“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: STUDIO EIGHTY EIGHT CLOTHING (PTY) LTD vs MARY ANN BEZUIDENHOUDT & 2 OTHERS	**Case No:** HC-MD-LAB-MOT-REV-2020/00207
	Division of Court: LABOUR COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE GEIER	**Date reserved:** 10 SEPTEMBER 2021
	***Delivered* on:** 29 SEPTEMBER 2021
Neutral citation: *Studio Eighty Eight Clothing (Pty) Ltd v Bezuidenhoudt & 2 Others* (HC-MD-LAB-MOT-REV-2020/00207) [2021] NALCMD 44 (29 September 2021)	

IT IS ORDERED THAT:

1. The application for condonation, delivered on 28 May 2021, is struck from the roll with costs.
2. The Registrar of this Court will be requested to bring this judgement to the attention of the Director of Legal Aid.
3. The case is postponed to 3 November 2021 at 08h30 for a Status Hearing.

Following below are the reasons for the above order:

[1] The background facts against which the applicants seek condonation for their non-compliance with the Rules of Court to oppose the review application brought by their employer against an arbitration award made in their favour and their failure to file their answering affidavits therein was sketched by their legal practitioner as follows:

‘a. On the 03 August 2020 an arbitration award was issued in favour of the applicants.
b. On 14 August 2020 the arbitration award was varied.
c. On 18 August 2020 - the arbitration award was registered as an order of this Court under

Case Number: HC-MD-LAB-AA-2020/00178.

d. On 09 September 2020 the respondent brought an application for review of the arbitration award.

e. The applicants ought to have within 10 days delivered a notice of intention to oppose said application and further, in terms of Rule 14(10) (a) and (b), deliver an answering affidavit together with any relevant documents.

f. Applicants failed to enter an appearance to oppose said application and to deliver answering papers.

g. On 19 April 2021, a notice of intention to oppose said review application was entered on behalf of the applicants.

h. On 27 April 2021, an answering affidavit raising points of law was filed on behalf of the applicants. This answering affidavit and the initial condonation application filed of record on 07 May 2021 would later be withdrawn on 28 May 2021.

i. On 28 May 2021 applicants filed their second application for condonation, (this is the application that requires determination).'

[2] This summary however omits to mention that the review application, because it was initially unopposed, was set down for hearing in the residual court, that is on the first motion court roll, for the hearing of unopposed motions, on 25 September 2020. On that day, and before the scheduled hearing of the matter, the applicants and their labour representative, a Mr Pogisho, attended to the offices of the respondent's legal practitioner. It was agreed that the matter would be removed from the roll to afford the applicants time to obtain Legal Aid and to allow for the exchange of settlement proposals.

[3] On this occasion the applicants and their representative where again handed copies of the review application.

[4] Subsequent to the consequent removal of the review application from the roll on 25 September 2020 the applicants however utilised the opportunity so gained by making various attempts to have the award enforced, despite a bond of security, for the award, having been offered.

[5] An urgent application for the stay of the award was also brought unsuccessfully. Accordingly the Respondent has since paid the award and the Applicants have been re-instated in the interim and are continuing with their employment gainfully. Nevertheless and contrary to the relevant provisions of the Legal Aid Act 1990, they continue to be in receipt of legal aid.

[6] In the current proceedings the parties have also raised a number of technical objections. There is firstly the applicants' failure to comply with the requirements of Rules 32(9) and (10). There is the point raised by the applicants that service of the review application was defective and that in the heading of the respondent's answering affidavit certain additional parties are mentioned, (the Deputy-Sheriff and the Labour Inspector), in respect of which no amendment has been sought, and which, so the argument goes, renders the answering papers materially defective.

[7] The condonation application was also opposed on the merits.

[8] As the applicants seek condonation, the requirements, set by Rules 32(9) and (10) of the High Court Rules, as read with Rule 22 of the Labour Court Rules, seem to be of application. The applicants - while conceding with reference to *Mukata v Apollus* 2015 (3) NR 695 (HC) - that compliance with these rules is peremptory in interlocutory proceedings - seek to side-step the requirements imposed by these Rules through the contention that *' … this application for condonation, is not interlocutory for the applicants, since and we contend that the ruling by the Honourable Court in this matter will be final for the parties, the affected parties can appeal the decision to the Supreme Court …'.* It was submitted further that:

'… As the granting or refusal of the condonation application herein has the effect of a final order and *(is)* thus not interlocutory. In the premise we submit that the applicants herein did not need to comply with Rule 32(9) and (10) and that the opposing contention by the respondents stands to fall.'

[9] Reliance was placed in this regard on what Silungwe J had said in *Thiro v M & Z Motors* NLLP 2002 (2) 370 NLC, as cited with approval by Van Niekerk J in *Telecom Namibia Ltd v Klein* (LCA 39-2009) [2013] NALCMD 5 (5 February 2013) at [8].

