It appears expressly from the order that it gave NAMFISA the choice, at its discretion, and thus at its peril, to elect as to how to proceed. A court does not give legal advice to a party and it emerges that the court merely facilitated the taking of any further steps which NAMFISA might have wanted to take. The order was simply not prescriptive at all and it was obviously wide enough to allow for an application for 'leave to oppose' to be brought, in accordance with the Rules of Court.

[19] The applicant also fails to mention that this initial order was subsequently varied at his behest. Nothing can thus turn on the original order which was subsequently varied on 18 September 2013.

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[11] See the judgment delivered on 25 January 2014 at pages 45 to 47,

[20] Mr Van Vuuren, who initially appeared on behalf of NAMFISA, with instructions to oppose the ex-parte application brought by the applicant, tendered a notice to oppose together with a power of attorney at the time. The applicant then had no objection that these documents were to be handed up to court. So much is apparent from the record. Nevertheless it was clear that NAMFISA, through the handing up of these documents, did not thereby just simply become a party to the launched *ex-parte* proceedings, automatically, in the absence of a formal application for 'leave to oppose', which application, so it should be mentioned, was delivered at a later stage, in spite of the opportunistic allegations made by the applicant in the current papers to the contrary.

[21] I have said it before and I will say it again, I believe that a court, faced with the circumstances which are apparent from the referred to transcript of the record, the subject matter and history of the dispute between the parties, would have been remiss not to give NAMFISA the opportunity to be heard and not to give and allow NAMFISA the opportunity to formalise its status in the *ex-parte* application brought by the applicant, which directly affected NAMFISA's interests.

[22] In any event, if the initial hearing, which culminated in the subsequent, formal joinder of NAMFISA, as a party and as a respondent to the pending proceedings on 28 January 2014 amounts to an irregularity, it is for the applicant to pursue this point on appeal. Even if the court would have been in breach of any particular rule, which I believe is not the case, such perceived breach cannot just simply be converted into a ground for recusal.

THE COURT'S ALLEGED FAILURE TO INTERPRET SECTION 5(2) of ACT 3 of 2001

[23] The same must be said for the ground mounted on the court's alleged failure to interpret Section 5(2) of Act 3 of 2001. From the reasoned judgment, delivered on 21 May 2014, (the judgment was incidentally delivered *ex tempore* and was thus read into

the record in the presence of the applicant), it appears pertinently that the court dealt with the point and the applicant's submissions made in this regard.[12] The court also dealt with the applicant's related challenge to Mr Shiimi's authority to oppose the *ex-parte* application. The court, after dealing with the applicant's challenge – and - after considering that challenge to be a weak one - explained why it decided to refrain from deciding the point. The court expressly stated and again I quote from the judgment:

'The arguments exchanged on the competency of the delegation of powers to Mr Paulino were not raised by Mr Christian in his Answering Affidavit filed in opposition to the Condonation Application. In any event, the challenge mounted in this regard was not underscored by any evidence. In such circumstances, although some arguments was contained in the Heads of Argument and raised during oral argument, I will refrain from deciding this issue and thereby the second point in *limine* raised by Mr Christiaan.'

[24] It appears that the applicant opportunistically has extracted one sentence from the judgment to create a ground for recusal, ignoring deliberately so the express reasoning of the court. Again, and in any event, if these reasons and the conclusion of the court was wrong, it is for the applicant to raise this point on appeal. No recusal application can be mounted on this ground."

THE GROUND BASED ON THE COURT'S INTERLOCUTORY RULING TO HEAR THE IN LIMINE POINTS TOGETHER WITH THE MERITS

[25] It is also convenient at this stage to deal with the next procedural ground advanced, namely the court's ruling to hear the applicant's points in *limine* together with the merits, as well as the outstanding costs issue.

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[12]The following was stated in the judgment and I quote : 'He then took issue with Mr Paulino's appointment in disregard of Section 5(2) of the NAMFISA Act and Mr Paulino's power to instruct legal practitioners and that apart from his mere say so he had not provided proof of his authority and that both Mr Paulino and Mr Philander were not authorised to depose to any Affidavits and that the Respondent had failed in discharging its onus in this regard. He also raised a second point *in limine* on his interpretation of Section 5 (2) of the NAMFISA Act in terms of which any acting CEO of NAMFISA could only be appointed in consultation with the minister and that Mr Shiimi the CEO of Respondent also had no power to appoint an acting CEO and that thus Mr Paulino's appointment was invalid.'

