REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-LAB-MOT-GEN-2022/00109

In the matter between:

QKR NAMIBIA NAVACHAB GOLD MINE (PTY) LTD **APPLICANT**

and

MARIANE KWALA **RESPONDENT**

Neutral Citation: *QKR Namibia Navachab Gold Mine (Pty) Ltd v Kwala* (HC-MD-LAB-MOT-GEN-2022/00109) [2022] NALCMD 43 (4 August 2022).

Coram: MASUKU J
Heard: **29 July 2022**
Delivered: **4 August 2022**

Flynote: Labour Law – Labour Court Rules – non-compliance therewith – effect of failure to file an answering affidavit or a notice to raise points of law – whether an applicant for condonation is required to comply with the provisions of rule 32(9) and (10) of the High Court Rules.

Summary: The applicant applied for an order condoning its failure to prosecute a labour appeal within the stipulated time period and further applied for reinstatement of

its appeal, which had lapsed. The respondent opposed the application but neglected to file an answering affidavit or a notice to raise points of law *in limine*. The applicant, in the light of the failure to file opposing papers, proceeded to set the matter down on the residual court as an unopposed matter. On the eve of the hearing of the matter, the respondent filed heads of argument in which she argued that the application for condonation should be dismissed.

Held: that there is a *lacuna* in the Labour Court Rules regarding a party, which does not file an answering affidavit or a notice to raise points of law. That being the case, the provisions of rule 22 of the Labour Court, which call for the invocation of the Rules of the High Court, apply.

Held that: where a respondent does not file an answering affidavit or a notice to raise points of law in terms of rule 6(9)(b)(i) or (ii) of the Labour Court Rules, the provisions of rule 66(3) of the High Court Rules apply, which require the matter to be set down on the residual roll for determination.

Held further that: the provisions of rule 32(9) and (10) must be interpreted incrementally and that the interpretation thereof should not be cast in stone.

Held: rule 32(9) and (10) does not apply to matters of condonation because the parties do not resolve any aspect of the interlocutory application. Even after having complied with rule 32(9) and (10), the applicant is still required to file an application for condonation.

Held that: to apply rule 32(9) and (10) in matters of condonation goes against the overriding objects of judicial case management in that it does not result in saving costs and time. Furthermore, it results in judicial time and resources not being used efficiently.

RULING

MASUKU J:

Introduction

[1] This is a matter that served before me on first motion court on 22 July 2022. Because of the long roll I had to contend with, it became impossible for the court to deal with the application on that day. I accordingly postponed the matter for argument to 29 July 2022. I am indebted to both counsel for their assistance.

The parties

[2] The applicant is QKR Namibia Navachab Gold Mine (Pty) Ltd, a company duly incorporated in accordance with the company laws of this Republic. It's place of business is situate at Farm 58, Farm Navachab, Republic of Namibia. The respondent, on the other hand is Ms. Mariane Kwala, an adult female Namibian who had been in the applicant's employ as a cleaner.

Background

[3] It appears common cause that the applicant dismissed the respondent, which dismissal was not accepted by the latter. She approached the Office of the Labour Commissioner, which eventually found in her favour. Dissatisfied with the award issued in the respondent's favour, the applicant lodged an appeal before this court in which it has failed to comply with certain procedural steps needful for prosecuting the appeal.

[4] Serving before court presently is an application dated 14 June 2022 and in which the applicant applies for condonation of it's non-compliance with the provisions of rule 17(25) of the Labour Court Rules, ('the rules'), by failing to prosecute the said application within a period of 90 days as stipulated in the rules. The applicant further sought an order reinstating the appeal filed under case no: HC-MD-LAB-APP-AAA-2022/00010.

