

**REPUBLIC OF NAMIBIA****HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK****RULING**

Case No.: HC-MD-CIV-MOT-REV-2021/00217

In the matter between:

**ELIFAS EBSON KHOESEB****APPLICANT**

and

**CITY OF WINDHOEK****1 ST RESPONDENT****GEORGE MAYUMBELO****2 ND RESPONDENT****ATTORNEY GENERAL FESTUS MBANDEKA****3 RD RESPONDENT****MINISTER OF URBAN AND RURAL DEVELOPMENT****ERASTUS UUTONI****4 TH RESPONDENT**

**Neutral Citation:** *Khoeseb v City of Windhoek and Others* (HC-MD-CIV-MOT-REV-2021/00217) [2022] NAHCMD 621 (15 November 2022)

**Coram:** CHRISTIAAN AJ**Heard:** 25 October 2022**Delivered:** 15 November 2022**Reasons:** 22 November 2022

**Flynote:** Interlocutory applications – Condonation – Failure to file answering affidavit in compliance with a court order – 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.

**Summary:** The first and second respondents were ordered by the court on 26 January 2022 to file their answering affidavit on 09 March 2022, which they have failed to do. This is an application wherein they seek condonation for the non-compliance with the said court order and upliftment of the bar. The application is opposed on the basis that the first and second respondents did not comply with rule 32 (9) and (10).

*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 applicant provided a reasonable explanation for its failure to file the answering affidavit 5 days 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 answering affidavit and upliftment of the bar was granted.

Accordingly, the application was granted.

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**ORDER**

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1. The application for condonation for late filing of the answering affidavit and upliftment of the bar is hereby granted.
  2. The parties are ordered to file a joint status report on the further conduct of the matter by no later than **30 November 2022**.
  3. The case is postponed to **05 December 2022** at **14h15** for a Status Hearing.
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**JUDGMENT**

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CHRISTIAAN AJ:

Introduction

[1] The parties will be referred to in this judgment as they are in the main action.

[2] This is an opposed application for condonation, filed by the first and second respondents, seeking condonation in respect of the late filing of an answering affidavit and further seeking leave to oppose the relief sought by the applicant in the review application.

Background

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

[4] This application stems from a review application instituted by the applicant on 02 June 2022, wherein he seeks a review and setting aside of a decision by the first respondent to disconnect water and electricity supply to Erf 3382, Sukkot, Katutura Windhoek.

[5] The basis of the abovementioned prayer is Regulation 14 issued under the State of Emergency Regulations and the directives to Regional Councils and Local Authority Councils Regulation No. 104 of 21 April 2021.

[6] The first and second respondents delivered their record on 24 September 2021 in compliance with Rule 76 and the applicant requested for further documents on 30 September 2021. The first and second respondents delivered their affidavit in terms of Rule 76(7) and supplemented the record on 25 January 2022.

[7] The applicant delivered the supplementary founding affidavit on the 3<sup>rd</sup> of February 2022. The first and second respondents were ordered by the court on 26 January 2022 to file their answering affidavit on 09 March 2022, which they have failed to do.

#### The relief claimed and summary of arguments before the court

[8] The first and second respondents seek condonation for their failure to file their answering affidavit as per the court order dated 09 March 2022. The first and second respondents also seeks leave to oppose the review application by the applicant.

[9] The first and second respondents application for condonation was filed on Tuesday, 29 March 2022. The plaintiff filed his answering affidavit to the application for condonation.

[10] The first and second respondents deposed in the founding affidavit in respect of their condonation application that the reason for their failure to file the answering affidavit in time was due to the unavailability of the then acting Chief Executive Officer, Mrs Comalie, who was out of the office attending to urgent meetings and engagements relating to the first respondent. The answering affidavit was only considered at the earliest convenience which was 15 March 2022.

[11] It was further deposed that there was no prejudice to the applicant, as the matter has not been set down for hearing and the delay was only 5 days and the application for condonation was brought promptly and the applicant was afforded enough time to reply thereto in time as stipulated by the court order.

[12] Furthermore, if the first and second respondents are not afforded an opportunity to defend the matter, they will be prejudiced in that they will not have the opportunity to properly vindicate their rights, with regard to the defence to the applicant's claim. It was argued that the failure to comply with the court order was not intentional, but having regard to the complexities raised by the applicant, more time was needed to deal with the issues in the answering affidavit.