[26] In a befuddled argument, the applicant alleges, on the one hand, that the court's ruling is in breach of procedural fair play and that this is unheard of, while stating, on the other, in the same breath, that Justice Smuts did the same.

[27] It does not take much to realise that a Judge would always be free to regulate the procedure before him or her and thus hear the merits together with any technical points raised. This happens on a daily basis in our courts.

[28] Again the applicant does not present the full picture. Prior to the complained of ruling, the parties were invited to submit their arguments 'on the way forward' in writing. The court also heard the parties before it made the ruling of 18 August 2015.

[29] It should incidentally be mentioned in this regard that it was pointed out subsequently to Mr Christian that the applicant here quotes the wrong order. The order which the applicant cites and which reads:

'Having heard the applicant **in person** and **Mr Barnard**, on behalf of the respondent and having read the documents filed of record and due to the xxx contained in paragraph 3.5 of the respondent's status report dated 11 August 2015:

IT IS ORDERED THAT:

1. The main application is set down for hearing on **22 October 2015** at **10h00**.

2. Also the applicant's points *in limine* as well as the issue of wasted costs relating to the postponement of the matter on 22 July 2015 are to be heard on that date.

BY ORDER OF THE COURT

REGISTRAR

/ es'

[30] This order was never authorised to be issued by myself. It is unknown how this order came to be released. I follow the practice that all my orders, and especially all my case management orders, are initialled by myself, before they can be issued. The order relied on was not initialed by myself and its issue was thus never authorised.

[31] The correct order then also reflects the reasons for the ruling and I quote the correct order that is the signed order which reflects that the order was made for the reasons set out in paragraph 3.5 of the respondent's status report dated 11 August 2015:

'**CASE NO.: A 35/2013**

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION
WINDHOEK, TUESDAY, THE 18TH DAY OF AUGUST 2015
BEFORE THE HONOURABLE MR JUSTICE GEIER

In the matter between:

HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES **APPLICANT**

and

NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY **RESPONDENT**

***In re*:**
In the *ex parte* application of:
IN RE: DECLARATION OF RIGHTS IN CASE NO: 244/2007 (HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES V NAMIBIA FINANCIAL INSITITUTIONS SUPERVISORY AUTHORITY & ANOTHER) PURSUANT TO SUPREME COURT JUDGMENT IN CASE NO: SCR1/2008

(HENDRIK CHRISTIAN t/a HOPE FINANCIAL SERVICES V NAMIBIA FINANCIAL INSITITUTIONS SUPERVISORY AUTHORITY & 2 OTHERS)

Having heard the applicant **in person** and **Mr Barnard**, on behalf of the respondent and having read the documents filed of record and for the reasons set out in paragraph 3.5 of the respondent's status report dated 11 August 2015:

IT IS ORDERED THAT:

2. The main application is set down for hearing on **22 October 2015** at **10h00**.

2. Also the applicant's points *in limine* as well as the issue of wasted costs relating to the postponement of the matter on 22 July 2015 are to be heard on that date.

BY ORDER OF THE COURT

REGISTRAR
/ es'

[32] All this seems to be of no significance to Mr Christian, who pushed on regardless with this issue at the hearing, despite the court having pertinently pointed this out to him earlier during the case management hearing conducted on 10 November 2015.

THE RELIANCE ON SUPREME COURT CASE 1/2008

[33] The applicant also relies on Supreme Court case 1 of 2008, which he cites as a precedent, which this court is bound to follow and he relies particularly on paragraph 6 of that judgment which I will then quote:

'The rule in the *Cape Mall-case* is in my view a salutary one. Whenever a power of attorney is filed of record authorising a legal practitioner to appear on behalf of a corporate entity in a matter such as the one currently before the Court, the minimum evidence required would be a resolution of the corporation from which it should be apparent that the person who had signed the power of attorney had been authorised to execute it in those terms. In the absence of such a resolution, this Court is not satisfied on the papers before it that sufficient evidence exists to show that the first respondent has authorised opposition to this application; instructed LorentzAngula Inc. to file heads of argument and to appear on its behalf.'

