**REPUBLIC OF NAMIBIA** NOT / REPORTABLE


**LABOUR COURT OF NAMIBIA**

**JUDGMENT**

Case no: LCA 78/2013

In the matter between:

1.1.1.1. **LIFE OFFICE OF NAMIBIA LTD t/a NAMLIFE**
**APPLICANT**

and

**JOEL AMAKALI** **1st RESPONDENT**
**KAHITIRE KENNETH HUMU N.O.** **2nd RESPONDENT**
**BRO-MATTHEW SHINGUANDJA N.O.** **3rd RESPONDENHT**
**PENDA YA OTTO N.O.** **4th RESPONDENT**

*Neutral citation: Life Office Namibia Ltd ta NAMLIFE v Amakali (LCA 78/2013) [2014] NALCMD 17 (17 April 2014)*

**Coram:** SMUTS, J
**Heard**: 15 April 2014
**Delivered**: 17 April 2014

**Flynote:** Application to set aside an arbitrators award and for a complaint to be heard *de novo* because a material portion of the record was missing and could not be reconstructed. The portion in question

was the first respondent's evidence-in-chief. The court resolved to refer the matter back to the arbitrator to rehear the first respondent's entire testimony including his cross-examination.

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**ORDER**

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**1.** That the applicant's non-compliance with the Rules of this Court and the forms and service provided for in these Rules as envisaged in Rule 6(24) of the Rules is condoned.

**2.** That the appeal is postponed to **25 July 2014** at **9h00**.

**3.** That the matter is remitted to the second respondent to rehear the evidence of the first respondent (including his cross-examination) upon a date and time convenient to the second respondent and the parties but to be completed within **60 days** of this order.

**4.** That the evidence of the first respondent is to be transcribed and lodged with this court **15 days** after it is heard.

**5.** That the applicant is afforded the opportunity to supplement its appeal grounds within **5 days** after the record of such evidence is lodged.

**6.** No order is made as to costs.

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**JUDGMENT**

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SMUTS, J

[2] The applicant noted an appeal against an arbitrator's award under s 89 of the Labour Act.[1] The award was made in favour of the first respondent, one

[1]Act 11 of 2007.

of its former employees.

[3] The appeal was noted timeously. The applicant was also granted an interim interdict on 13 December 2013 staying the operation of the award, pending the determination and finalisation of the appeal. The rule was confirmed on 22 January 2014. In order to address prejudice to the first respondent, this court set down the appeal for 4 April 2014, obviating the need for the parties to follow Rule 17(18) of the Rules of this Court to apply for a date of hearing.

[4] The applicant was also granted leave to bring an application as a matter of urgency, duly supported, to compel the filing of the record by the Labour Commissioner, given the early set down of the appeal.

[5] The record, which was subsequently found to be incomplete, was provided to the applicant on 31 January 2014. The applicant's legal practitioner mistakenly certified that the record was complete and correct. It was however subsequently established that a portion of that record was missing and would need to be reconstructed. This was brought to the attention of the arbitrator by way of a letter on 14 February 2014. The entire evidence-in-chief of the first respondent had been omitted from the record. It soon transpired that this portion of the record was missing. The applicant's representative at the hearing was requested to assist in reconstructing the record. But his contemporaneous notes were no longer in his possession and he was only able to provide a brief summary reflecting his recollection of the first respondent's evidence-in-chief.

[6] The applicant's legal practitioners then addressed a letter to the first respondent's legal practitioners on 18 February 2014 explaining the missing portion of the record and enquiring as to whether the first respondent or his representative had contemporaneous notes regarding his evidence-in-chief. The arbitrator subsequently provided copies of his handwritten notes of the first respondent's evidence-in-chief. By the nature of things, these notes were brief and did not reflect the full extent of the evidence-in-chief. A further request was directed to the first respondent's legal practitioner enquiring as to whether the first respondent would be satisfied with those notes. The first respondent's legal

practitioner reverted by advising that the first respondent's representative at the hearing had not kept proper notes.

[7] The applicant thus only had in its possession the incomplete notes of the arbitrator and the subsequent recollection of its representative but no contemporaneous notes of its own representative or of the first respondent's representative. Faced with this difficulty, the applicant then brought this application set down for a case management hearing on 26 April 2014 seeking an order that the matter be referred back to the arbitrator to be heard *de novo* because of the incomplete record. It then became clear that the appeal could no longer be heard on 4 April 2014. At the case management hearing on 26 March 2014, the applicant's application and the appeal were postponed to 15 April 2014 and the parties were placed on terms with regard to the filing of further affidavits and heads of argument.

[8] In the meantime, the applicant amended its notice of motion seeking the setting aside of the award and the referral of the matter back to the office of the Labour Commissioner for the complaint to be heard *de novo*. Certain further ancillary relief has also been sought. In view of the conclusion I reach in this matter, it is not necessary to further address the ancillary relief.

[9] The first respondent opposed the application and filed an answering affidavit. Several points were raised. But in view of the conclusion I have reached in the matter, it is also not necessary to deal with each of those.

