



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CA 47/2012

In the matter between:

LEAH SHAANIKA

APPELLANT

and

THE MAGISTRATE'S COMMISSION

FIRST RESPONDENT

MINISTER OF JUSTICE

SECOND RESPONDENT

Neutral citation: *Shaanika v The Magistrate's Commission* (CA 47/2012) [2013] NAHCMD 203(18 July 2013)

Coram: NDOU AJ

Heard: 12 July 2013

Delivered: 18 July 2013

ORDER

1. The appeal is struck from the roll.
-

**Notice to Appeal against dismissal in Terms of Section 21 (4) of the
Magistrate's Act, 2003**

RULING

NDOU AJ [1].The appellant was employed as a Magistrate under the First Respondent ("The Commission"). On 11 April 2005 the Commission charged the appellant, in terms of Section 26 of the Magistrate's Act No 3 of 2003 ("the Act"), with six counts of misconduct, particularly of which are -

"Count 1: alleged use of derogatory language towards a staff member (Ms Amupanda) and assaulting her;

Count 2: alleged insults and use of derogatory language towards Mr Amunyela;

Count 3: alleged refusal to handle a civil matter brought by Mr B Pfeiffer, a legal practitioner;

Count 4: alleged misuse of her position as Magistrate and threatening Ms L Mupetami;

Count 5: advertising and selling lunch boxes at Mungunda Street Magistrate's Court, Katutura;

Count 6: the alleged misuse of her position, interlinked with count 4 involving threats made towards Ms M Anthonissen and Ms Van Dyk."

[2] After a number of postponements and delays the misconduct proceedings commenced in December 2006. A presiding Officer and an Investigating Officer had been appointed by the Commission to conduct the inquiry. Further delays occurred which, in the result, caused the inquiry to drag on for considerably much longer than it should have. The hearing of evidence eventually proceeded on 26 October 2007. On that day, the appellant walked out and left the hearing apparently in protest over the conduct of the hearing. The hearing was, therefore, concluded in her absence on 27 October 2007. The appellant was found guilty on the six charges of misconduct and was then invited to present mitigating factors. Once more, in protest, she declined to make any representations. The Presiding Officer thereupon submitted to the Commission the record of proceedings and his written statement of findings and the reasons therefore, as well as his recommendation for the dismissal of the appellant.

[3] The Commission accepted the Presiding Officer's recommendation and asked the appellant to resign as a Magistrate in terms of Section 26 (17) (i) of the Act. This was done by letter dated 4 December 2007. The appellant refused and/or failed to resign within the period of fourteen (14) days, resulting in the Commission making a written recommendation to the Second Respondent, the Minister of Justice ("The Minister") to dismiss her from office in terms of Section 21 (3) (a) with effect from 1 February 2008. The Minister was reluctant to do so resulting in the Commission applying for a *Mandamus* in this Court on 19 April 2010. The Commission obtained the order but the Minister appealed against the said judgment to the Supreme Court of Namibia. The appeal was dismissed and the Minister had no option but to dismiss the appellant. The appellant was dismissed on 29 June 2012 and she noted an appeal on 26 July 2012. On 7 December 2012, the appeal was set down for hearing before me. The appeal did not take off primarily because the appellant sought a postponement and further the record of the proceedings was incomplete. Later the matter resumed on 12 July 2013 the record still remains incomplete. This fact is beyond dispute and it common cause between the parties. There was an exchange of letters between the parties and the Registrar of this Court on who is responsible for the filing of a complete record.

[4] Against this the issues before me are:

- (a) Who is responsible for filing a complete record of proceedings in the appeal?
- (b) What is the consequence of filing an incomplete record?
- (c) Are these proceedings before me civil or a criminal? The issue has to be determined because the consequences differ in criminal and civil appeals.

