REPORTABLE

CASE NOs: SA 19/2012 and
SA 27/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

BELETE WORKU	**Appellant**
and	
EQUITY AVIATION SERVICES (NAMIBIA) (PTY) LTD (IN LIQUIDATION)	**First Respondent**
L M MOLOTO & J S KOKA NNO	**Second Respondents**
G F KÖPPLINGER & OTHERS	**Third Respondents**
J A N STRYDOM & OTHERS	**Fourth Respondents**

Coram: O'REGAN AJA, ZIYAMBI AJA and GARWE AJA

Heard: **4 November 2013**

Delivered: **15 November 2013**

APPEAL JUDGMENT

O'REGAN AJA (ZIYAMBI AJA and GARWE AJA concurring):

[1] This case has a long and contested history. More than ten years ago, the appellant, Mr Belete Worku, was employed on a three-year contract by the first respondent, Equity Aviation Services (Namibia) (Pty) Ltd which is now in

liquidation, at a time when the company was called Servisair Namibia (Pty) Ltd. During September 2001, when more than two years of his contract was left to run, Mr Worku was dismissed and he approached the District Labour Court for relief, alleging unfair dismissal. The termination of his employment with the first respondent lies at the heart of the grievance that brings the appellant before this Court for the second time. The further facts of his dispute with the first respondent are set out in the judgment of this Court that followed from appellant's previous appeal to the Court.[1]

[2] The most important fact to record here is that appellant obtained two judgments from the District Labour Court sounding in money, the one initially granted on 4 February 2002 and amended on 1 November 2002, or so it appears, and the other granted on 3 December 2004. It is difficult to discern from the incomplete and uncertified appeal record (of which more will be said in a moment) the exact amount of money that the District Labour Court ordered the first respondent to pay to the appellant. The appellant asserts that the total exceeded N$1 000 000, coupled with an order to pay interest from the dates of the respective judgments. What is clear is that it has been appellant's goal to obtain satisfaction of these judgment debts from the first respondent.

[3] The immediate genesis of these appeal proceedings lies in the fact that on 1 December 2011, Equity Aviation Services (Pty) Ltd, apparently a South African company, launched urgent proceedings to obtain an order from the High Court placing the first respondent into provisional liquidation. A rule *nisi* was granted with

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[1] See *Worku v Equity Aviation (Pty) Ltd* 2010 (2) NR 621 (SC) at 623 – 625.

a return date of 20 January 2012, which on that date was extended to 2 March 2012. On that return day, Ueitele AJ confirmed the rule and placed the first respondent into final liquidation. The apparent consequence of the order of final liquidation was that the claims that appellant had against the first respondent became claims within the *concursus creditorum* thus preventing the appellant from recovering the judgment debts by way of execution. On 13 April 2012, appellant lodged a notice of appeal against the judgment of Ueitele AJ in granting the final liquidation order. This shall be referred to as the first appeal.

[4] *S*ome months prior to the application for provisional liquidation, on 30 September 2011, the appellant had approached the High Court urgently on a few hours notice for an order to prevent a long list of respondents from selling, liquidating or closing first appellant. On that date, Miller AJ delivered an extemporaneous judgment dismissing the application with costs.[2] On 28 March 2012, the third respondent in this appeal, who had also been a respondent in the matter before Miller AJ, applied for the taxation of the costs ordered by Miller AJ. On 23 May 2012, the costs were taxed at approximately N$3000. At about this time, appellant brought an application to review the judgment of Miller AJ before the High Court. On 8 June 2012, Kauta AJ removed the review application from the roll in order to afford the respondents an opportunity to respond to appellant's application and on 22 June 2012, appellant lodged a notice of appeal against the order of Kauta AJ. This shall be referred to as the second appeal.

