

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-MOT-GEN-2021/00401

CAPE CROSS SALT (PTY) LTD

APPLICANT

and

MINISTER OF MINES AND ENERGY

FIRST RESPONDENT

THE MINING COMMISSIONER

SECOND RESPONDENT

CAPE CROSS NAMIBI INVESTMENT (PTY) LTD

THIRD RESPONDENT

NAMIBIA SMALL MINERS ASSISTANCE CENTRE

FOURTH RESPONDENT

MINERALS DEVELOPMENT FUND OF NAMIBIA

FIFTH RESPONDENT

ENVIRONMENT COMMISSIONER

SIXTH RESPONDENT

Neutral citation: *Cape Cross Salt (Pty) Ltd vs Minister of Mines and Energy* (HC-MD-CIV-MOT-GEN-2021/00401) [2023] NAHCMD 269 (16 May 2023)

Coram: NDAUENDAPO J

Heard: 17 April 2023

Delivered: 16 May 2023

Flynote: Practice — Rule 61 application — Filing of answering affidavit late without applying for condonation — Applicant suffered financial prejudice — Application granted. Condonation application for late filing of answering affidavit — Applicant gave a full, reasonable and acceptable explanation. Application granted.

Summary: The applicant launched a rule 61 application submitting that the third respondent took an irregular step by filing an answering affidavit out of time without leave from the court. It submitted that it suffered financial prejudice by paying legal fees. Applicant opposed the third respondent's condonation application on the basis that no full and acceptable explanation was proffered for the late filing of the answering affidavit. Applicant also submitted that the third respondent had not complied with rule 32(9) and (10). Third respondent also filed a condonation application for the late filing of the answering affidavit. It explained why it was late and the prospects of success.

Held: that the applicant had demonstrated that it suffered financial prejudice by incurring legal costs.

Held: that the application is granted.

Held: that a rule 32(9) and (10) procedure not applicable to condonation application.

Held further: that the third respondent gave a satisfactory and acceptable application.

Held further: that the condonation application is granted and the answering affidavit stands.

ORDER

1. The rule 61 application is granted with costs, such costs to be capped in terms of rule 32(11) and such costs to exclude the costs of arguing the application on 17 April 2023.
2. The condonation application is granted with costs, such costs to be capped in terms of rule 32(11).
3. The answering affidavit filed on 7 September 2022 stands.
4. The case is postponed to 05 July 2023 at 15:30 for Status Hearing.

5. The parties must file a joint status report on the further conduct of this matter on or before 30 June 2023.

JUDGMENT

NDAUENDAPO J

Introduction

[1] Before me are two applications. First, an application in terms of rule 61 of the High Court Rules and second, a condonation application for the late filing of an answering affidavit.

[2] The rule 61 application relates to the filing of the answering affidavit by the third respondent, which was filed out of time and without an application for condonation.

[3] The applicant in its rule 61 application sought an order that this court declare the answering affidavit filed on 07 September 2022 as irregular and that the court set aside the said answering affidavit.

[4] The third respondent filed a counter application, requesting this court to condone the late filing of the answering affidavit, which was filed on 07 September 2022.

The rule 61 application

[5] Mr Shafashike deposed to the founding affidavit in support of the rule 61 application. He avers that the answering affidavit by the third respondent was filed 76 days late without an application for condonation. He further avers that the applicant suffered financial prejudice by paying legal fees to its legal practitioner to peruse and to launch the rule 61 application.

[6] The third respondent in a letter dated 3 April 2023 tendered the applicant's taxed costs, limited to N\$20 000. The applicant rejected the tender for wasted costs and insisted that it will pursue the rule 61 application.

Third respondent's condonation application

[7] The third respondent filed an application for condonation for the late filing of the answering affidavit.

[8] Mr Mwayengapo deposed to the founding affidavit in support of the condonation application. He avers that the applicant brought a review application under rule 65, instead of rule 76, which required the filing of the review record.