[13] The prospects of success in this matter appear from the founding affidavit<sup>1</sup> to the application for condonation. The contents of such founding affidavit is incorporated into this condonation application. Counsel for the first and second respondents argued that it understand that the plaintiff seeks to set aside of a decision by the first Respondent made on the 13th of April 2021. The decision involved the disconnection of water supply to Erf 3382, Sukkot, Katutura, Windhoek.

[14] The basis of the application was the implementation of the Covid 19 Regulations that prevented the first respondent from disconnecting the water supply and that the debt of all residents owing the first respondent for water supply must be written off.

[15] The first respondent maintains that they did not disconnect the water supply to the said Erf 3382, Sukkot, Katutura, Windhoek, due to non-payment of water supplied to the premises. It was further argued that the first respondent is authorised to do so in terms of Regulation 21 of the Water Regulations.

[16] Counsel for the first and second respondents argued that the decision to be set aside is not an administrative decision, and that the disconnection of water

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<sup>1</sup> Paragraph 6- 16 of the founding affidavit filed in support of the application for condonation.

supply was due to non-payment of water supplied and other services to Erf 3382, Sukkot, Katutura, Windhoek.

[17] It was also argued further that the Covid 19 Regulations that prevented the first respondent from disconnecting water supply to the Erf 3382, Sukkot, Katutura, Windhoek, has been declared unconstitutional by the Supreme Court on 23 June 2022, in the matter of *Namibian Employers' Federation v President of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2020/00136) [2020] NAHCMD 248 (23 June 2020)<sup>2</sup>, and is not applicable in this case at all.

[18] Counsel for the first and second respondents in closing argued that the filing of the answering affidavit is a serious matter that the court must consider and there are good prospect of success and that there is a reasonable and acceptable explanation for the non-compliance with the court order. The applicant was engaged in terms of Rule 32(9) and (10), ten (10) days prior lodging the application for condonation.

[19] The applicant argues that the condonation application be dismissed for non-compliance with Rule 32(9) and (10) and that they do not have prospects of success in this matter.

[20] It is important to note from the pleadings filed, that despite the applicant having filed a notice of intention to oppose the condonation application, the opposing affidavit was filed four months out of time, with no application for condonation being made.

### Applicable legal principles and determination

#### *Condonation application*

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<sup>2</sup> *Namibian Employers' Federation v President of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2020/00136) [2020] NAHCMD 248 (23 June 2020).

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

[22] 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*<sup>3</sup>, the Supreme Court cited with approval the following passage from *Petrus v Roman Catholic Archdiocese*<sup>4</sup>:

[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.'

[23] In a recent judgment of this court, *Beukes and Another v Swabou and Others*<sup>5</sup>, the principles governing condonation were once again set out. Langa AJA noted that "an application for condonation is not a mere formality" (at para 12) and that it must be launched as soon as a litigant becomes aware that there has been a failure to comply with the rules (at para 72). The affidavit accompanying the condonation application must set out a "full, detailed and accurate" (at para 13) explanation for the failure to comply with the rules.'

[24] 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 (*Beukes at para 20*).'

[25] The above authorities and authorities cited by counsel for the first and second respondents in their heads of argument are clear that condonation is not to be

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<sup>3</sup> *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC and Others* SA 79/2016 delivered on 31 August 2018 at para 20.

<sup>4</sup> *Petrus v Roman Catholic Archdiocese* 1997 NR 184 (HC).

<sup>5</sup> *Beukes and Another v South West Africa Building Society (SWABOU) and Others (Appeal Judgment)* (SA 10 of 2006) [2010] NASC 14 (05 November 2010).

granted for the asking but the explanation for the default must be full, detailed and accurate. The different factors applicable must be weighed together.

[26] The explanation for the delay in this matter appear from the founding affidavit<sup>6</sup> to the application for condonation. The court is satisfied that the explanation given for the delay is full, detailed and accurate. It is further evident that the application for condonation was done as soon as the non-compliance became apparent. Furthermore, the explanation tendered is reasonable in the circumstances. There will be no prejudice on the part of the applicant as the date of hearing for the main matter is not yet determined.

[27] The applicant's prospects of success is in general an important though not a decisive consideration. The prospects of success in this matter appear from the founding affidavit<sup>7</sup> to the application for condonation. The court is satisfied that the first and second respondents has clearly illustrated proper prospects of success for condonation to be granted.

[28] It is necessary, in this regard, to deal with the relevant provisions of the rules. Rule 56 of the High Court rules requires a party who seeks relief from sanctions or adverse consequences, arising from a failure to comply with a rule, practice direction or court order must have regard to the grounds listed in the rule. The court is satisfied that the grounds listed in the rule has been discussed sufficiently in this matter to address the matter concerning the upliftment of the bar to oppose the main application for review.

