

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

HC-MD-LAB-APP-AAA-2022/00010

In the matter between:

QKR NAMIBIA NAVACHAB GOLD MINE (PTY) LTD

APPELLANT

and

MARIANE KWALA

RESPONDENT

Neutral Citation: *QKR Namibia Navachab Gold Mine (Pty) Ltd v Kwala* (HC-MD-LAB-APP-AAA-2022/00010) [2022] NALCMD 64 (21 October 2022)

CORAM: CHRISTIAAN AJ

Heard: 03 October 2022

Delivered: 21 October 2022

Flynote: Labour Law – Appeal from award of arbitrator – Condonation for failure to prosecute appeal within time limits – Principles for condonation restated – Applicant who seeks condonation bears the onus to satisfy the court that there is sufficient cause to grant condonation and to bring the application for condonation without delay – Court will also consider the litigant’s prospects of success on the merits, save in

cases of 'flagrant' non-compliance with the rules which demonstrate a 'glaring and inexplicable disregard' for the processes of the court.

Common law – Authority to institute proceedings on behalf of a juristic person - Legal position is that where a litigant acts in a representative capacity, he or she must have the requisite authority to act in such capacity – Court's determination on the issue of authority will depend on the factual allegations, if any, placed before court – *In case the* respondent did not refer to any fact upon which she based her submission that the appellant did not have the requisite authority to oppose the application.

Summary: The appellant lodged an appeal against an arbitration award issued in favour of the respondent who was previously employed by the appellant. In terms of rule 17(15) of the Labour Court Rules the appellant was required to file its notice to amend its notice of appeal within ten days after the record of the is made available. The appellant filed its notice to amend one day after the ten day period had lapsed. It subsequently sought condonation for the late filing of its notice to amend which condonation was opposed by the respondent.

Held that it is settled law that an applicant who seeks condonation bears the onus to satisfy the court that there is sufficient cause to grant condonation and to bring the application for condonation without delay.

Held further that in determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of 'flagrant' non-compliance with the rules which demonstrate a 'glaring and inexplicable disregard' for the processes of the court.

Held further that the appellant provided a reasonable explanation for its failure to file the notice of amendment one day late. The court was further of the view that the appellant succeeded to demonstrate to the court that it has good prospects of success on appeal. As a result, the application for condonation for late filing of the notice to amend the notice of appeal was granted.

The respondent failed to file its grounds of opposition in terms of rule 17(16) within the 21 day period after receipt of the arbitration record period, having received the record

on 19 April 2022. The appeal lapsed on 10 May 2022, the same day on which the respondent was to file her grounds of opposition. The appeal was subsequently reinstated on 4 August 2022.

It was argued by the appellant that the respondent was required to file her grounds of opposition on the date when reinstatement was ordered and further that the respondent had not been afforded additional days to do so. It was argued by the appellant that by virtue of the respondent's failure to file her grounds of opposition within the prescribed period that the appeal should be heard unopposed.

Held that the reinstatement order must be interpreted broadly in order to give practical effect thereto. The order must be interpreted to mean that the appeal which had lapsed has been revived. Similarly, the 21 day period thus can only be said to run from the date that the appeal was revived and the respondent was not obliged to file grounds of opposition prior to the date of reinstatement, as the appeal was considered dead and without life and no obligation could flow from it

Held further that the respondent did not fail to adhere to the provisions of rule 17(16)(b) and as a result respondent could not be subjected to a bar to file her statement in terms of rule 17(16)(b).

The court was of the view that this was an appropriate case where the court, in the exercise of its inherent jurisdiction and in the interests of justice, may direct that the 21 days starts running from the date on which the appeal was reinstated.

It was further argued by the respondent that the appellant did not have the necessary authority to lodge the appeal.

Held that it is indeed the legal position that where a litigant acts in a representative capacity, he or she must have the requisite authority to act in such capacity. It however depends upon what factual allegations, if any, are put before court which will determine the response by the opposing party and whether a court will subsequently be satisfied that enough has been placed before it or not, regarding the issue of authority. In the present matter the respondent did not refer to any fact upon which she based her submission that the appellant did not have the requisite authority to oppose the application.