[2] See *Worku v Equity Aviation (Pty) Ltd* 2011 of the High Court dated 30 September 2011. The judgment is reported on www.saflii.org

[5] In about May 2012, as well, the appellant approached the High Court, this time seeking a review of the final liquidation order granted by Ueitele AJ in March 2012. In response, again it would appear, the respondents lodged a Rule 30 notice asserting that the review application was an irregular proceeding. On 13 November 2012, Unengu AJ found that the review application was indeed an irregular proceeding and struck the application from the roll with costs. Appellant lodged a notice of appeal against this order in December 2012. This shall be referred to as the third appeal.

[6] In describing these three notices as 'notices of appeal', it is important to record that they do not crisply and clearly identify the issues that are raised in the respective appeals. Instead, they are discursive documents that are difficult to comprehend. For example, the precise identity of the respondents is nowhere clearly indicated. The first respondent is the Namibian company that is in liquidation as described in para [1]. The second respondents appear to be the liquidators of the first respondent. The third and fourth respondents are various legal practitioners. Of these only Mr G F Köpplinger was represented in these proceedings and is described as the third respondent in this judgment. I shall return to the lack of clarity in the notices of appeal when I consider the issue of prejudice occasioned by the manner in which these appeals have been prosecuted.

<u>Appellant's failure to comply with the rules of this Court</u>

[7] The facts set out in the previous paragraphs are not exactly stated because the Court is not certain what the facts are. The Court has had to piece together

the events underlying these appeals from judgments of courts below as well as from the heads of argument filed by the parties to the appeal, as the facts do not appear from what has been lodged as the appeal record.

[8] The rules of the Supreme Court are clear. An appeal must be lodged within a stipulated time,[3] and thereafter, a record of the appeal must be filed within three months of the judgment against which the appeal is brought.[4] Rule 5(6)(*b*) states that if an appellant has failed to lodge an appeal record within the stipulated time, he or she 'shall be deemed to have withdrawn his or her appeal'.

[9] Moreover, the rules require that the Registrar of the court from which the appeal comes must certify one of the copies of the appeal record as correct.[5] This rule is important in ensuring that what is filed as a record on appeal does indeed include the documents that served before the court whose judgment is the subject of the appeal. In support of this requirement, Rule 5(13) provides that the record shall 'contain a correct and complete index of the evidence and of all the documents and exhibits in the case' and Rule 5(10) provides that every tenth line of each page shall be numbered.

[10] The appellant lodged one appeal record in relation to all three notices of appeal, albeit in two parts. The first nine volumes of the appeal record were lodged

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[3] See Rule 5(1) of the Rules of this Court which provides that:
"Every appellant in a civil case who has a right of appeal shall lodge notice of appeal with the registrar, the registrar of the court appealed from and the respondent or his or her attorney within 21 days or such longer period as may on good cause be allowed …".
[4] See Rule 5(5)(a) and (b). Rule 5(5)(a) provides for shorter periods where the order appealed against is given on an exception or an application to strike out, or in cases where leave is required.
[5] Rule 5(8).

on 16 November 2012 and a tenth volume was lodged in mid-December 2012. The first material breach of the rules of this Court relates to the timing of the lodging of the appeal record. The first nine volumes were lodged more than eight months after the order of final liquidation was made (in respect of which the first notice of appeal was noted), and more than five months after the order made by Kauta AJ which is the subject of the second notice of appeal. Given that the records were lodged more than three months after the judgments that were the subject of the appeals had been handed down, the first two appeals are deemed to have been withdrawn by the appellant as provided for in Rule 5(6)(*b*). Appellant was informed of this fact before he lodged the appeal record as appears from the record which contains two letters from the Registrar of this Court, dated 24 July 2012 and 23 October 2012 respectively, notifying appellant that due to his non-compliance with Rule 5(6)(*b*), his first two appeals are deemed to have lapsed.