[5] It would appear that the application was served on the respondent on 20 June 2022, as evidenced by a return of service filed of record. In terms of rule 6(5)(b), a

respondent is to deliver a notice to oppose the application to the registrar within 10 days of service of the application on him or her. In the instant case, the respondent did file her notice to oppose but neglected to file either an answering affidavit or deliver a notice to raise points of law only. It is important to mention that the filing of an answering affidavit in terms of rule 6(9)(b)(i) or a notice to raise points of law in terms of rule 6(9)(b(ii), must be done within a period of 14 days after the filing of the notice to oppose.

[6] It is common cause that the respondent did not, after filing the notice to oppose on 20 June 2022, file either an answering affidavit nor a notice to raise points of law only. The applicant, in view of that situation, decided, as it was entitled to, to set the matter down for hearing on the first motion court roll as an unopposed application.

[7] In this connection, especially in the absence of any answering affidavit or notice to raise points of law, the applicant set the matter down before me on 22 July 2022 understanding that the matter was not opposed. Lo and behold, on the eve of the hearing of the matter, the respondent, through the offices of AngulaCo filed a document called respondent's points of law and in which a number of legal contentions are raised on the respondents behalf, the object of which it is to move the court to refuse to grant the application as applied for in the notice of motion.

[8] The question confronting the court head-on is whether the court is entitled to entertain the respondent's points of law at this late hour in the day and particularly in the absence, as it would seem, of an application for condonation for the non-compliance with the provisions of rule 6(8)(i) or (b) referred to above.

[9] I presently proceed to decide whether this application must be granted as prayed or whether, as Ms. Kandjella later argued, the matter should be postponed to allow the respondent to file an application for condonation.

Determination

[10] It is necessary, in this regard, to deal albeit briefly with the relevant provisions of the rules. Rule 6(5)(b) requires a respondent to file a notice to oppose the matter 10 days after service of the application. In the instant case, the notice to oppose was filed

on 20 June 2022. The respondent was, in terms of the rules required to file either an answering affidavit or notice of points of law within 14 days from the filing of the notice to oppose. She had to file her answering affidavit on or before 4 July 2022. She did not. Where does this non-compliance leave her?

[11] Rule 6(8) states the following:

'A respondent who does not deliver a notice to oppose within the period of time referred to in subrule (5) is not entitled to take any part in the proceedings except –

(a) to apply under rule 15 for an extension of time to deliver such notice;
(b) to apply under rule 16 for rescission or variation of any judgment or order; or
(c) to be called as a witness by another party.'

[12] It is important to mention that there is a lacuna in the rules regarding a situation where a respondent who has opposed the application has not, as required however, filed an answering affidavit or a notice to raise points of law. Whereas it is clear what happens to a case where the respondent does not file a notice to oppose, there is no clear provision regarding the failure to comply with the provisions of rule 6(9)(b)(i) or (ii).

[13] The question is what should happen in that event? Rule 22 provides the following:

'(1) Subject to the Act and these rules, where these rules do not make provision for the procedure to be followed in any matter before the court, the rules applicable to civil proceedings in the High Court made in terms of section 39(1) of the High Court Act, 1990, (Act 16 of 1990) do apply to proceedings before the court with such qualifications, modifications and adaptations as the court may deem necessary.'

[14] The above rule points to the proper approach in this matter being the application of the High Court Rules as there is no provision regarding the failure to file an answering affidavit or a notice to raise points of law within the stipulated time. The relevant provision is rule 66(3) of the High Court Rules.

[15] Rule 66(3) provides the following:

'Where no answering affidavit or notice in terms of subrule (1)(c) is delivered within the period referred to in subrule (1)(b), the applicant must within four days of the expiry of that period give notice to the registrar to place the application before a judge in residual court for determination.'

[16] It is accordingly clear that in the light of the respondent's failure to file the answering affidavit or notice to raise points of law, the applicant was entitled within four days after the expiry of the period for filing the papers in question, move the application for determination before the residual court. It is clear on every account that the matter proceeds unopposed as the filing of the notice to oppose, in the absence of any grounds filed, renders the matter unopposed.