It was clear from the special power of attorney that the allegation of authority has been made, although there was no evidence in the form of a board resolution placed before court to prove such authority.

Held that enough information had been placed before the court to satisfy the court that it was the appellant who was authorised to institute the application and not some unauthorised person.

ORDER

IT IS ORDERED THAT:

1. The application for condonation for late filing of the notice to amend the notice of appeal is hereby granted.
2. The point *in limine* dealing with the respondents' non-compliance with rule 17(16)(b) is dismissed.
3. The point *in limine* that the appellant failed to provide authority that it authorised and it had given the necessary resolve to lodge this appeal is dismissed.
4. The parties are ordered to file a joint status report on the further conduct of the matter by no later than 31 October 2022.
5. The case is postponed to 07 November 2022 at 09:00 for a Status Hearing.

JUDGMENT

CHRISTIAAN AJ:

Introduction

[1] The respondent was a former employee of the appellant who referred a dispute to the Labour Commissioner's Office for unfair dismissal.¹ The appellant noted an

¹ Appeal Record p.1-4.

appeal against the arbitration award delivered on 10 January 2022 under case number CROM150.

Parties

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

Background

[3] I am confident that this judgment will be better appreciated when the background is revealed to the reader, which I dutifully proceed to do.

[4] It is common cause that the appellant 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 on 10 January 2022, the appellant lodged an appeal before this court.

[5] On or about 09 February 2022 the appellant noted an appeal against the said arbitration award under the above captioned case number, subsequent to service of the Form 11 and Form LC 41 on the respondent and the Office of the Labour Commissioner, respectively, on 08 February 2022.

[6] In terms of rule 17(7) of the Labour Court Rules, the Office of the Labour Commissioner was required to dispatch the record of proceedings within 21 days of service of the Form 11 and Form LC 41. The 21 days would therefore lapse on 01 March 2022.

[7] The record was however, only dispatched on 08 April 2022.

[8] The appellant was required in terms of rule 17(15), to file its notice to amend, add to, or vary the terms of the notice of appeal within ten days after the Registrar had made available the record so dispatched by the Office of the Labour Commissioner. The record was uplifted on 08 April 2022, therefore, the ten days lapsed on 18 April 2022, which was a public holiday, which further meant that the Notice was due on 19 April 2022.

[9] The appellant's notice was however only filed on 20 April 2022. This is one day late in terms of rule 17(15).

[10] On 27 April 2022 the appellant filed a condonation application in addition to an extension of time application. The respondent was required to file the grounds of opposition on 10 May 2022, which similarly lapsed on 10 May 2022.

[11] The appellant successfully applied for reinstatement of the appeal and it was so ordered on 04 August 2022.

[12] The appellant applied for hearing dates on 08 August 2022, which was postponed by the Registrar to 17 August 2022. The respondent filed her statement of grounds of position on 22 August 2022.

[13] A notice of set down was issued on 24 August 2022. The respondent was duly served on 13 September 2022 and the hearing was said to commence on 30 September 2022.

[14] On 30 September 2022, preliminary issues were raised by both counsel. The parties have agreed for the court to make a ruling on those aspects after hearing the arguments and based on that ruling determine the further conduct of the matter.

[15] Serving before this court presently is an application dated 27 April 2022 in which the appellant applies for condonation of its non-compliance with the provisions of rule 17(15) of the Labour Court Rules ('the rules'), by failing to file its notice to amend within a period of ten days after the Registrar made available the record.

[16] Ms Kemp counsel for the appellant took issue with the respondents' alleged non-compliance with rule 17(16)(b) and invited the court to consequently strike out the grounds of opposition filed by the respondents and for the appeal to be heard unopposed. Ms Kandjella counsel for the respondent submitted contrariwise.

[17] Ms Kandjella in her response to the heads of arguments filed by the counsel for the appellant took issue with the appellant's alleged failure to provide authority that it is authorised to lodge the appeal. Ms Kemp counsel for the respondent submitted contrariwise.

