

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

<b>Case Title:</b>  CHRISTIAN SHILONGO v CHAIRPERSON OF THE APPEAL TRIBUNAL 1 <sup>st</sup> RESPONDENT CHAIRPERSON OF KAVANGO WEST COMMUNAL LAND BOARD 2 <sup>nd</sup> RESPONDENT UKWANGALI TRADITIONAL AUTHORITY 3 <sup>rd</sup> RESPONDENT IMMANUEL SIKONGO 4 <sup>th</sup> RESPONDENT	<b>Case No:</b> HC-MD-CIV-MOT-REV-2022/00245
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO	<b>Date of hearing:</b> 27 March 2023
	<b>Delivered on:</b> 15 June 2023
<b>Neutral citation:</b> <i>Shilongo v Chairperson of the Appeal Tribunal</i> (HC-MD-CIV-MOT-REV-2022/00245) [2023] NAHCMD 321 (15 June 2023)	
<b>Results on merits:</b>  Merits not considered.	
<b>The order:</b>  1. The decision taken by the Chairperson of the Appeal Tribunal (first respondent) handed down on 23 November 2021 and communicated to the applicant on 4 February 2022 is reviewed and set aside.  2. The 1 <sup>st</sup> to the 3 <sup>rd</sup> respondents must pay the applicant's costs of suit, such costs to include the costs of one instructed and one instructing counsel.  3. The matter is finalised and removed from the roll.	

**Reasons for orders:**Introduction

[1] The applicant is Christian Shilongo an adult male farmer, residing at Endola, Omakanga, Ohangwena Region, Republic of Namibia.

[2] The respondents are as follows:

a) The first respondent is the Chairperson of the Appeal Tribunal appointed by the Minister of Land Reform in terms of s 39(6) and Regulation 25 of the Communal Land Reform Act 5 of 2002 (the 'Act') in the care of the Minister of Agriculture, Water and Land Reform, at Ministry of Agriculture, Water and Land Reform, situated at 55 Robert Mugabe Avenue, Windhoek, Khomas Region, Republic of Namibia.

b) The second respondent is Kavango West Communal Land Board, a statutory administrative body duly established in terms of s 2 of the Act for the Kavango West Region situated at Maria Mwengere Road, Rundu, Kavango West Region, Republic of Namibia.

c) The third respondent is Ukwangali Traditional Authority, a traditional Authority duly established in terms of s 2 of the Traditional Authorities Act 25 of 2000 for the Ukwangali traditional community and situated at Ukwangali Tribal Office, Kahenge, Nkurenkuru, Kavango-West Region, Republic of Namibia.

d) The fourth respondent is Immanuel Sikongo, a major male person residing at Erf 1753 Safari, Rundu, Kavango-East Region the Republic of Namibia. The fourth respondent is cited for the interest he might have in the outcome of the matter.

Current application before court

[3] This is a review application brought in terms of rule 76(1) of the Rules of the Court,

wherein the applicant seeks to review and set aside the decision taken by the Chairperson of the Appeal Tribunal (first respondent) taken on 23 November 2021 and communicated to the applicant on 04 February 2022. The gist of the communique was that the applicant's appeal was dismissed and the notice of eviction dated 16 December 2020 was upheld.

[4] The first to third respondents ("the respondents") opposed this application and raised a point in limine to the effect that the applicant delayed in bringing the review application and that the record of proceedings that was served before the Appeal Tribunal was used in arriving at a fair and just decision.

#### Background

[5] The fourth respondent was allocated a leasehold with a leasehold certificate dated 31 March 2017 by the Kavango East Communal Land Board. Prior to May 2021, the Kavango East Communal Land Board was responsible for the affairs of the whole Kavango region pertaining to the ratification of land rights as prescribed by the Act. The statutory functions of the Kavango East Communal Land Board were then transferred to the Board which was set up as a separate, autonomous entity to manage the Communal Land Board affairs of the Kavango West Region.

[6] On 30 July 2019, Kadhila Amoomo Legal Practitioners, acting on behalf of the fourth respondent, sent a letter to the Board requesting it to evict the applicant who is in unlawful occupation of the leasehold. On 09 December 2019, the fourth respondent wrote to the Board explaining the terms of his lease agreement with the applicant. The Board resolved to institute an investigation committee in terms of s 37 of the Act. On 13 and 14 July 2020, the Board held a hearing which was attended by the second to the fourth respondents. The hearing was chaired by the erstwhile chairperson, Adolf Moremi.

[7] At a further meeting held from 03 to 06 November 2020, the Board resolved that the applicant must vacate the premises. This was on the basis that the agreement of subleasing concluded between the applicant and the fourth respondent was not approved by the Board and was thus ultra vires in terms of s 31(6) of the Act.