[10] Mr JPR Jones, who represented the applicant, prepared detailed heads of argument referring to cases within this jurisdiction and in South Africa which have dealt with difficulties arising when incomplete records have been filed and where portions of evidence had gone missing and were no longer available. The first preference would usually be to reconstruct the missing portion of the record, if possible. In this instance, it became clear upon the facts placed before me that it would not be possible to prepare an adequate reconstruction of the first respondent's evidence-in-chief in the circumstances. Although the first respondent's counsel, Mr Phatela, argued that this should occur, he was

eventually constrained to concede that upon the facts placed before me this was not feasible. A reconstruction would thus be inadequate.

[11] The question arises as to what is to be done in the absence of a reconstruction of the record.

[12] Mr Jones referred in his heads of argument to *Department of Justice v Hartzenberg*.[2] The then Labour Appeal Court in South Africa was faced with a situation where a record could not be reconstructed. It set aside the orders of the Court *a quo* and directed a re-hearing of the matter *de novo* before a different commissioner.

[13] The facts of that matter are in certain respects different to those which confront me. The cross-examination of the respondent in that matter was lost as well as the entire testimony of the four witnesses called by the appellant.

[14] The court in *Hartzenberg* referred to the position in criminal appeals from Magistrate's Courts which had been settled in South Africa in *S v Joubert*[3] The position is similarly settled in Namibia in *S v De Almeida*[4] which in turn adopted the approach in *Tiboth v State*.[5]

[15] The court in *Hartzenberg* proceeded to refer to the position in civil appeals and to the dearth of authority with regard to incomplete records. The court referred to *Beaumont v Anderson*.[6] In that matter the handwritten record of the plaintiff's evidence-in-chief was lost and Broome J declined the application to remit the matter for a hearing *de novo*, but instead remitted it for the Magistrate to re-hear the evidence of the plaintiff.

[16] Both the court in *Hartzenberg* and in *Beaumont* stressed the right of a litigant to appeal on the one hand which is to be weighed up against the fact that

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[2]2002(1) SA 103 (LAC).

[3]1991(1) SA 119 (A).

[4]2012(1) NR 60 (HC) at 63.

[5]Case No CA 49/95 unreported and delivered on 4/12/1995 by Strydom JP, as he then was.

[6]1949(3) SA 562 (N).

the other party had obtained an order in his or her favour.

[17] I raised with Mr Jones the possibility of remitting the matter to the second respondent to hear the evidence-in-chief of the plaintiff. He however rightly responded that the entire testimony of the first respondent should be re-heard as there could be aspects raised in the evidence-in-chief which had not been raised in the same way previously. I indicated to him that in view of the considerations amply set out in the *Hartzenberg* and *Beaumont* matters, it would seem to me that the appropriate course would only be to remit the matter for that purpose rather than the complaint being heard *de novo.*

[18] Mr Jones indicated that his client would no longer persist in seeking the setting aside of the award and remittal of the complaint *de novo*, a concession which in my view was correctly made. Mr Phatela, as I have indicated, expressed a preference for the reconstruction of the record and also pointed out that new aspects could be raised in evidence or cross-examination which could affect the second respondent's view of the matter. Whilst this may be so, the prospects of such an occurrence are however not significant when viewed against the alternative of an incomplete record where the evidence-in-chief is entirely omitted and where an adequate reconstruction is not feasible.

[19] In weighing up the countervailing considerations, it would seem to me that a referral to the second respondent to hear the first respondent's testimony in full would be the appropriate course and the one which is most equitable in the circumstances.

[20] Mr Phatela had also submitted that the appeal had lapsed by reason of the failure to have prosecuted it within the time period set out in Rule 17 of the Rules of this court. I agree with Mr Jones that the granting of a date for the hearing of the appeal on the return date on 22 January 2014 which appeal date was thereafter postponed and now again postponed to 25 July 2014 has meant that the appeal has not lapsed and an order for its re-instatement and an extension for the filing of the record would thus not be necessary.

[21] I accordingly granted an order on 16 April 2014 to remit the matter to the second respondent to re-hear the testimony (including the cross-examination) of the first respondent and made certain further directions as set out in the order which I quote in full:

**1.** 'That the applicant's non-compliance with the Rules of this Court and the forms and service provided for in these Rules as envisaged in Rule 6(24) of the Rules is condoned.

**2.** That the appeal is postponed to **25 July 2014** at **9h00**.

**3.** That the matter is remitted to the second respondent to rehear the evidence of the first respondent (including his cross-examination) upon a date and time convenient to the second respondent and the parties but to be completed within **60 days** of this order.

**4.** That the evidence of the first respondent is to be transcribed and lodged with this court **15 days** after it is heard.

**5.** That the applicant is afforded the opportunity to supplement its appeal grounds within **5 days** after the record of such evidence is lodged.

**6.** No order is made as to costs.'

[22]

[23] These are my reasons for doing so.

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D SMUTS

Judge

APPEARANCES

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| APPLICANT: | Mr JPR Jones<br>Instructed by Köpplinger Boltman |

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| FIRST RESPONDENT: | Mr TC Phatela<br>Instructed by Shikale & Associates |