[9] The application was served on the third respondent on 3 November 2021. Instructed counsel was appointed in January 2022. Mr Mwayengapo avers that given the content of paragraphs 3 and 4 of the affidavit, the affidavit was replete with request for further instructions.

[10] On 17 March 2022, the government respondents filed the review record and on 24 March 2022, they filed a supplementary record. After the filing of the supplementary record, counsel advised that the filing of the answering affidavit be kept in abeyance pending further steps by the applicant.

[11] On 19 April 2022, the applicant amended its notice of motion and filed augmented grounds of review and amended its application to the rule 76 application. In terms of rule 77(1)(b), the third respondent had 20 days to file its answering affidavit, which lapsed on 19 May 2022.

[12] Counsel for the third respondent could only consult with the directors during July 2022 and advised that a condonation application may be necessary. During the period 7 June to 4 July 2022, the applicant filed various notices in terms of rule 66(3). The answering affidavit was filed on 7 September 2022, without the condonation application at the time.

Submissions on behalf of the applicant

[13] Mr Ipumbu submitted that the third respondent delivered the answering affidavit 76 days late and did not file a condonation application. He submitted that the condonation application, which was delivered after the rule 61 application was launched, is procedurally defective.

[14] He argued that rule 32(9) and (10) were not complied with. No full and acceptable explanation for the late filing of the answering affidavit is provided. In addition, the third respondent does not deal with prospects of success.

Submissions on behalf of the third respondent

[15] Mr Nekwaya submitted that the only prejudice suffered by the applicant is a financial one and the third respondent tendered the applicant's wasted costs limited to N\$20 000 as per rule 32(11).

[16] Counsel further submitted that a rule 32(9) and (10) compliance was not required as this is a condonation application. Counsel submitted that a full and acceptable explanation was provided for the delay in filing the answering application. Counsel further submitted that the prospects of success are contained in the answering affidavit.

Determination on the rule 61 application

[17] Rule 61 of the High Court Rules provides that:

'61. (1) A party to a cause or matter in which an irregular step or proceeding has been taken by any other party may, within 10 days after becoming aware of the irregularity, apply to the managing judge to set aside the step or proceeding, but a party that has taken any further step in the cause or matter with knowledge of the irregularity is not entitled to make such application.

(2) An application under subrule (1) is an interlocutory application and must be on notice to all parties and must specify in the notice the particulars of the irregularity alleged as well as the prejudice claimed to be suffered as a result of the alleged irregular step.

(3) The managing judge must give directions as to the hearing of such application.

(4) If at the hearing of the application the managing judge is of opinion that the proceeding or step is irregular or improper he or she may, with due regard to the alleged prejudice suffered, set it aside in whole or in part either as against all the parties or as against some of them and grant leave to amend or make any other order that the court considers suitable or appropriate.

(5) A party that has not complied with an order of court made against him or her in terms of this rule is not entitled to take any further step in the cause or matter, except to apply for an extension of time within which to comply with the order.'

[18] Rule 61 consists of two aspects. These aspects were clearly set out in the Supreme Court case of *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*,¹ where the Court dealt with the provisions in question, albeit under the old rules. The court held that:

'Rule 30² contemplates two separate but interrelated enquiries, which should not be conflated. **The first is whether the step or proceeding complained of is irregular.** The answer to this question must be determined by considering the step itself in the light of the meaning of an irregular step or proceeding. **The second enquiry,** which only arises once it is established that the step complained of is irregular, **is what order should follow the finding of an irregularity. In this enquiry, the court has a discretion whether or not to overlook the irregularity. It is in this enquiry that prejudice is relevant.**' (emphasis added)

[19] I will deal with the first enquiry, which is whether the late filing of the answering affidavit constitutes an irregular step.

¹ *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC), p 703, para [110].

² Similar to rule 61 under the new rules.

[20] In terms of Rule 77(1)(b) of the High Court Rules,³ the third respondent had to file its answering affidavit within 20 days from the date which the applicant filed its supplementary notice of motion and affidavit. The third respondent filed its answering affidavit 76 days later, without a condonation application.