[10] It immediately becomes clear that the authorities relied upon do not bear out the submissions made by Mr Kamarenga, on behalf of the applicants, as the courts, in *Thiro* and *Klein,* where considering the question, whether or not the orders, relating to condonation, where appealable as of right or not. It was in this context said that:

' … a certain ruling by the district labour court granting condonation for the late filing of a rule 7(3) reply was merely incidental to the pending action as it did not dispose of any issue in the

main action and that, as such it was not appealable right away…'.

[11] While there may well be circumstances where the refusal to grant condonation may result in a situation that such order is final in effect and may thus become appealable this is a far cry from what is relevant in this case and where the court is not tasked to determine the appealability of an order not even made.

[12] One does not have to look far in order to find guidance in this regard where clearly the application now before the Court will in essence only regulate the procedural issue of determining whether or not the applicants will- or will not be able to deliver any answering papers in opposition to the review.

[13] That Rules 32(9) and (10) are applicable to condonation applications is also borne out by various decision of this court, as a simple search would have revealed to Mr Kamarenga. See for instance : *Inamutira v Shilongo* HC-MD-CIV-ACT-DEL-2020/03339 [2021] NACHMD 149 (1 April 2021) at [13], *Mahoto v Minister of Environmental Affairs (*HC-MD-CIV-ACT-DEL-2019/02558) [2020] NAHCMD 437 (24 September 2020) at [27], *Ipinge vs Titus* (HC-MD-CIV-ACT-DEL-2017/00946) [2018] NAHCMD 91 (23 February 2018) at [15], *Namibia Airports Company vs IBB Military Equipment And Accessory Supplies Close Corporation* (HC-MD-CIV-ACT-OTH-2017/01488) [2019] NAHCMD 496 (30 October 2019) at [30] – [31], *Muti v Nkurenkuru Town Council (*HC-MD-CIV-ACT-DEL-2020/02097) [2020] NAHCMD 561 (4 December 2020) at [28], *Kamuhanga v Ovambanderu Traditional Authority* (HC-MD-CIV-APP-AMC-2019/00024) [2020] NAHCMD 541 (8 December 2020) at [12] – [13] and others.

[14] In addition, counsel for both parties, inexplicably failed to draw the Court's attention to the judgments delivered in *Langer Heinrich Uranium (Pty) Ltd v Flook* (HC-MD-LAB-MOT-GEN-2020/00282 [2021] NAHCMD 34 (03 August 2021), *Minister of Urban and Rural Development v Witbooi* (HC-MD-CIV-MOT-GEN-2019/00225 [2020] NAHCMD 279 (9 July 2020) and *Walenga v Nangolo* (HC-NLD-CIV-ACT-CON-2020/00091) [2020] NAHCNLD 122 (31 August 2020), where Mr Justice Masuku - despite recognising the mandatory requirements imposed by Rules 32(9) and(10) in regard to interlocutory applications such as condonation applications - in all these decisions[1] nevertheless came to the conclusion :

[1] *Minister of Urban and Rural Development v Witbooi* at [12] and *Langer Heinrich Uranium (Pty) Ltd v Flook* at [40].

[15] I am accordingly of the considered view that the belated opposition to the application for condonation cannot be sustained and must fail. This is so because rule 32(9) and (10) does not apply in a mandatory manner where an application for condonation by the court of the non-compliance with its rules is concerned.'[2]

and :

'In this regard, there are a few cases, which espouse the view that in such applications, the parties are not strictly required to comply with the subrules in question for the reasons advanced above.[3] For the above reasons, I hold the view that it would be an incorrect step to strike the matter from the roll in the instant case, as the provisions of rule 32(9) and (10) are not strictly necessary to comply with. This is so because of the relief sought about which the parties can do nothing to resolve.'[4]

[16] While the learned Judge is of course correct when he states that *' … condonation applications are directed to the court and the non-errant party can do no more than indicate its attitude to the application and even if that party decides not to oppose the condonation application, that does not settle the interlocutory hearing because it is the court that must have a final word as to whether a reasonable explanation has been given and whether it should exercise its discretion in favour of the errant party and that it would thus appear, for that reason, that the parties do not have the capacity to resolve the issue at the heart of a condonation application the resorting to the said subrules does not serve to advance the determination of the interlocutory hearing to any meaningful degree…* '[5] - he does not say – in any of his three judgments - why the many other judgments [6] - that have squarely held that Rules 32(9) and (10) are of application to interlocutory applications - and thus also to condonation applications - are wrong - and for which reasons he considered them to have been wrongly decided, and which finding would then have freed him not to follow the many precedents that have been set by these judgments over the years.

[17] This is especially so, if regard is had, for instance, to the thoroughly reasoned judgment of Prinsloo J delivered in *Namibia Airports Company vs IBB Military Equipment And Accessory Supplies Close Corporation* (HC-MD-CIV-ACT-OTH-2017/01488) [2019]

[2] *Walenga v Nangolo* at [21].
[3] *Witbooi v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-GEN-2019/00225) [2020] NAHCMD 279 (9 July 2020) *Walenga v Nangolo* (HC-NLD-CIV-ACT-CON-2020/0091) [2020] NAHCNLD 122 (31 August 2020).
[4] *Langer Heinrich Uranium (Pty) Ltd v Flook* at [44].
[5] *Langer Heinrich Uranium (Pty) Ltd v Flook* at [42] – [43].
[6] As cited in para [13] above.