[18] The court deemed it crucial to deal with the above points *in limine* which might also have an impact on the further conduct of the matter. I will therefore discuss them under the following headings:

- (a) The appellant's application for condonation for late filing of the notice to amend the notice of appeal;
- (b) Respondent's alleged non-compliance with rule 17(16)(b) of the Labour Court Rules; and
- (c) Appellant's alleged failure to provide evidence that it authorised and it had given the necessary resolve to lodge this appeal.

[19] At this juncture I opt to set the judgment in motion by considering the points *in limine* raised by the appellant and respondent.

Discussion

The appellant's application for condonation for late filing of the notice to amend the notice of appeal

[20] It is necessary, in this regard, to deal with the relevant provisions of the rules. Rule 17(15) requires an appellant to file a notice to amend, add to or vary the terms of

the notice of appeal within ten days after the registrar has made the record available to him or her.

[21] Rule 17(15) states the following:

'The appellant may within 10 days after the registrar has made the record available to him or her, by delivery of a notice, amend, add to or vary the terms of the notice of appeal.'

[22] Ms Kemp informed the court that the appellant became aware of the non-compliance on 20 April 2022 and filed an application for condonation on 27 April 2022.

[23] The law reports are replete with the approach that the court should take in an application for condonation.

[24] It is settled law that an applicant who seeks condonation bears the onus to satisfy the court that there is sufficient cause to grant condonation and to bring the application for condonation without delay. In *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC and Others*², the Supreme Court cited with approval the following passage from *Petrus v Roman Catholic Archdiocese*³:

'[9] It is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay.'

[25] In *Beukes and Another v SWABOU and Others*⁴ the Supreme Court once again set out the principles governing condonation. Langa AJA noted that 'an application for condonation is not a mere formality and that it must be launched as soon as a litigant becomes aware that there has been a failure to comply with the rules⁵. The affidavit accompanying the condonation application must set out a 'full, detailed and accurate explanation,' for the failure to comply with the rules.⁶

² *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC and Others* SA 79/2016 delivered on 31 August 2018 at para 20.

³ *Petrus v Roman Catholic Archdiocese* 1997 NR 184 (HC).

⁴ *Beukes and Another v South West Africa Building Society (SWABOU) and Others* (Appeal Judgment) (SA 10 of 2006) [2010] NASC 14 (05 November 2010).

⁵ *Beukes* para 12.

⁶ *Beukes* para 13.

[26] In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of 'flagrant' non-compliance with the rules which demonstrate a 'glaring and inexplicable disregard' for the processes of the court.⁷

[27] The above authorities and authorities cited by counsel for the appellant in her heads of argument are clear that condonation is not to be granted for the asking but the explanation for the default must be full, detailed and accurate. In certain circumstances, the negligence or laxity of a legal practitioner will not save the applicant. The different factors applicable must be weighed together.

[28] Ms Kemp, counsel for the appellant explained that the reason for the failure to file the notice to amend timeously was due to the fact that its legal practitioner of record, in computing the ten days to file the notice to amend, mistakenly excluded the 15th and 18th of April which were public holidays.

[29] It was further explained that the 15th of April 2022 should not have been excluded since public holidays, in terms of the Labour Act 11 of 2007 ("the Act"), are only excluded when the last day for filing falls on a public holiday. The last day to file the notice to amend was 18 April 2022 and as a result, only the 18th of April should have been excluded.

[30] The appellant further argued that the application for condonation was done as soon as the non-compliance became apparent. Furthermore, the explanation tendered is reasonable in the circumstances. The appellant requested the court to condone the non-compliance as the respondent was not prejudiced in any manner since the grounds of opposition was still not filed at that stage.

[31] The appellant's prospects of success is in general an important consideration though not a decisive consideration. The prospects of success in this matter appear

⁷ *Beukes* para 20.

from the founding affidavit⁸ to the application for condonation. The contents of such founding affidavit is incorporated into this condonation application. Counsel for the appellant argued that its appeal falls within the ambit of section 89 of the Act in that the arbitrator reached conclusions that are so perverse, that no reasonable arbitrator would have come to the same conclusion and that the arbitrator in some instances wrongly applied legal tests. The court is satisfied that the appellant has clearly illustrated proper prospects of success for condonation to be granted.