[8] The applicant, aggrieved by the decision of the Board, appealed that decision in terms of s 39 of the Communal Land Reform Act, read with reg 25 of the Regulations made in terms of

the Communal Land Reform Act. Following the hearing of the appeal, the Appeal Tribunal dismissed the applicant's appeal and upheld the decision made during 03 to 06 November 2020. It is this decision that the applicant seeks to have reviewed and set aside.

*The applicant's grounds of review may be summarised as follows:*

[9] It is the applicant's case that there was no full and certified record of proceedings from the second respondent that served before the first respondent when the impugned decision was taken.

9.1 In its answering affidavit, the first respondent relies on letters and an investigative report to support and justify their decision, even though these documents were not available to them at the time they made the decision;

9.2 Due to a lack of a complete and certified record from the second respondent, the first respondent had to gather information from the second respondent's representative who was present at the Appeal Tribunal hearing. This included evidence that was not previously considered by the second respondent when making their decision during the meeting held from 03 to 06 November 2020;

9.3 A record of proceedings can never come in the form of viva voce evidence as the first respondent purports in its answering affidavit;

9.4 As there was no record of proceedings from the second respondent, the first respondent had to collect evidence during the appeal hearing by disguising it as submissions to comprehend the dispute between the parties better;

9.5 The Appeal Tribunal acted beyond its scope of powers and unprocedurally descended into the arena when:

9.5.1 It took evidence without powers to do so – which is the investigative report and the various letters produced in its answering affidavit;

9.5.2. It invited submissions made by parties not called as witnesses at the second respondent's meeting and used the submissions to amplify the second respondent's ruling;

9.5.3. It did not properly consider the record of the decision of the second respondent, but held a trial de novo without informing the parties that it was taking evidence as opposed to submissions;

9.5.4. It accepted submissions of the second respondent as evidence of fact which is contrary to its powers.

*The respondents' point in limine*

[10] As indicated earlier in this judgment, the respondents raised a point in limine to the effect that the applicant delayed in bringing these review proceedings. According to the respondents, the applicant instituted proceedings on 03 June 2022, after the decision he seeks to impugn was handed down on 23 November 2021. This is seven (7) months after the decision was taken. The applicant's founding affidavit is silent on this issue. The application falls to be dismissed on this basis alone.

[11] In response to the respondents' point in limine, the applicant argues that the parties have agreed in their case management report that from the time that the applicant received the complete judgment on 04 February 2022 to the time the applicant launched the review application, only a total period of three (3) months had lapsed. The applicant, in his founding affidavit set out the steps he undertook after his legal representative received the complete judgment on 04 February 2022. The applicant demonstrated that he did not sit idle after he received the complete judgment, but engaged his legal representative to consider the judgment and sought a legal opinion from counsel on the prospects of success should he seek to have the first respondent's decision reviewed and set aside.

[12] The applicant in his founding affidavit explains the reason for the delay in launching the application as follows: On 31 January 2022, Ms Semitha Kuria forwarded to his legal representative via email the appeal judgment in the *Christian Shilongo v Kavango West Communal Land Board*, which judgment was delivered on 23 November 2021. Subsequently, on 02 February 2022, Ms Mcleod-Janser, responded to the email of 31 January 2022 to the effect that the judgment was incomplete and enquired from her whether that was the full copy. Two days

later on 04 February 2022, Ms Kuria shared the complete judgment and tendered her apologies for any inconvenience caused.

[13] After the applicant received the complete judgment, he considered it and instructed his legal representative of record to seek a legal opinion from counsel on whether the procedure

followed by the first respondent was lawfully and procedurally permitted. He explains that the legal opinion from counsel was received on 01 March 2022, whereafter his legal representative considered the opinion. He consulted his legal representative in April 2022 and gave instructions to his legal counsel to institute review proceedings, against the decision of the first respondent. Following the instructions to counsel the applicant's legal representative caused a notice of motion to be issued on 03 June 2022, which is three (3) months after the complete judgment was emailed to him by Ms Kuria.

*The applicable legal principles for unreasonable delay*

[14] The Supreme Court in the matter of *South African Poultry Association and 5 Others v Minister of Trade and Industry and 3 Others*<sup>1</sup> stated the following regarding the legal principles governing delay:

'Two enquiries are to be determined: the first is an objective one and is whether the delay was on the facts unreasonable. The second is whether the delay should be condoned. As stated in *Keya v Chief of the Defence Force and others*, the first enquiry is a factual one and does not involve the exercise of a discretion. It entails a factual finding and a value judgment based upon those facts. The second enquiry involves the exercise of a discretion. There is a narrow ambit of an appeal, against the exercise of a discretion. This court would only interfere with the exercise of that discretion when it is found not to have been exercised judicially by the court a quo.'