[34] The judgment and the relied upon paragraph in the judgment do however not sustain in the applicant's submissions which can, in my view, also not be seen and be interpreted to prescribe and lay down a hard and fast rule that precludes a court from hearing the merits of a matter together with any in *limine* objections that may have been raised. The Supreme Court obviously dealt with the issues serving before it in a particular and pragmatic manner at the time, on the basis that it deemed fit, and, this is precisely the reason why all higher courts are left with a free hand to deal with such procedural matters, on a case by case basis, as deemed appropriate. It must be concluded that also this ground is devoid of all merit.

THE ALLEGED DISCUSSSIONS

[35] The most important ground advanced by Mr Christian was based on the alleged discussions which the court apparently had, with Adv. Barnard and Mr Philander, prior to the set hearing.

[36] In this regard the applicant's propensity to rely on half-truths was exposed by the answering affidavit filed on the merits and through the written heads of arguments filed on behalf of the respondent. There simply were no discussions as is alleged. Not only was this aspect belatedly and opportunistically alleged, as was exposed by Mr Barnard, it is also noteworthy that neither the applicant, nor Mr Jossop, who witnessed the events in court did not- and- obviously were unable to reproduce what the alleged discussions

entailed and what they were all about. Not an iota of detail as to what was allegedly said in the alleged discussion was reproduced in the affidavit founding this point.

[37] Mr Philander on the other hand declared:

'5. I unequivocally state that this is not the truth. Adv. Barnard and I greeted the judge. We had no further communication. The judge was in the process of checking whether the recording mechanism was functioning properly and did not communicate with us other than acknowledging our greetings.

6. The allegation in paragraph 19 of the founding affidavit that neither the Honourable Geier J, nor Adv. Barnard and I denied the above situation or explained the *ex parte* discussions, is untruthful. In paragraph 5.5 in the founding affidavit to the previous application the allegation is only that the honourable Geier J and Adv. Barnard and I were present in Court A before the hearing. No allegation is made of any discussion. That was also the issue at the appearance before court on 22 October 2015. There was thus no opportunity to deny or explain the alleged *ex parte* discussions. In any event, the respondent's position in respect of the averments by the applicant is evident from the status report it had to file with court as per the Court Order of 22 July 2015.'

[38] It is further telling in this regard that the applicant's case takes a different direction once confronted with this version of the events and after it was exposed that the aspect of the alleged discussions was an untruthful afterthought, which, if such discussions did occur, one would have expected the applicant and Mr Jossop to provide full and precise details of and one would, in any event, have expected an aggrieved party to raise this aspect immediately, which was not done.

[39] It emerges from the heads of argument filed by applicant that he then attempted to confine this point on recusal to the Judge's mere presence in the courtroom before the hearing. This is a telling shift. It would be a sad day if a Judge should have to recuse him or herself just because he or she has entered a courtroom in order to check

a recording mechanism or for any other neutral reason and if the parties would then, by chance, enter the court room and the Judge, counsel or the parties, would not be able to acknowledge each other's presence by exchanging mere greetings, only a common courtesy after all. Surely this cannot be, but this is then also the factual matrix against which this ground of recusal is to be determined.

[40] The test for recusal that has been adopted in this jurisdiction by the Supreme Court is whether a reasonable objective, informed person would, on the correct facts, reasonably apprehend that the Judge was not and will not bring an impartial mind on the adjudication of the case.[13].

[41] It is precisely on the application of this test that this ground must fail. No reasonable objective and informed person would, on the underlying facts, i.e where a Judge simply for unrelated reasons happens to be in a courtroom and is merely greeted by the parties, reasonably apprehend that the court has not or will not bring an impartial mind to bear on the case. To find otherwise would be absurd as then, any form of greeting, or acknowledgement of each other's presence, for instance also, if the Judge would by chance meet counsel in the street, or in the corridors of the court and acknowledge such counsel' presence through a greeting, in the absence of the other party, would be able to found a recusal application.

[42] Nothing further needs to be said on this. The conclusion must be that Mr Christian's advanced apprehension is not that of a reasonable person and that this advanced ground is contrived and is simply not a reasonable one.