[32] It follows therefore that the appellant offered a reasonable explanation for the delay. In view of the findings and conclusions stated herein above, I am of the considered opinion that the appellant provided a reasonable explanation for its failure to file the notice of amendment one day late. I am further of the view that the appellant succeeded to demonstrate to this court that it has good prospects of success on appeal. As a result, the application for condonation for late filing of the notice to amend the notice of appeal to be granted. This brings me to the next point to be decided upon.

Respondents' alleged non-compliance with rule 17(16) (b) of the Labour Court Rules

[33] Rule 17(16)(b) of the rules requires any person opposing the appeal to file its grounds of opposition within 21 days after receipt of the copy of the record. It is important to note that the respondent received a copy of the record on 19 April 2022, the date on which the initial appeal was lodged. She was therefore required to file her grounds of opposition on or before 10 May 2022. The appeal similarly lapsed on 10 May 2022 and reinstatement was thereafter ordered on 04 August 2022. Counsel for the appellant argues that the respondent was required to file her grounds of opposition on 04 August 2022 when reinstatement was ordered. It was further argued that the respondent was not afforded additional days to file her grounds of opposition, once reinstatement was ordered and is therefore in non-compliance with rule 17(16)(b).

⁸ Paragraph 34- 36 of the founding affidavit filed in support of the application for condonation.

[34] Counsel for the appellant in support of the above argument directed the court to the matter of *Matuzee v Sihlahla*⁹, where Justice Parker made the following remark in paragraph 22 of his judgment.

[22] The reinstatement order must be interpreted broadly in order to give practical effect thereto. In my view the order must be interpreted to mean that the appeal which had lapsed has been revived. A new life, so to speak, has been breathed into the lapsed appeal's limbs so that all the limbs are revived and alive – even those limbs of the lapsed appeal which are in possession of the respondent in the form of the record. In other words the reinstatement order must be interpreted to mean that the entire appeal, including the notice of appeal and the record is revived and is reinstated on the court's appeal roll. The appeal is considered as if it had never lapsed. Similarly, the copy of the record in possession of the respondent is revived so that there is no need to re-serve the record again on the respondent, after the reinstatement order.'(Emphasis on the underlining).

[35] Counsel for the appellant further argued that the failure by the respondent to file the statement in terms of rule 17(16) on 04 August 2022, pushes them off the bus and the appeal therefore should be heard unopposed.

[36] Rule 17(16) states the following:

'Should any person to whom the notice of appeal is delivered wish to oppose the appeal, he or she must-

(a) within 10 days after receipt by him or her of the notice of appeal or any amendment thereof, deliver notice to the appellant that he or she intends so to oppose the appeal on Form 12, and must in such notice appoint an address within eight kilometres of the office of the registrar at which he or she will accept notice and service of all process in the proceedings; and

(b) within 21 days after receipt by him or her of a copy of the record of the proceedings appealed against, or where no such record is called for in the notice of appeal, within 14 days after delivery by him or her of the notice to oppose, deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents.'

⁹ *Matuzee v Sihlahla* (LCA 2/2016) [2017] NALCMD 23 (5 July 2017).

[37] I must confess that I have a problem with Ms Kemp's argument in that it is too restrictive. It makes the purpose of rule 17(16) almost meaningless. Furthermore, the interpretation is likely to lead to unintended and absurd consequences. Taken to its logical conclusion, it will mean that once the reinstatement order is granted, rule 17(16) is no longer applicable and the respondent who did not file the statement in terms of rule 17(16) on the lapsed appeal is barred from exercising their right to oppose the appeal. Further to the aforementioned, it would mean that the respondent should have filed documents on a dead process that has no effect.

[38] I therefore disagree with the interpretation that Ms Kemp is giving to paragraph 22 of the *Matuzee* matter. I prefer Ms Kandjellas' argument, that the time the respondent ought to have filed her grounds of opposition to the appeal only starts to commence running once the appeal is alive again. The respondent would have 21 days to file her statement in terms of rule 17(16)(b) since 4 August 2022. This 21 day period would then only lapse on 25 August 2022. The statement was filed by the respondent on 22 August 2022.