*First and Second respondents alleged non-compliance with Rule 32(9) and (10) in respect of the condonation application*

[29] I can say without fear of disagreement that the application is interlocutory in nature, the application for condonation for the late filing of the answering affidavit and the upliftment of the bar to oppose the review application.

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<sup>6</sup> Paragraph 16-25 of the founding affidavit filed in support of the application for condonation.

<sup>7</sup> Paragraph 34- 36 of the founding affidavit filed in support of the application for condonation.



[30] Rule 32(9) and (10) concern 'Interlocutory matters' and applications for directions, that is all matters, so long as they answer to the epithet '*interlocutory*'. The rules do not exempt any interlocutory matters.<sup>8</sup>

[31] In *Studio Eighty Eight Clothing (Pty) Ltd v Bezuidenhoudt & 2 Others* (HC-MD-LAB-MOT-REV-2020/00207) [2021] NALCMD 44 (29 September 2021)<sup>9</sup> Geier J stated as follows:

'The provisions of rule 32(9) and (10) are clear and unambiguous; and so no words should be added by implication to the language of rule 32(9) and (10) in order to give those provisions sense and meaning in context. The sense and meaning in context of those provisions are abundantly clear. And one can find the true extent and meaning of the rule from the rules of court only. See *Namibian Association of Medical Aid Funds v Namibian Competition Commission* (A 348/2014 [2016] NAHCMD 80 (17 March 2016), para 12. Thus, considering the use of the word 'must' in rule 32(9) and (10), there is not one iota of doubt that rule 32(9) and (10) 'are peremptory, and non-compliance with them must be fatal'.

[32] It is clear from the papers filed that there was an attempt on the part of the first and second respondents to comply with the provisions of rule 32(9) and (10). It is unfortunate that the applicant denies the engagement between the parties.

[33] In the matter before court, the applicant alleges that the first and second respondent did not engage him in terms of Rule 32(9) and (10) before bringing the application for condonation and the application for condonation stands to be dismissed. The first and second respondents in their heads of arguments<sup>10</sup>, clearly state that the applicant was engaged in terms of rule 32(9) and (10) as required, 10 days before the application for condonation and answering affidavit was filed on 29 March 2022.

[34] From a closer look at the case management history, the following could be noted, that first and second respondents engaged the applicant in terms of Rule

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<sup>8</sup> *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (15 March 2015), para 6) (HC-MD-LAB-MOT-REV-2020/00207) [2021] NALCMD 44 (29 September 2021).

<sup>9</sup> *Studio Eighty Eight Clothing (Pty) Ltd v Bezuidenhoudt & 2 Others* (HC-MD-LAB-MOT-REV-2020/00207) [2021] NALCMD 44 (29 September 2021).

<sup>10</sup> Paragraph 12 of the heads of argument.

32(9) and filed a rule 32 (10) report on 28 March 2022. It is clear from the Rule 32(10) report that the applicant was engaged by way of a letter to informing him of the intention to bring an application for condonation. It is further stated that the applicant gave his intention to oppose the application, thus no amicable resolution was reached and the application for condonation was filed on 29 March 2022. The respondent's notice of intention to oppose the application for condonation was filed on 30 March 2022.

[35] The court is satisfied that the first and second respondents have made an attempt to amicably resolve this application which was not successful. The applicant's argument that the first and second respondents have failed to adhere to the provisions of rule 32(9) and (10) can therefore not stand.

### Conclusion

[36] It follows therefore that the first and second respondents 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 first and second respondents provided a reasonable explanation for its failure to file the answering affidavit to the review application as directed by the court order. I am further of the view that the first and second respondent's succeeded to demonstrate to this court that they have good prospects of success and that they have complied with Rule 32(9) and (10) before lodging the application for condonation. As a result, the application for condonation for late filing of the answering affidavit and upliftment of the bar is to be granted.

### Order

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

1. The application for condonation for late filing of the answering affidavit and upliftment of the bar is hereby granted.
2. The parties are ordered to file a joint status report on the further conduct of the matter by no later than **30 November 2022**.
3. The case is postponed to **05 December 2022** at **14h15** for a Status Hearing.

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P CHRISTIAAN  
Judge, Acting

APPEARANCES

APPLICANT:

E Khoeseb (In person)  
Windhoek

FIRST and SECOND RESPONDENTS:

E Shifotoka  
Instructed by Uanivi Gaes Inc,  
Windhoek