[17] In this connection, it means that the applicant should have set the matter down before the residual court four days after 4 July 2022. This takes us to 11 July 2022. The matter, from the record was set down on the residual court on 11 July 2022 as seen from the documents filed on ejustice. It is accordingly clear that although the applicant did not specifically allege compliance with rule 66 of the High Court, it did, on an objective basis, however comply with the rule of the High Court in that regard.

[18] I am of the considered view that the respondent's notice to raise points of law filed on 22 July 2022, the eve of the hearing of the matter, is improperly before court. Rule 15 of the rules of this court state the following:

'The court may, on application and on good cause shown, at any time –

(a) condone any non-compliance with these Rules;
(b) extend or abridge any period prescribed by these Rules, whether before or after the expiry of such period.'

[19] It is abundantly obvious that the respondent fell foul of the provisions of rule 6 in that she did not file an answering affidavit or a notice to raise points of law. She had to do either by 4 July 2022 and did not do so. This shows that the applicant was entitled, as it did, to move the application on an unopposed basis, bar the respondent having filed an application for condonation. This is clearly not the case.

[20] What cannot be denied is that there is no application before court for condonation for the non-compliance with the provisions of rule 6 above relating to the filing of the answering affidavit or a notice to raise points of law. As rule 15 states clearly, the court may exercise its discretion and condone any non-compliance in cases where an application has been made and furthermore, where good cause is shown. The respondent has not made any application at all and as it follows naturally, there is no good cause shown entitling the court to loosen the proverbial knot of non-compliance on the respondent's neck.

[21] It has been stated time and again that a party, which has not complied with a rule, should, as soon as that non-compliance comes to the fore, apply for condonation.[1] In the instant case, the respondent was represented by a legal practitioner. In this regard, it would have been obvious that the respondent was required by the rules to file the basis of the opposition and she did not. As soon as the *dies* for filing lapsed, the respondent should have filed her application for condonation and she did not.

[22] It has been stated time and again that there is a limit beyond which a client cannot escape the consequences of his or her legal practitioner not doing the needful in terms of complying with the rules.[2] This is such a case. When the respondent's legal practitioner filed the heads of argument on the eve of the hearing, it is clear that it was as a result of a knee-jerk reaction. An application for condonation should have been filed simultaneously with the notice filed.

[23] The consequences of not filing an application for condonation where necessary must return to haunt the non-compliant party. In the instant case, the respondent was aware from 22 July 2022 that she had not complied with the provisions of the rules but did not do the needful even between the postponement of the matter and the date of hearing. It would send bad signals for the court in the circumstances, to postpone the matter yet again to enable the respondent to file an application for condonation that she ought to have known should have long been filed.

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[1] *Telecom Namibia Ltd v Nangolo and Others* (LC 33/2009) 28 May 2012, para 5-8, generally.
[2] *Saloojee v Minister of Community Development* 1965 (SA) 135 (A).

[24] The unnecessary loss of time and needless incurring of further costs suggest inexorably that Ms. Kandjella's application for a postponement to allow the respondent to file the application for condonation must be refused as I hereby do.

[25] There is another argument that Ms. Kandjella latched on to, in a bid to get a foothold in this case. She argued that the applicant had not complied with the provisions of rule 32(9) and (10) of the High Court Rules. She accordingly argued that the applicant's application must be struck from the roll therefor.

[26] I am acutely aware that there is a difference of opinion in this court regarding the application of rule 32(9) and (10). Some judges of this court have expressed the view that the judgments which hold that it is unnecessary to comply with rule 32(9) and (10) in applications for condonation are clearly wrong. While I understand their reasoning, I still hold the firm view that it is unnecessary for a party to comply with rule 32 (9) and (10) where the interlocutory application is for condonation.

[27] As stated in previous judgments on this issue, it seems to me that the important words to be considered are in rule 32(9) where the rule states the necessity to 'seek an amicable resolution thereof'. It means that this rule applies peremptorily in cases where the parties are capable, on their own, to amicably resolve that matter without needing the intervention of the court.

