

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON RECUSAL APPLICATION

Case no: HC-MD-CIV-MOT-REV-2020/0025

In the matter between:

HENDIK CHRISTIAN

APPLICANT

and

THE JUDICIAL SERVICE COMMISSION

1ST RESPONDENT

THE HONOURABLE JUSTICE MASUKU

2ND RESPONDENT

THE CHIEF JUSTICE

3RD RESPONDENT

Neutral citation: *Christian v The Judicial Service Commission* (HC-MD-CIV-MOT-REV-2020/00025) [2020] NAHCMD 466 (9 October 2020)

Coram: SIBEYA AJ

Heard: 30 September 2020

Delivered: 9 October 2020

Flynote: Application for recusal — Presiding judge — Application for recusal made in a review application — Applicant bears the onus to establish that a reasonable person on the facts and evidence would have a reasonable apprehension of bias on the part of the judicial officers — The presumption of

judicial impartiality restated coupled with the independence of the judiciary — Applicant failed to discharge the onus — Application dismissed.

Summary: The applicant instituted review proceedings against the decision regulating the affairs of judges about the manner in which it dealt with a complaint against a judge. The applicant then brought an application for recusal of the presiding judge in the review application given the working relationship of the presiding judge and the regulatory body, the Chief Justice and judge whose decision is questioned. Applicant sought the appointment of a foreign judge.

Held, that the applicant bears the onus to prove on a balance of probabilities that a reasonable person in the position of the applicant on the proven facts and evidence would reasonably apprehend that the judge would not be impartial in the adjudication of the case.

Held further, the applicant has a duty to dislodge the presumption of judicial impartiality which is applicable to judges and which presumption is not easily dislodged.

Held further, that a recusal application requires double reasonableness: that a reasonable and informed person should on the correct facts reasonably apprehend that judge will be biased.

Held further, that judges are duty bound to preside over cases assigned to them and not recuse themselves for flimsy reasons.

Held further, that our courts should play a role in protecting our sovereignty, and not easily appoint foreign judges who are not part of the Namibian judiciary on ad hoc basis when there are already judges appointed to preside over cases.

Held further, that judge shopping is discouraged.

Held further, that the applicant's grounds for recusal lack merit and do not make out a compelling case for recusal and fall to be dismissed.

ORDER

1. The applicant's application for recusal is dismissed.
2. The applicant is ordered to pay costs of the 1st and 3rd respondents consequent upon the employment of one instructing and one instructed counsel.
3. The matter is postponed to 13 November 2020 at 09:00 for hearing of the review application.

JUDGMENT

SIBEYA AJ:

Introduction

[1] Where a party apprehends that a judge would not be impartial (simply put, where a party, based on reasonable grounds, believes that a judge would be biased) in adjudicating the matter, such party may apply for the recusal of the judge as of right. It is a recourse available to the parties for good reason, mainly to give effect to the settled principle of law that justice should not always be done but must further be seen to be done. A judge should not regard an application for recusal as an attack on his or her person.

[2] This court is seized with an interlocutory application launched on notice of motion and filed on 07 August 2020. The applicant sought the relief that the managing judge recuses himself from hearing the merits of the review application.

The parties

[3] The applicant is Mr. Hendrik Christian, an adult male Namibian.

[4] The 1st respondent is the Judicial Service Commission established in terms of Article 85 of the Namibian Constitution (the JSC).

[5] The 2nd respondent is the Honourable Justice Masuku, a Judge of the High Court Namibia appointed in terms of Article 82(1) of the Constitution.

[6] The 3rd respondent is the Chief Justice of the Republic of Namibia duly appointed as such and he is, *ex officio*, the head of the judiciary (the Chief Justice).

The representatives

[7] Mr. Christian acted in person while the Mr. Narib, assisted by Mr. Khupe, acted for the 1st and 3rd respondents. Mr. Coetzee acted for the 2nd respondent.

Background

[8] The 1st and 3rd respondents opposed the application for recusal. The 2nd respondent did not oppose the said application but opted to abide by the ruling of this court. Consequently, at the hearing of the recusal application, Mr. Coetzee asked to be excused from the proceedings, and he was granted his wish.

[9] Mr. Christian raised the following points *in limine*: that Mr. Narib lacked authorization to appear for the 1st and 3rd respondent and to oppose the application for recusal; that the 1st and 3rd respondents lacked legal standing in the recusal application which was directed towards the presiding judge and that ultimately, the 1st and 3rd respondents together with Mr. Narib were acting on behalf of the presiding judge as they appear to have taken position to defend the presiding judge. The submissions of the parties regarding the

points *in limine* were heard and an *ex tempore* ruling was delivered dismissing the points *in limine*. The court proceeded to hear the main application for recusal.