THE RELIED UPON CUMULATIVE GROUND

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[13]See in this regard *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 (SC), *S v Munuma and Others*2013 (4) NR 1156 (SC), *Januarie v Registrar of the High Court & Others* Case (I 396/2009) [2013] NAHCMD 170 (19 June 2013) reported on the SAFLII website at : http://www.saflii.org/na/cases/NAHCMD/2013/170.html as set out again in *Beukes v The President of the Republic of Namibia* (A 427/2013) [2015] NAHCMD 62 (17 March 2015) at [29] reported on the SAFLII website at http://www.saflii.org/na/cases/NAHCMD/2015/62.html at [125] to [128]

[43] Finally - and in so far as the applicant also relies on the cumulative effect of all the grounds raised - it should firstly be said again that the applicant's remedy lies rather in an appeal should he be dissatisfied with the outcome of those rulings which have gone against him. It is also clear that the seeking of the recusal of a Judge because he makes an adverse order against a party cannot simply be a basis for seeking a recusal.[14]

[44] It may, incidentally, be apposite to mention here that the applicant, in the course of this litigation, has also obtained certain rulings in his favour and thus a measure of success.[15]

[45] Be that as it may, each of the above mentioned grounds for recusal, as raised by the applicant, have been dealt with. All have been found to be without substance. It follows as a matter of logic that all these meritless grounds cannot now add up to a meritorious ground simply through their collective effect. Out of nothing comes nothing!

THE NEW MATTERS RAISED IN REPLY

[46] This leaves the new matters raised by Mr Christiaan in the replying affidavit which under normal circumstances would not have been considered.[16]

[47] Here the applicant takes the repeated stance that the respondent had allegedly stated that it would not oppose the recusal application. Again this statement is false and misleading. This indication was only given in respect of the second recusal application which did not quite get off the ground on the 22nd of October 2015. At no stage did the

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[14]See in this regard *Ndeitunga v Kavaongelwa* (I 3967/2009) [2013] NAHCMD 350 (21 November 2013) reported on the SAFLII website at http://www.saflii.org/na/cases/NAHCMD/2013/350.html at [141]

[15] See the interlocutory judgments in this case Judgments of 18 September 2013 and that of 28 January 2014.

[16] See for instance *Erasmus Superior Court Practice* – Vol 2 at p D1-66 (Original Service 2015) and the authorities cited there

respondent communicate that it would not oppose a new and further, (that is the current), recusal application, in respect of which it then also duly gave 'Notice to Oppose' on 24 November 2015.

[48] The court also never put up 'an impassioned plea' for the respondent's participation in the current recusal application. It simply regulated the procedure to be followed by the parties as per its case management order of 17 November 2015 which expressly, and I emphasise, expressly, afforded the parties the choice of opposition and if necessary to exchange papers, if they elected to do so. There is no plea in this and nothing prescriptive in this regard and nothing further needs to be said in regard to this unfounded allegation.

THE RESPONDENT'S ENTITLEMENT TO OPPOSE THE RECUSAL APPLICATION

[49] The applicant then states that there is no factual or legal foundation for the respondent to put up a defence to his objections made against the court which he perceived as being personal in nature. He goes on to state that he finds it strange that Mr Philander involved himself in litigation which is personal in nature and in fact between the Judge and the applicant. He stated in this regard:

'13.1 I find it strange that Mr Philander involved himself in 'litigation' which is personal in nature and in fact between the Honourable Mr Justice Geier and the applicant by requesting for the dismissal of the recusal application, and asked to be awarded costs.

13.2 It appears that Mr Philander has very little understanding of the purpose of awarding of costs, which is to award costs to a successful litigant to indemnify his or her expenses to which he or she been put through having been unjustly compelled to initiate or defend litigation, as the case may.

13.3 Despite the respondent's decision not to oppose the recusal application, Mr Philander on the 'recommendation' of the Honourable Mr Justice Geier put up defend on behalf of the Honourable Mr Justice Geier.

13.4 The Honourable Court is humbly requested to order that Mr Philander to pay costs *de bonis propriis* in that he acted in an irresponsible and reckless manner by misleading the Court and deceiving his 'own client' the respondent.'