[11] The jurisprudence of this Court in this regard is well-established.[6] If an appeal is deemed to have been withdrawn within the meaning of Rule 5(6)(b) the appellant must lodge an application for condonation for the late filing of the appeal record as well as reinstatement of the appeal. The appellant failed to apply for reinstatement of the first and second appeals, despite the letters from the Registrar of this Court. On this basis alone, neither of these appeals is properly before the Court and should accordingly be struck from the roll. Although there are documents labelled 'applications for condonation' in the record, these

[6] See, for example, the most recent judgment of this Court in *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia,* SA 87/2011, handed down on 16 October 2013; and also *Namib Plains Farming CC v Valencia Uranium (Pty) Ltd* 2011 (2) NR 469 (SC) at paras 19 - 25; *Beukes and Another v SWABOU and Others* [2010] NASC 14 (5 November 2010) at paras 6 -10; *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) at para 9; *Arangies t/a Auto Tech v Quick Build,* unreported judgment of this Court dated 18 June 2013, at paras 2 - 7.

documents are not in the proper form. They do not contain clear prayers for relief, nor are they supported by duly attested affidavits, nor do they set out concisely and clearly the reasons for non-compliance with the Rules. Moreover, these purported applications for condonation were never independently served or filed, but were merely added to the record as if they had been. The absence of proper applications for condonation and for reinstatement of the appeals is an insuperable obstacle to this Court entertaining the first and second appeals.

[12] The second material breach in relation to the prosecution of the appeals relates to the appeal record that has been filed. The record is in ten volumes, and is neither indexed, nor paginated and the lines are not numbered as required by rule 5(10). Of great importance is the fact that the record does not contain 'a correct and complete index of the evidence and of all the documents and exhibits'[7] filed in the various proceedings below. It is for this reason that this Court has found it difficult to ascertain the facts relevant to the appeal (see paragraphs 2 - 6 above).

[13] In relation to the first notice of appeal, the appeal against the final liquidation order, the record does not include the notice of motion or founding affidavit that initiated the application. This constitutes material non-compliance with the rule and renders it impossible for the appeal to be heard. An appellate court cannot determine an appeal against an order of another court without having at the very least the material parts of the record on which that court made its order.

[7] See Rule 5(13).

[14] Similarly, in relation to both the second and third notices of appeal, the record does not include the founding papers upon which appellant sought to have the decision of Kauta AJ or Unengu AJ reviewed. Without these documents, together with the judgments and orders made by the courts below, that should form the core of the record as stipulated by Rule 5(13), an appeal cannot proceed. Instead of the documents that the record should contain, the record contains hundreds of pages of materials and documents that are of little apparent relevance to the issues on appeal. The manifest and manifold inadequacy of the record that has been filed by appellant constitutes a second insuperable obstacle to this Court entertaining the first and second of these appeals, as well as an insuperable obstacle to entertaining the third appeal.

[15] There is a further material defect in the manner in which these appeals have been prosecuted. The appellant failed to pay security for the respondents' costs in terms of rule 8(3). According to that rule, failure to inform the Registrar at the time that the copies of the appeal record are lodged of the fact that an appellant has entered into security in terms of rule 8, or been released from the obligation to furnish security, constitutes non-compliance with rule 8(3). In terms of rule 8(3) non-compliance with that subrule also constitutes non-compliance with rule 5(5). At no stage of these proceedings, has appellant furnished security for respondents' costs, nor have respondents released him from that obligation. The consequence of his failure to furnish security was drawn to the appellant's attention by the Registrar of this Court in the letters referred to in para [10] above. Yet appellant took no steps to remedy the matter.

[16] A further material difficulty should be mentioned in relation to the second notice of appeal. This notice purports to note an appeal, as of right, against an order made by the High Court that was interlocutory in character. An appeal does not lie as of right against such an order,[8] and the appellant was therefore not entitled to note an appeal against that order, without leave. No leave appears to have been sought in this respect and this failure too constitutes an insuperable barrier to the purported appeal.