[10] For better appreciation of this matter, I find it prudent to set out the genesis of this case but in no particular detail. The applicant instituted the main application on notice of motion where he complained about the decision of the 2nd respondent and the process leading to such decision. Subsequent to the said decision, the applicant launched a complaint against the 2nd respondent to the JSC. The Chief Justice in his capacity as the chairperson of the JSC is alleged to have delayed the processing of the said complaint. The JSC decided that the complaint concerned the exercise of a judicial function by the 2nd respondent and such complaint did not disclose a *prima facie* case of misconduct on the part of the 2nd respondent. It is this decision of the JSC that the applicant seeks to be reviewed and set aside in the review application.

The merits of the recusal application

[11] Rule 1 of the Rules of this Court defines a managing judge as:

‘A judge to whom a docket or a case is allocated to manage the docket or case in terms of these Rules’.

[12] A managing judge may not always be the judge assigned to hear the action or the application launched. *In casu*, it should be made clear from the starting blocks that this matter was assigned to me to manage and ultimately preside over it until its finality is reached. It is in this context that as I understood the recusal application to be, that the presiding judge should recuse himself from presiding over this matter in any manner, shape or form.

[13] The premise of the recusal application appears from the applicant’s papers to be:

13.1 That the presiding judge is appointed on the recommendations of the JSC in terms of Article 82 of the Constitution and further that it is the JSC that decides on complaints against judicial officers;

13.2 That the presiding judge is a colleague to the 2nd respondent, whose judgment is questioned in the main application and further that judges have a brotherhood relationship, a demonstration of a close relationship;

13.3 That the Chief Justice is the chairperson of the JSC and he further supervises the judiciary.

The law on recusal of a judge

[14] Article 12(1)(a) of the Constitution guarantees a fair and public hearing by an independent, impartial and competent Court or Tribunal to all persons in the determination of their rights and obligations. Judges take the oath or make an affirmation of office in terms of which they swear or affirm to defend and uphold the Constitution and fearlessly administer justice to all without favour or prejudice.¹

[15] The independence of the judiciary is cemented by the provisions of Article 78(2) which further guarantees the impartiality of the judiciary in the following terms:

‘The Courts shall be independent and subject only to this Constitution and the law.’

[16] It follows that in the exercise judicial functions, a judge is not answerable to any other judge, the Judge President, the Chief Justice or any other person. The judge is only answerable to the Constitution and the law.

¹ Article 82(1) read with Schedule 1 of the Constitution.

[17] In the same vein O'Linn J in *S v Heita*,² while discussing the independence of the courts provided for in Article 78 of the Constitution stated that:

‘Subarticle (2) makes it absolutely clear that the independent Court is subject only to the Constitution and the law. This simply means that it is also not subject to the dictates of political parties, even if that party is the majority party. Similarly, it is not subject to any other pressure group.’

[18] The Supreme Court in the matter of *the Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others*³ in para 25, stated the following while discussing recusal:

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

[19] The often-cited authority on recusal is the decision of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)*.⁴ In paras 35 – 48 the Constitutional Court of South Africa put emphasis on the impartiality of a judge as the foundation of a fair and just legal system. Para 48 of *SARFU* which was fully quoted by Mr. Christian in his heads of argument provides that:

‘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

² 1992 (NR) 403 (HC) 407-408.

³ 2019 (3) NR 605 (SC).

⁴ 1999 (4) SA 147 (CC).

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.'

[20] Mr. Christian was amazingly on point regarding the law applicable to recusal applications and I cannot help but commend him for restating the legal position correctly. The above quoted passage from *SARFU* reveals the approach of our courts to recusal applications. Mr. Christian went further in his navigation through our legal position on recusal applications, and again without fail and to my delight, he correctly submitted that;

'The test is whether a reasonable objective and informed person would on the correct facts reasonably apprehend that the judge would not be impartial. The requirement is one of double reasonableness. Not only must the person apprehending the bias be a reasonable person ... but the apprehension must also be reasonable.'⁵

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

[22] Mr. Christian, however, orally and with emphasis, repeated his submission made in his heads of argument that:

'It must be mentioned that I have no personal issue with the managing judge. There is also no reason for me to be against the judge.'

[23] With a flip of a hand, Mr. Christian submitted that the relationship of the presiding judge and the JSC which recommended the appointment of the judge and the Chief Justice who supervises judges is such that the presiding judge is not capable of ruling against the JSC and the Chief Justice. Mr. Christian further submitted that the 2nd respondent is a near relative to the

⁵ Para 5 of the Applicant's heads of argument.

⁶ 2000 (3) SA 705 (CC).

presiding judge by virtue of reference to a fellow judge as brother and therefore such relationship has impartiality written all over it.

[24] Mr. Christian proceeded to state that since his complaint is the relationship of the presiding judge and the JSC, the Chief Justice and the 2nd respondent, it means that any other judge of the High Court will fit hand in glove in the position of the presiding judge and will equally not be impartial in adjudicating the review application. It should be remembered that central to impartiality is the absence of bias. Impartiality generally refers to the state of mind or attitude of a judge. A blanket perception of bias (when it is said to exist) on all judges therefore requires closer scrutiny to determine its reasonableness. Mr. Christian submitted that justice will not only be done but will be seen to be done when a foreign judge is appointed to preside over the review application, failing which he will be severely prejudiced by an impartial judge.