[28] The question that has to be posed in this regard is this - Can the parties amicably resolve a non-compliance with the rules of court or an order of court? Amicable resolution of an interlocutory in this context, means one, which, if reached, would avoid the court having to make a determination on that very issue.

[29] In matters of condonation, the parties cannot resolve anything except for the respondent to agree not to oppose the matter. That is as far as the amicable resolution, if resolution it is, goes. It certainly does not result in the parties avoiding to make an application to court for condonation. This is because the violation or non-compliance can only be purged by the court and not the parties, either individually or collectively. The respondent's non-opposition is only but one consideration the court may take into account in deciding on the application for condonation.

[30] It thus becomes clear that where there is an application for condonation, parties who are compelled to follow rule 32(9) and (10) lose both time and money in the sense that they go through the motions and for argument's sake, if they agree on the condonation not being opposed, the applicant still has to file the application for condonation.

[31] If the application were filed from the onset, the engagement would not be necessary as it does not in any event have any tangible benefits regarding it not having to launch the application for condonation. Having spent time complying with the said subrule, then the application has to be made some hundreds of Namibian dollars later and time having been lost in the process.

[32] The interpretation of these rules, which are relatively new, must, in my considered view, not be cast in stone but be done incrementally. Interpretations, which at the end of the day go against the overriding objects of judicial case management, should be avoided at all costs.[3] This is especially the case in matters of condonation where the insistence on compliance with rule 32(9) and (10) in every case does not save costs but results in the issue not being dealt with expeditiously. Furthermore, judicial time and resources are not properly and beneficially allotted as a result.

[33] I accordingly come to the view that the contention that the matter must be struck from the roll for non-compliance with rule 32(9) and (10) should not, in the peculiar circumstances of an application for condonation, be upheld.

[34] Ms. Kandjella also cried foul and alleged that the applicant had sought wider relief in the notice of motion than that applied for subsequently in the draft order. I am of the considered view that although there is merit, in this contention, what is sought is more clarity in terms of the time frame in the draft order. In the notice of motion, the applicant sought for condonation for non-compliance with rule 17(25) and further sought an order reinstating the appeal. In the draft order, the applicant, in expatiating the relief sought in rule 17(25), sought an order that the appeal be prosecuted within a period of 15 days.

[3] Rule 1(3).

[35] I am of the view that this addition of the time period within which to prosecute the appeal does not in any way, shape or form, prejudice the respondent, who did not effectively oppose this matter timeously or at all. Giving a time frame actually conduces to clarity and does the respondent's right no harm in my respectful view. There is accordingly no substance in that contention. In this connection it would seem that the addition of the time for prosecution falls within 'further and or alternative relief' in any event.

Conclusion

[36] I am, in view of the discussion and conclusions reached above, of the considered view that the application is worthy of being granted. The applicant has made out a good case for the granting of the relief sought. As stated above, the respondent did not mount any opposition as required by the rules. On the other hand, I am of the considered view that a case has been made for the relief sought and it should therefor be granted.

Order

[37] In the premises, the following order is condign to grant:

1. The applicant's non-compliance with the provisions of Rule 17(25) of the Rules of this Court by failing to prosecute the appeal under case number HC-MD-LAB-APP-AAA-2022/00010 within 90 days, is hereby condoned.
2. The appeal under case number HC-MD-LAB-APP-AAA-2022/00010 is hereby reinstated.
3. The appeal mentioned in paragraphs 1 and 2 above must be prosecuted within 15 days from the date of this order.
4. The matter is removed from the roll and is regarded as finalised.

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T S Masuku

Judge

APPEARANCES

APPLICANT:	M Kemp Of Metcalfe Beukes Attorneys, Windhoek.
RESPONDENT:	R Kandjella Of AngulaCo.,Windhoek.