

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA
MAIN DIVISION, WINDHOEK**

Case Title: Samuel Mulemwa Amukena v Nampower	Case No: HC-MD-LAB-MOT-REV-2021/00092
	Division of Court: High Court Main Division
Heard before: Honourable Lady Justice Tommasi	Heard on: 8 April 2022 Delivered on: 11 July 2022
Neutral citation: <i>Amukena v Nampower</i> (HC-MD-LAB-MOT-REV-2021/00092) [2022] NALCMD 39 (11 July 2022)	
ORDER : <ol style="list-style-type: none">1. The transcription of the cellphone conversations is to form part of the record. The admissibility thereof remains an issue to be determined at the hearing of the main review application.2. The late filing of the supplementary affidavit is condoned.3. The prayer sought in paragraph 1.2 of the Interlocutory Application, is refused.	

4. The matter is postponed to 3 August 2022 for a case management conference.

TOMMASI J:

[1] The applicant herein filed an application for review on 30 April 2021, the same day the arbitration award was registered with the High Court of Namibia. The first respondent filed a notice to oppose on 10 May 2021.

[2] On 15 June 2021, the first respondent's legal practitioner filed a one sided status report complaining that they had not received a copy of the record in order for them to file their answering affidavit and that the applicant informed them that he did not have money to pay for the record. The record was received by the office of the registrar on 15 July 2022. On 27 July 2021, the applicant filed a copy of the record and it appears that same was served on the first respondent on 2 August 2021. On 20 August 2021, the applicant filed a status report wherein he indicated that the first respondent, despite their internal policies and procedures, failed to provide him with a copy of the record of the internal disciplinary hearing. On 25 August 2021, the applicant applied for the assignment of a hearing date for the matter to be heard. The enrolment of the matter for a date to be assigned was removed from the roll by the registrar as a managing judge was appointed.

[3] On 3 September 2021, a status hearing was scheduled for 15 September 2021. On 13 September 2021, the first respondent's legal practitioner filed a "joint status report" which was not signed by the applicant. The first respondent confirmed that the parties had been in touch with each other regarding the filing of the record. The first respondent held the view that the record filed was incomplete and filed out of time without an accompanying application for condonation. The court, on 15 September 2021, issued an order out of chambers and in absentia of the parties postponing the matter to 3 November 2021 to afford the applicant the opportunity to file the complete record.

[4] On 16 September 2021 the applicant filed an "interlocutory application", a

supplementary affidavit and a typed record of audio recordings. The application reads as follows:

‘1.The applicant intends to apply to this court under Rule 6(23), Rule 14 (9), (12), Rule 15 of the rules of the Labour Court and the law of evidence Act 23 of 1985 for the following relief and orders;

2. The **late filing of the supplementary affidavit** be condoned in terms of Rule 15 (Rule **15 Non-compliance with rules**) of the Labour Court if in the opinion of the Court there was non-compliance or negligence on the side of the applicant; (Rule 14 (9) The applicant may within 10 days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit;

3. The court is requested to make an order directing the Ministry of Public Enterprise to give effect to Annexure E1;

4. The Court to make an order to have the cell phone recorded transcribed records/ transcripts admitted as hearsay evidence or direct evidence in terms of the Law of Evidence Act, 32 of 1985, or in any manner deemed appropriate by the Court;

5. Retrospective re-instatement with back pay as from date of unfair dismissal with costs on the applications;

6. Upgrade the applicant as per practical assessment retrospectively as of 08th May 2018 with back pay.’

[5] This application was opposed. The matter was transferred to me to further manage it. The dispute which was raised by the first respondent was that the record was not complete. The court directed the first respondent to advise before 17 December 2021 which portions of the record was still outstanding. This was not done and the court ordered the legal practitioner of the first respondent to file a sanctions affidavit. The sanctions affidavit was filed on 10 March 2022. It appears that the first respondent’s complaint involves seven pages where certain paragraphs reflect that the recording is inaudible. No case was made out by the first respondent that these parts are material.

[6] It should be noted that the court order of 15 September 2021 afforded the applicant an opportunity to avail the complete record to the first respondent. He must filed his notice of motion and supplementary affidavit one day thereafter i.e. without delay. The applicant indicated in the supplementary affidavit that he was unaware of the fact that the cell phone conversations could be transcribed. The first respondent on the other hand took considerable time to indicate why they maintain that the record was incomplete.

[7] The applicant, in his “supplementary affidavit” indicated that the cellphone audio recordings were admitted or allowed and were played during the internal disciplinary hearing which took place on 22 and 30 August 2019 but were not taken into consideration. He submitted arguments in the supplementary affidavit which ought to be raised during argument but I take note of his averment that the cell phone recordings were listened to during the internal disciplinary proceedings.

[8] It appears from the record that the recordings were indeed listened to but that the chairperson of the internal disciplinary hearing did not admit same as it was considered to be inadmissible. In this case, it forms part of what transpired during the internal disciplinary hearing and there is no reason for it not to form part of the record. Whether or not same was correctly excluded from the evidence appears to be an issue which the applicant raises in his supplementary affidavit and this may therefore be argued during the hearing of this matter. It is for these reasons, that I find no fault to accept the transcriptions of the cellphone conversations as part of the record. In view of this conclusion, the court makes an order that the cellphone record transcribed forms part of the record. The admissibility thereof remains an issue for argument.

[9] The first respondent objected to the late filing of the supplementary affidavit. The court on 15 September 2021 allowed the applicant to make available the complete record. This means that the applicant was allowed to do so after the 14 day period had expired.

[10] The supplementary affidavit explains that the applicant is seeking leave to file a

supplementary affidavit. I see no prejudice in the filing of the supplementary affidavit at the same time the additional part of the record is filed as no answering affidavit was filed. In light hereof the court would grant prayer 1.1 of the applicant's notice titled "interlocutory application.

[11] The applicant further prays in paragraph 1.2 of the interlocutory application for an order directing the Ministry of Public Enterprise to give effect to the letter which was addressed to him on 3 May 2021, marked Annexure E1. The Ministry of Public Enterprise is not a party to the proceedings and therefor no such order can be made.

[12] Paragraphs 1.4 and 1.5 are a part of the initial application for review and must be determined during the hearing of the application.

[13] In the result the following order is made:

1. The transcription of the cellphone conversations is to form part of the record. The admissibility thereof remains an issue to be determined at the hearing of the main review application.
2. The late filing of the supplementary affidavit is condoned.
3. The prayer sought in paragraph 1.2 of the Interlocutory Application, is refused.
4. The matter is postponed to 3 August 2022 for a case management conference.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Mr. S Amukena Applicant in person Windhoek	Ms. R Kandjella of AngulaCo Inc Windhoek

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