[50] A number of fundamental misconceptions appear from the applicant's stance which require immediate correction:

a) I have already exposed that there was never a decision by the respondent not to oppose this third recusal application;

b) The application was not personal in nature and it was not confined to the court and the applicant.

c) The case did indeed become personal in nature in a different respect, namely once the applicant had alleged that the court and the respondent's legal practitioners, Adv Barnard and Mr Philander had discussions with the Judge. This was tantamount to alleging unethical and untoward conduct on the part of Adv. Barnard and Mr Philander. This attack on their personal integrity, as legal practitioners, on its own, entitled them to a response. The recusal issue revolving around the events of 22 July 2015 were thus not simply between the court and the applicant.

d) When Mr Philander then filed an answering affidavit, on the merits, on behalf of the respondent, he did so also to defend his- and Mr Barnard's professional and personal integrity which, co-incidentally, also vindicated the actions of the court.

e) It should be mentioned that, as officers of the court, they also – and in any event - had a duty to respond to the recusal application – and - in particular - they had the duty to put the record straight, enabling the court to make independent findings on the facts. There was thus nothing irresponsible or reckless in this conduct, which was obviously duty- bound. I also refer in this regard to what was said in *Beukes vs The President* at paragraph [68] to [70].[17]

[51] The allegations that Mr Philander has misled the court is also without foundation and is clearly vexatious. The contrary is true.

COSTS

[52] It has emerged that the applicant has misrepresented the true facts by alleging that the court was engaged in discussions with Mr Barnard and Mr Philander, which clearly did not occur. It is this conduct that requires censure on its own.

[53] Not only was the entire application misconceived, it also fits into the pattern of recusal applications, as exposed by respondent's counsel, whereby the applicant,

[17] '[68] The first submission made here is to the effect that I apparently allowed the *'Government Attorney which had not delivered answering affidavits and who were not legally before the court to partake in the hearing …'*.

[69] The first problem with this submission is that the Government Attorney is only, like any other legal practitioner, the legal representative of a party. So the Government Attorney would merely act on behalf of a party as agent or as mandatary. In this instance the Government Attorney represents the first to sixth respondents, who had filed a notice to oppose on behalf of the government respondents, indicating thereby that their clients wished to oppose the case. It was the applicants that had elected to sue the respondents they then went on to cite in this matter: case A 427/13. Surely a party who has been dragged to court is entitled to be heard, either in person or through the medium of a legal representative, at any stage of the proceedings, unless there would be some impediment to being heard. There was no such impediment in this case.

[70] In any event such a party would continue to retain a recognisable interest in the outcome of a matter in which it has become a party on account of having been sued.'

seemingly, on a regular basis, and as part of his repertoire of remedies in litigation, tries to avoid the hearing of matters on the merits.

[54] Mr Barnard has submitted that the applicant has no respect for the law and the courts in Namibia. This seems indeed to be the case and this was borne out especially and ultimately also by the applicant's disrespectful oral argument during which he brazenly submitted that the presiding Judge was incompetent and not mentally fit and able to follow and comprehend, intellectually, Mr Christian's legal arguments centering around the voidness of judgments and those pertaining to the doctrine of *ex debito justitiae*.

[55] While I accept that a judicial officer should not be unduly sensitive when faced with a recusal application[18], I believe that the applicant has overstepped the mark and that his conduct cannot thus simply be ignored.

[56] As an expression of the court's censure of the applicant's unacceptable conduct, I will exercise my discretion in upholding the submissions made on behalf of the respondent for a special costs order.

[57] In the result, I make the following orders:

1. The application for recusal is dismissed with costs.

2. The applicant is to pay the respondent's wasted costs pertaining to the recusal application, on an attorney and own client scale, such costs to include the costs of one instructed- and one instructing counsel.

3. The main application is set down for hearing on **12 May 2016** at **10h00**.

[18]See in this regard also *Beukes v The President of the Republic of Namibia* and the cases referred to in paragraph [127] of that judgment and particularly *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) page 13 H –I ,

4. All points *in limine*, as well as the issue of wasted costs relating to the postponement of the matter on 22 July 2015 are to be heard on that date.

H GEIER

Judge

APPEARANCES

FOR THE APPLICANT: IN PERSON

FOR THE RESPONDENT:	PCI Barnard Instructed by LorentzAngula Inc., Windhoek