*Was the delay unreasonable?*

[15] The applicant explained in his founding affidavit that the appeal was heard on 01 November 2021, the judgment was handed down on 23 November 2021, he became aware of the judgment on 31 January 2022, and the outcome of the complete judgment was communicated to the applicant on 04 February 2022. After the applicant received the complete judgment, he considered

same and instructed his legal representative of record to seek a legal opinion from counsel. The legal opinion from counsel was received on 01 March 2022 where after his legal representative considered the opinion. After consideration by his legal representative, he consulted his legal representative in April 2022 and gave instructions to his legal counsel to institute review proceedings, against the decision of the first respondent. Following the instructions to counsel

<sup>1</sup> *South African Poultry Association and 5 Others v Minister of Trade and Industry and 3 Others* (SA 37 – 2016) [2018] NASC (17 January 2018).

the applicant's legal representative caused a notice of motion to be issued on 03 June 2022, which is three (3) months after the complete judgment was emailed to him by Ms Kuria. In contrast, the respondents submitted that the applicant had common law remedies inclusive of instituting a mandamus to compel the first respondent or the Ministry to make the judgment available to the applicant. According to the respondents, the applicant did not utilise that legal route.

[16] In my view, the applicant has provided a reasonable and detailed explanation for the delay in instituting proceedings between the date when the complete judgment was emailed to him on 04 February 2022 and 03 June 2022 (the date when the notice of motion was launched). This court is further of the view that cogent, convincing and sufficient facts have been placed before it to satisfactorily explain the delay. This court finds that the Appeal Tribunal failed to exercise its discretion properly in deciding the issues placed before it without being privy to the record of proceedings of the meeting held from 03 to 06 November 2020. Consequently, the court condones the applicant's three (3) months delay in instituting these review proceedings.

#### The grounds for review

[17] The first ground of review raised by the applicant is that there was no full and certified record of proceedings from the second respondent that served before the first respondent when the impugned decision was taken. I find it necessary to only deal with the first ground of review.

#### Arguments advanced

##### *On behalf of the applicant*

[18] The applicant argues that the appellate body must only consider the record of the hearing where the decision was made. The first respondent used an investigative report created after the hearing, which was neither considered by the second respondent nor presented to the applicant. It was clear from the proceedings that the first respondent accepted the submission by the second

respondent as evidence of fact and used the second respondent's submissions as grounds to amplify, clarify or supplement the second respondent's decision of 16 December 2020.

[19] According to Ms Kauta, the first respondent acted beyond their authority by conducting a hearing de novo and considering evidence from the second respondent's investigation report and testimony. This means that their decision should be reviewed and set aside.

*On behalf of the respondents*

[20] Mr Ncube in his heads of arguments makes the submissions that the Appeal Tribunal has no power to determine evidence that does not form part of the appeal record. The Board did not use evidence from parties that were not permitted to lead oral evidence. Their evidence was irrelevant for all intents and purposes. Counsel submitted that as the title aptly states, this is an Appeal Tribunal, not a court of law that calls for evidence to be led.

Failure by the respondents to produce the record of proceedings

[21] In the matter of *New Era Investment (Pty) Ltd v Roads Authority*<sup>2</sup> Damaseb DCJ stated the following:

‘It is trite that in review proceedings the production of the record of proceedings and the accompanying reasons sought to be reviewed is for the benefit of an applicant.’

[22] In this review application before court, the parties failed to produce the record of proceedings of the hearing which took place from 03 to 06 November 2020. Undoubtedly, the records of proceedings/ hearings/ meetings which took place in the past aid the courts in the adjudication of matters in order to attain justice. More often than not, it is only after having sight of the record that a picture of the proceedings under review will be laid bare for the court to scrutinize. Attempts to withhold court records from the reviewing court may have the capacity of placing insufficient information before court, which may at times mislead the court. Resultantly, injustices may be carried out.<sup>3</sup>

[23] This court therefore finds that the absence of the record of proceedings is dispositive of the matter and I do not find it necessary to deal with the remaining grounds of review raised by the applicant.

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<sup>2</sup> *New Era Investment (Pty) Ltd v Roads Authority* 2017 (4) NR 1160 (SC).

<sup>3</sup> *Simon v The Prosecutor-General of Namibia* (HC-MD-CIV-MOT-GEN-2020/00080) [2020] NAHCMD 221 (12 June 2020).



Costs

[24] The only remaining issue to decide is the issue of costs. The applicant is successful in his claim, and I do not see why costs should not follow the event.

Order

[25] In the result, I make the order as set out above.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>1-3 Respondents</b>
V Kauta Instructed by Shikongo Law Chambers, Windhoek	J Ncube Of the Office of the Government Attorneys, Windhoek