[25] In *S v Collier*,⁷ an accused insisted on being tried by a black magistrate but the white magistrate refused to recuse himself on that ground. On appeal it was held that:

‘Equally, the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision ... the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true.’⁸

[26] I endorse the above remarks and find them to be indicative of our legal position, read together with the oath or affirmation of office taken by a judge. The mere fact that a local judge presides over an application where the JSC, the Chief Justice and a fellow judge are parties thereto, cannot be reasonably perceived to prejudice another party to such an application. It is incumbent on the applicant in application for recusal to bring forth sufficient facts and evidence, the basis on which it can be said that a reasonable person will have a reasonable perception of bias.

⁷ 1995 (2) SACR 648 (C).

⁸ *S v Collier* (supra) para 650E-H.

[27] Mr. Narib forcefully and correctly argued that the judge who is seized with a case is duty bound to disclose facts peculiarly within his knowledge which may not bring an impartial judgment to bear on the matter. He submitted that in the present application such a duty does not arise. He proceeded to submit that the applicant *in casu*, remained in his starting blocks as he failed to establish reasonable facts on which the presiding judge may recuse himself. Mr. Narib ably concluded his arguments with a statement that the applicant failed to advance facts which could dislodge the presumption of impartiality of the presiding judge.

[28] The long and short of Mr. Christian's argument is that he has no faith in the judges of the High Court and he requires the appointment of a foreign judge to preside over his review application.

[29] It is important to remind all and sundry that our justice system has inherent safeguards in place, whereby a party disgruntled with the judgment of the High Court, may appeal or take such decision on review to the Supreme Court. The High Court is therefore not the final court of the land which can consider the review application.

[30] Judicial officers have a duty to preside in any case in which they are not obliged to recuse themselves.⁹ Recusal at the slightest given opportunity and for flimsy reasons disrupts the smooth operation of the courts and should be discouraged. There must be cogent reasons and evidence brought to the fore to warrant recusal, which should not easily be granted.

[31] It is crucial that the Judiciary should take the lead in protecting the interests of justice and the sovereignty of our country. The preamble to the Constitution provides, *inter alia*, that:

'Whereas we the people of Namibia –

⁹ S v Stewe and three Similar Matters 2019 (2) NR 359 (SC) 364E-F.

have finally emerged victorious in our struggle against colonialism, racism and apartheid;

are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle;

desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world;

will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state;

committed to these principles, have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity,

Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic.' (My underlining for emphasis purpose).

[32] It is high time that courts play their part in breathing meaning into our Constitution. Our sovereignty is our identity and should be protected by any means necessary. Dancing to the tune of litigants to appoint foreign judges, referring to non-Namibian judges who are not part of the Namibian judiciary, has the capacity of undermining our sovereignty. This should be a no-go area for our courts. It is only in exceptional and worthy circumstances that a foreign judge may be appointed where on good cause shown, no local judge may preside in a particular matter. These cases are bound to be extremely rare. The current application falls way outside the circumference of such exceptional matters. I find that the respondents have no influence on the decision to be arrived at by the presiding judge, neither was the contrary view established by the applicant. The so-called apprehension of bias by the applicant is not rooted on any reasonable foundation. An unfounded apprehension concerning a judicial officer's impartiality is unreasonable and therefore not a justifiable basis for a recusal application.

[33] Litigants should not be allowed to shop for judges who should preside on their cases. Any relaxation of this position can be catastrophic to the judiciary which is one of the pillars on which our democracy is founded and rests. Judge-shopping stinks of corruption, nepotism, bias, to say the least. It is the reason why parties are not allowed to shop for preferred judges to preside over their cases. Foreign judge shopping on the other hand extends the undesirability of judge shopping as over and above the aforesaid factors, it would be costly to acquire the services of foreign judges willy-nilly. This exercise would also be a duplication of resources as an additional judge would be appointed when there are judicial officers appointed and available to preside over cases.

Conclusion

[34] The applicant failed to establish facts constituting reasonable grounds for my recusal. There are no facts on which this court could even begin to consider the reasonableness of the presumed bias on its part. It should further be mentioned that the applicant who correctly set out the legal position regarding recusal applications, should have known better and raised what he could also understand to be reasonable grounds for recusal. The above leads me to one conclusion, that the applicant's application for recusal lacks merit and falls to be dismissed. I am tempted to remark that, with the applicant's knowledge of the legal position on recusal applications, he cannot, objectively speaking, be said to have had faith in the success of his application for recusal in its present form.

[35] In the result, it is ordered that:

1. The applicant's application for recusal is dismissed.
2. The applicant is ordered to pay costs of the 1st and 3rd respondents consequent upon the employment of one instructing and one instructed counsel.
3. The matter is postponed to 13 November 2020 at 09:00 for hearing of the review application.

O S Sibeya
Acting Judge

APPEARANCES:

APPLICANT : H Christian
 Acting in person
 Windhoek

RESPONDENT: G Narib (assisted by M. Khupe)
 Instructed by Government Attorney,
 Windhoek