[21] From the onset, it is evident that the filing of affidavits outside the time periods provided for in the rules of court and without condonation applications constitutes irregular proceedings. In light thereof, I agree with the applicant that the answering affidavit filed 76 days later without a condonation application constitutes an irregular step.

[22] It follows that the second enquiry, once it is established that the step complained of is irregular, is what order should follow the finding of an irregularity taking into consideration the prejudice suffered.

[23] In *Ovambanderu Traditional Authority v Minister of Urban and Rural Development and Others*⁴ Masuku J held that:

[24] Third, if the step or proceeding is irregular, **the question will be whether there is tangible prejudice by the applicant** (own emphasis), resulting directly from the irregular step or proceeding complained of. The court has a discretion in dealing with the application. If it forms the opinion that the step or proceeding is indeed improper or irregular, it may set it aside in part or in whole, if (as stated immediately above), depending on the prejudice suffered. (own emphasis added).'

[24] I fully concur with the above dictum as the correct enunciation of the legal position.

[25] The applicant submitted that it suffered financial prejudice by paying legal fees to its counsel for receiving and perusing the late answering affidavit and launching the rule 61 application. There is no other prejudice suffered by the applicant other than the financial one. However, that financial prejudice was cured by the offer made by the third respondent in tendering the wasted costs limited to N\$20 000 as per rule 32(11).

³ High Court Practice Directions: Rules of High Court of Namibia, 2014. Where the court refers to Rules, the court is referring to the Rules of the High Court.

⁴ *Ovambanderu Traditional Authority v Minister of Urban and Rural Development and Others* (HC-MD-CIV-MOT-REV-2019/00239) [2022] NAHCMD 59 (17 February 2022).

[26] The non-acceptance of the tender for wasted costs by the applicant does not only defy logic, but goes against the primary objective of judicial case management, which is to resolve matters speedily and in a more cost effective manner. Had the applicant accepted the offer, judicial resources would not have been wasted and it is for that reason that the applicant will be deprived of the costs of arguing the application on 17 April 2023.

[27] I am of the view, that the applicant did not suffer any tangible prejudice and that there is no reason before this court to set aside the answering affidavit filed on 7 September 2022. The financial prejudice suffered by the applicant because of the irregularity caused by the third respondent is one that can be cured by a cost order.

[28] In the result, the application in terms of rule 61 is granted with costs, such costs to be capped in terms of rule 32(11) and excluding the costs of arguing the application on 17 April 2023.

Determination on the condonation application

[29] Rule 32(9) and (10) is not applicable to condonation applications. It is not for the parties to condone one another's non-compliance with court orders or rules. In the matter of *QKR Navachab Gold Mine v Kwala*,⁵ Masuku J held that:

[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

⁵ *QKR Namibia Navachab Gold Mine (Pty) Ltd v Kwala* (HC-MD-LAB-MOT-GEN-2022/00109) [2022] NALCMD 43 (4 August 2022).

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.'

[30] I fully concur with my brother. 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.

[31] It is trite that when the court considers an application for condonation, the applicant must offer a reasonable, acceptable explanation for the delay. The whole period must be explained and the prospects of success must also be dealt with.

[32] Although the explanation offered by the applicant is not an ideal one, in my view, it is a reasonable and acceptable explanation. There will be no prejudice to be suffered by the other respondents, as they are not opposing the application.

[33] As to the prospects of success, Mr Nekwaya referred this court to the grounds of opposition to the review application. He submitted that the review application is brought more than 10 years after the ML 147 (mining license) was granted to the third respondent. Mr Nekwaya submitted that there was undue delay and no explanation is offered for bringing the application after 10 years and if that submission is correct, the third respondent may have good prospects of success to ward off the review application.

[34] For all these reasons, the condonation application succeeds with costs and the answering affidavit filed on 7 September 2022 stands.

N. NDAUENDAPO

APPEARANCES:

APPLICANT: T. IPUMBU
TITUS IPUMBU LEGAL PRACTITIONERS

THIRD RESPONDENTS: E. NEKWAYA
INSTRUCTED BY
LORENTZANGULA INC.