[39] The reinstatement order must be interpreted broadly in order to give practical effect thereto. In my view the order must be interpreted to mean that the appeal which had lapsed has been revived. Similarly, the 21 day period thus can only be said to run from the date that the appeal was revived and the respondent was not obliged to file grounds of opposition prior to the date of reinstatement, as the appeal was considered dead and without life and no obligation could flow from it.

[40] In the light of the view I have taken with regard to the appellants interpretation of the consequence of the re-instatement order, I am further of the considered view that the respondent did not fail to adhere to the provisions of rule 17(16)(b) and as a result the respondent cannot be subjected to a bar to file its statement in terms of rule 17(16)(b). I am of the further view that this is an appropriate case where this court, in the exercise of its inherent jurisdiction and in the interests of justice, may direct that the 21 days starts running from the date on which the appeal was reinstated, which I accordingly do.

[41] It follows therefore from the above that the default position is that, once an appeal is reinstated, the period of 21 days stipulated by rule 17(16)(b) commences to run and within which period a respondent must deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents.

[42] The appeal should therefore be considered opposed.

Appellants' alleged failure to provide evidence that it authorised and it had given the necessary resolve to lodge this appeal.

[43] The point *in limine* taken by Ms Kandjella counsel for the respondent is firstly, that the appellant failed to provide authority that it is authorised and that they have obtained the necessary resolve to lodge the appeal. Secondly, the special power of attorney was not filed when the appeal was lodged, this is indicative of the fact that no such power of attorney existed when the appeal was lodged. Consequently the legal practitioner appointed does not have authority to represent the appellant and Mr George Botshiwe, is not authorised by any resolution to instruct Metcalfe Beukes to institute the action on behalf of the appellant.

[44] From the onset, it should be pointed out that it is common cause that the respondent filed the heads of arguments on the eve of the hearing without seeking leave from this court to do so. There was also no engagement between the parties before uploading the documentation.

[45] The appeal was lodged on and the special power of attorney filed on 9 February 2022. The special power of attorney is authorised by a certain George Bothiwe, the Managing director of the appellant, QKR Namibia Navachab Gold Mine (Pty) Ltd. The document with the title "*Special Power to sue and defend by the Managing Director*" reads as follows:"

'I, the undersigned

GEORGE BOTHIWE

Duly authorised in my capacity as the **MANAGING DIREICTOR** of the Appellant

Do hereby nominate, constitute and appoint RICHARD NICHOLAS METCALFE and/or power of substitution to be our lawful legal practitioner/s and agent in our name, place and stead to appear before the abovementioned Honourable Court or wherever else may be necessary, and then and there as our act and deed, to prosecute the appeal against the arbitration award /ruling issued by Ms Lahya Dumeni in the arbitration proceedings between the appellant and respondent under case number CROM150-16; and to pay all fees of Counsel and witnesses; to make all and any payments whatsoever which may be necessary and desirable for the proper conduct of the case; to compromise or withdraw the case or to proceed to the final end and determination thereof; and generally, for effecting the purpose aforesaid, to do or cause to be done, whatsoever shall be requisite, as fully and effectually, to all intents and purposes, as I/we might or could do if personally present and acting therein; hereby ratifying, allowing, and confirming, and promising and agreeing to ratify, allow and confirm all and whatsoever our said legal practitioners and agent have done or shall lawfully do or cause to be done by virtue of these presents.

Given under my hand at **KARIBIB** this **09th** day of **FEBRUARY 2022** in the presence of the undersigned witnesses.'

[46] This document was thus signed by the Mr Bothiwe as '*duly authorised*' on 9 February 2022. There is no resolution attached that authorises Mr Bothiwe to appoint Metcalfe Beukes to institute the appeal.