I propose to deal latter under (c) first. The appellant submitted that this appeal should be dealt with as criminal appeal. As a consequence of treating the matter as a criminal appeal, I should set aside the proceedings as was done in *S v Sebothe and others* 2006 (2) SACR 1 (T) at 8 and she also relies on *S v Sibeletwana* (A 401/2011) (2012). The answer to this question found is in Section 21 (4) (b) of the Act which provides –

“(b) An appeal under paragraph (a) –

- (i) must be noted in writing within 30 days of the date of receipt of the Notice of dismissal and the Notice of appeal must –
 - (aa) set out the full grounds of appeal, and
 - (bb) be served on every party to the matter; and
- (ii) *must be prosecuted as if it were an appeal from a judgment of a Magistrate’s Court in a civil matter, and all rules applicable to hearing of such an appeal apply with the necessary changes to an appeal under this subsection.*” (Emphasis added).

[5] The above cases referred to by the appellant are therefore not applicable. It is the civil appeal rules that apply. On the question of who is responsible for the incomplete record, it is trite law that the appellant has the sole responsibility to ensure that the matter is properly before Court, in that the record is complete and correct. Notwithstanding the fact that she has the responsibility of ensuring that a complete record is filed, the appellant raised a point *in limine* that the record of appeal is significantly and substantial incomplete. The 1st Respondent, as alluded to above, also holds the same view.

I am satisfied that the record of appeal filed is incomplete in material respects. There is no explanation from the appellant why she did not seek a reconstructed record from the Commission. There is no allegation from her that it was impossible to reconstruct the record. As pointed out by the Supreme Court in *Kamwi V Duvenhage* 2008 (2) NR 656 (SC) at 6591 – “The non-inclusion of vital documents in a record of appeal makes an appellate Court’s work as difficult as it is to build a house where there is no foundation.”

[6] The Court has a discretion, where the rules of court have not been complied with, depending on the circumstances of each case, to either strike the case from the roll, postpone it or even hear the matter. This discretion should, however, be exercised judiciously. If the record furnished to the appellate court is incorrect or incomplete and the irregularities are not minor, the matter is not properly before the court and will be struck from the roll. This is so because an incomplete record may hide material evidence which may be crucial to the respondent’s case or which may be material to the hearing of the appeal. Slackness on the part of those who are responsible for the state of the record should not be condoned – *Lafrenz (Pty) Ltd v Dempers*, 1962 (3) SA 492 AD at 497 H; *Estate Woolf V Johns* 1968 (4) SA 492 (A) at 493; *Van Der Merwe v Kgalokwane* 1977 (3) SA 106 (O) and *Kamwi v Duvenhage*, *Supra*.

In the latter case at 660 E, Chomba AJA stated-

“[13] Filing of incomplete record of appeal can attract serious consequences against the defaulting party. In the *Ministry of Regional and Local Government and Housing v Muyunda* 2005 NR 107 (LC), Damaseb P agreed with counsel for the respondent who submitted (the other party conceding) that where there is non-compliance with the rule of court which requires the filing of a complete record, an appeal should be struck off the roll. I would also agree, but as in the present case this is not the end of the matter, I defer my final view.”

In *Moji v Swart* 1978 (1) SA 227 (O) it was held that as documents which were of material importance to the adjudication of the appeal, not been annexed to the record, the court in the exercise of its discretion should not postpone the appeal but that it should be removed from the roll, see also *Kahn v Radyn* 1949 (4) SA 552 (C) and *Bekker v Dawkins Steenmasonry* 1959 (1) SA 32 (T).

[7] As alluded to above, the missing parts of the record are material. The position at present is so irregular that it seems to me that the court has no alternative but to hold that the matter is not properly before the court, and to strike the appeal off the roll. If the appellant is having difficulties in getting the missing parts of the record, her remedy is to seek that the Commission reconstructs the record.

If she still fails in this regard she has legal remedies to compel the Commission to provide her with a complete or reconstructed record.

This remedy is however not available to her on appeal. I do not find it necessary to deal with the other points *in limine* raised by the appellant. It is accordingly ordered that the appeal is struck from the roll.

N N Ndou
Acting Judge

APPEARANCES

APPELLANT: In Person

FIRST RESPONDENT: MR TJOMBE
Of Tjombe-Elago Law Firm Inc
Windhoek