[17] It follows from what has just been said that the appellant has not complied with the Rules of the Court that regulate the prosecution of appeals in material respects. In reaching this conclusion, it has been borne in mind that appellant is a layperson who represents himself before the Court. The appellant implored the Court to overlook his procedural non-compliance and determine the substantive issues that he asserts underlie the appeals, namely, the satisfaction of the judgments of the District Labour Court mentioned above. However, we cannot overlook the rules which are designed to control the procedures of the Court. Although a court should be understanding of the difficulties that lay litigants experience and seek to assist them where possible, a court may not forget that court rules are adopted in order to ensure the fair and expeditious resolution of disputes in the interest of all litigants and the administration of justice generally. Accordingly, a court may not condone non-compliance with the rules even by lay litigants where non-compliance with the rules would render the proceedings unfair or unduly prolonged.

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[8] See section 18(3) of the High Court Act, 16 of 1990.

[18] Respondents' counsel asserted that appellant's extensive non-compliance with the Rules has severely prejudiced the respondents in that they have been brought to court to answer a case not clearly identified in the three notices of appeal,[9] on an appeal record, lodged late, which fails to include the core documents and papers that it should contain and in circumstances where the appellant has not furnished security for their costs on appeal.

[19] In all these circumstances, the ineluctable conclusion is that the three appeals are deemed to have been withdrawn within the meaning of rule 5(6)(*b*) given the material non-compliance with, amongst others, rules 5(5) and 8(3). The proper order, therefore, is that the three appeals should be struck from the roll.

[20] A final note should be added. It should have been clear to the Registrar of this Court that the record in these appeals was not in compliance with the rules, and also that the appellant had failed to furnish security for the respondents' costs on appeal. It is undesirable for appeals to be enrolled for argument in circumstances where there is material non-compliance with the rules as the hearing of such appeals may involve respondents in unnecessary legal expense that they may not be able to recover, and will put strain on scarce judicial resources. Rule 5(6)(*b*) makes it plain that non-compliance with rule 5(5), and by extension rule 8(3), will have the consequence that an appeal is 'deemed to be withdrawn'. In this regard attention is drawn to rule 5(16) which provides that:

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[9] See para 6 above.

> ‘The Registrar may refuse to accept copies of records which do not in his or her opinion comply with the provisions of this rule.’

[21] Accordingly, where an appeal is deemed to have been withdrawn, or where the appeal record is not in proper order, an appeal should not be enrolled for hearing until proper applications for condonation and reinstatement of the appeal have been filed and served and the record has been put in proper order. Adopting this approach will ensure that respondents are not put to unnecessary legal expense and that scarce judicial resources are not dissipated.

Costs

[22] One last issue requires determination: costs. As it will be necessary for the appeals to be struck from the roll, it is appropriate that the appellant be ordered to pay the costs of the appeal. Those costs, however, will not include the wasted costs of the appearance on 5 July 2013. The appeal was enrolled for hearing on 5 July 2013 but had to be postponed due to the unavailability of two of the judges of appeal. The postponement was thus occasioned without fault on the part of any of the litigants. No order of costs was made on 5 July when the appeal was postponed, and this Court takes the view that the costs order made in this appeal should exclude the wasted costs occasioned by the appearance on 5 July given that it was occasioned by no fault of the parties. Accordingly, no order is made as to the costs of the appearance on that date.

[23] The first and third respondents who appeared in this matter were represented at the hearing by the same instructed counsel, but by different firms of

instructing counsel. Mr van Vuuren who appeared at the hearing on behalf of the first and third respondents requested that an order of costs made in favour of the respondents should be on the basis that the costs include costs of one instructed and two instructing legal practitioners. It shall be so ordered.

Order

[24] The following order is made:

1. The appeals are struck from the roll.

2. The appellant is ordered to pay the costs of the respondents on appeal, save for the wasted costs of appearance on 5 July 2013, such costs to include the costs of one instructed and two instructing legal practitioners.

3. No order is made as to the wasted costs of appearance on 5 July 2013.

O'REGAN AJA

ZIYAMBI AJA

GARWE AJA

APPEARANCES

APPELLANT:	In person
FIRST & THIRD RESPONDENTS:	A S van Vuuren Instructed by G F Köpplinger Legal Practitioners