[47] It is trite that an applicant must make out his case in the founding affidavit and explicitly state the source of his authority to bring an application on behalf of another person, be it an artificial or a natural person. The deponent must state that he or she had been authorised to bring the application in that representative capacity and if possible produce his source or proof of such authority. Alternatively, the principal must file a confirmatory affidavit confirming such authorisation.¹⁰

[48] A distinction must be drawn between matters where authority to launch the application is averred in the founding affidavit and objected to by the opposing party

¹⁰ *Minister of Safety and Security v Inyemba* (HC-MD-CIV-MOT-GEN-2019/00247) [2020] NAHCMD 170 (13 May 2020) referring to *Naholo v National Union of Namibia Workers* 2006 (2) NR (659) (HC); *South West Africa National Union v Tjonzongoro and Other* 1985 (1) SA 376 (SWA); *Wlotzkasbaken Home Owners Association v Erongo Regional Council* 2007 (2) NR 799; *JB Cooling and Refrigeration CC v Dean Jacques Willems t/a Armature Winding and Other* (A 76/2015 [2016] HAHCMD 8 (20 January 2016); and *Standard Bank Namibia Ltd v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089 [2020] NAHCMD 122 (26 March 2020).

and those matters where absolutely no averments are made regarding authority. In the former instance the principles as set out in *Otjonzondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others*¹¹ applies. In the *Otjonzondjupa Regional Council* matter Muller J (as he then was) sets out the principles as follows:

'(a) The deponent of an affidavit on behalf of an artificial person has to state that he or she was duly authorised to bring the application and this will constitute that some evidence in respect of the authorization has been placed before Court. (My emphasis)

- (b) If there is any objection to the authority to bring the application, such authorisation can be provided in the replying affidavit;
- (c) Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively;
- (d) Each case will in any event be considered in respect of its own circumstances; and
- (e) It is in the discretion of the Court to decide whether enough has been placed before it to conclude that it is the applicant who is litigating and not some unauthorised person on its behalf.'

[49] In *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*¹² the Court said the following at 351 H – 325 H:

'This seems to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. The best evidence that the proceedings have been properly authorised will be provided by an affidavit made by the official at the company annexing a copy of the resolution but I do not consider that form of proof necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf.' (Emphasis provided).

¹¹ *Otjonzondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others* (LC 7/2010) [2010] NAHC 29 (26 March 2010).

¹² *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C).

[50] In *Duntrust (Pty) Ltd v H Sedlacek t/a G M Refrigeration*¹³ Hannah J referred with approval to the Mall (Cape) decision in which Watermeyer J stated inter alia at 352 A – B as follows:

‘Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before Court, then I consider that a minimum of evidence will be required from the applicant.’ (Underlining mine).

[51] Normally, where the issue of lack of authority is raised earlier in the proceedings an appellant would have the opportunity to deal with such allegation in the replying affidavit, depending on what evidence is provided in support of such an allegation.

[52] In the present matter the allegation of lack of authority was first raised in the heads of arguments by the respondent as a preliminary point. As pointed out above, the respondent filed the heads of arguments on the eve of the hearing, leaving the appellant with no room to file a reply to the allegation of lack of authority.

[53] It is trite law that this court may in its discretion permit the filing of further affidavits.¹⁴

[54] In the present instance appellant did not apply to court for the filing of a further affidavit to deal with the allegation of lack of authority. In my view having regard to the circumstances of this matter, it was not necessary to do so.

[55] I say this since the respondent made a brief allegation of lack of authority in her heads of arguments. It is indeed the legal position that where a litigant acts in a representative capacity, he or she must have the requisite authority to act in such capacity.

¹³ *Duntrust (Pty) Ltd v H Sedlacek t/a G M Refrigeration* 2005 NR 147 HC.

¹⁴ *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd* 2007 (1) NR 222).

[56] It however depends upon what factual allegations, if any, are put before court which will determine the response by the opposing party and whether a court will subsequently be satisfied that enough has been placed before it or not, regarding the issue of authority.

[57] In the present matter the respondent did not refer to any fact upon which she based her submission that the appellant did not have the requisite authority to oppose the application.

[58] A minimum of evidence would thus in my view be required by the appellant to refute the submission of lack of authority. In this regard Muller J in *Otjozondjupa Regional Council* (supra) said at paragraph 14 the following:

‘It is clear from the authorities that there must be at least something to show that the litigation on behalf of an artificial person has been authorized. In several matters Courts have regarded a statement under oath by a deponent that he or she had been duly authorized to bring the application as sufficient.’

[59] In the present instance the managing director of the appellant stated on the special power of attorney that he was duly authorised to:

‘. . . nominate, constitute and appoint RICHARD NICHOLAS METCALFE and/or power of substitution to be our lawful legal practitioner/s and agent in our name, place and stead to appear before the abovementioned Honourable Court or wherever else may be necessary, and then and there as our act and deed, to prosecute the appeal against the arbitration award /ruling issued by Ms Lahya Dumeni in the arbitration proceedings between the appellant and respondent under case number CROM150-16.’

[60] In addition to the aforementioned, the special power of attorney provides that:

‘I/we might or could do if personally present and acting therein; hereby ratifying, allowing, and confirming, and promising and agreeing to ratify, allow and confirm all and whatsoever our said legal practitioners and agent have done or shall lawfully do or cause to be done by virtue of these presents¹⁵.’

¹⁵ Special power of attorney filed in support of the application to appeal.

[61] Muller J in *Otjonzondjupa Regional Council* (supra) said at paragraph 5 the following:

‘Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively;’

[62] It is clear from the special power of attorney that the allegation of authority has been made, although there is no evidence in the form of a board resolution has been placed before court to prove such authority. The above principle makes it clear that that ratification of the lack of authority can be done at a later stage and it will operate retrospectively. If one has to closely interrogate the argument of the respondent that there is no resolution to support the authority to institute the appeal or the Managing Director was not authorised by a board resolution to appoint Metcalfe Beukes, thus they lack the necessary authority to institute proceedings. I do not see why the abovementioned principle cannot be invoked to ratify such authority. The circumstances under which the allegation was made justifies the safe application of the principle.

[63] In *National Union of Namibian Workers v Peter Naholo*¹⁶ unreported judgment of this court delivered on 7 April 2006 by Tötemeyer AJ – which is distinguishable on the facts from the present application – one of the issues raised was lack of authority to bring the application and the court dealt with this issue at paragraphs 26.1 and 26.2 as follows:

‘[26.1] If a respondent offers no evidence at all to suggest that an applicant is not properly before Court, a minimum of evidence will be required from the applicant to establish authority. This is the import of the frequently followed judgment of the Mall (Cape) matter, supra. In my view, this principle should also apply if respondent avails himself of a mere non-admission or a tactical denial of authority without placing any evidence before Court to suggest that the applicant is not properly authorised. (My emphasis)

¹⁶ *National Union of Namibian Workers v Peter Naholo* Case No. A 16/2006 unreported judgment of this Court delivered on 7 April 2006.

[26.2] In circumstances where a respondent substantially challenges the authority of the applicant – supported by sufficient evidence so as to create a genuine dispute of fact as to whether or not the applicant was properly authorised – the duty is casted on the applicant to refute that evidence. In this case the validity of the particular resolution or extract purporting to confer authority (AVM1) was challenged on specific grounds. It went well beyond a mere non-admission. This challenge was supported by sufficient evidence. The applicant was called upon to properly respond thereto and to refute those allegations. In those circumstances the applicant could not merely be content by simply relying on the text of the resolution (and a bare allegation in the founding affidavit that the deponent of the applicant is duly authorised) without meeting these challenges. The duty was casted on the applicant to show that the relevant resolution has a valid underlying basis.”

[64] This approach is endorsed by this court.

[65] I am satisfied (since the submission by responded is a tactical denial of authority) that enough information has been placed before me to satisfy me that it is the appellant who was authorised to institute the application and not some unauthorised person.

[66] The point *in limine* that the appellant failed to provide authority that it authorised and it had given the necessary resolve to lodge this appeal is dismissed.

Order

[67] In the result I make the following order:

1. The application for condonation for late filing of the notice to amend the notice of appeal is hereby granted.
2. The point in limine dealing with the respondents’ non-compliance with rule 17(16)(b) is dismissed.
3. The point in limine that the appellant failed to provide authority that it authorised and it had given the necessary resolve to lodge this appeal is dismissed.

4. The parties are ordered to file a joint status report on the further conduct of the matter by no later than 31 October 2022.
5. The case is postponed to 07 November 2022 at 09:00 for a Status Hearing.

P CHRISTIAAN

Judge, Acting

APPEARANCES

APPELLANT: M Kemp
Of Metcalfe Beukes Attorneys,
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RESPONDENT: R Kandjella
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