NAHCMD 496 (30 October 2019) and where the learned Judge, after a thorough review of the applicable case law, that she had been referred to, [7] concluded :

'[27] There is no extra-ordinary or peculiar circumstances in the matter in casu which would cause this court to overlook the blatant disregard to comply with rule 32(9) and (10).

[28] The fact that the court graciously condoned the non-compliance in the *Kondjeni* and *Seelenbinder* matters do not set a precedent for condoning non-compliance with the relevant rule. In each of these cases the learned judge clearly addressed the importance of the rule and motivated his decision. He also cautioned against non-compliance and repeatedly stated that compliance with the provisions of rule 32(9) and (10) is peremptory. In my considered view it will cause chaos and make a mockery of the Rules of Court if parties can choose when they would comply with these rules and when not.

[29] In *Kambazembi Guest Farm CC t/a Waterberg Wilderness v The Minister of Lands and Resettlement*[8] Parker AJ in a strong worded ruling state the following in respect of compliance with Rule 32(9) and (10):

'[4] In my view, the provisions of rule 32(9) and (10) are as clear as day and they are unambiguous; and so, I do not think one is entitled to add any words to them by implication to attain a purpose which is outwit the intention of the rule maker. It has been said:

"Plainly, words should not be added by implication into the language of a statute unless it is necessary to do so as to give the paragraph sense and meaning in context."

(*Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793 (HC), para 7)

[18] 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'. (*Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (15 March 2015), para 6)'

[6] The applicant seeks to compel the respondents to deliver to the applicant 'a complete

[7] Compare: *Namibia Airports Company vs IBB Military Equipment and Accessory Supplies Close Corporation* at [16] to [22].

[8] *Kambazembi Guest Farm CC t/a Waterberg Wilderness v The Minister of Lands and Resettlement* (A 21/2015) [2016] NAHCMD 118 (21 April 2016).

record' and 'reasons' for the decision taken respecting the aforementioned assessment in order to pursue the main application. **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'. (Italicized and underlined for emphasis) The rules do not exempt any interlocutory matters**.' (Bold for emphasis)

[30] There is a plethora of cases which clearly crystallized the importance and the need for compliance with rule 32(9) and (10). This rule was not included in the Rules of Court to create a pitfall for the parties. It was included in the rules to avoid the ever increasing number of interlocutory applications that are serving before our courts. This rule is absolutely in line with the overriding objectives of the rules of court in order to encourage parties to resolve issues amicably.

[31] There was no effort on the part of the defendant to comply with the provisions of rule 32(9) and (10), or rule 32(4) for that matter and the application stand to be struck from the roll.'

[18] This reasoning is to some extent supported to what this court had to say in this regard in *Standard Bank of Namibia Limited v Nekwaya* (HC-MD-CIV-ACT-CON-2017/01164) [2017] NAHCMD 365 (01 November 2017) in a slightly different context :

'[21] The question of course remains whether or not those directions also absolved the parties, and in this instance mainly, and more specifically the plaintiff/applicant, from complying with Rules 32(9) and (10).

[22] Now, on a closer analysis of sub-rule (9), it appears that the party wishing to bring any interlocutory proceedings must comply with the sub-rule (9). I need to add here immediately that I keep in mind that the applicant clearly, in this instance, did not wish to bring any application for reinstatement and was, so to speak, forced by court order to bring such application. However, whether or not such bringing was voluntary or by direction of the court, the rule is quite clear. The rule required of the plaintiff/applicant - before it's launching - and in this instance this was before the delivery of the application as per the judge's direction by 6 October 2017, that the plaintiff/applicant had to engage the other party - and in the words of the rule – that the plaintiff/applicant had to seek an amicable resolution thereof with the defendant/respondent before it would have been entitled to deliver same for the adjudication of the court.

[23] I pause here to mention incidentally what type of resolution still remained open to the parties to seek an amicable resolution on, in the circumstances where their differences, relating to the procedure to be followed, had already been settled by court order. Quite clearly - and this was an aspect that was also taken up by the court with Mrs Angula - what was left - and what in my

view the parties still had to do - was to engage each other in order to seek an amicable resolution in regard to the merits of the application for reinstatement.

[24] In this regard, and for example, the parties could easily have engaged each other on the aspect of whether or not the respondent/defendant would continue to oppose the application, which had been directed by the court, and, whether or not they would- or would not utilise the time lines set for the exchange of affidavits, if still necessary.

[25] In both instances - it is quite obvious - that the report, required in terms of Rule 32(10), could have been filed for the benefit of the court on or before the 6th of October 2017, indicating to the managing judge, at the very least, that the parties did engage each other before the launching of this further application, but that they had been unable to resolve their differences relating to the merits of the application or that they were able to resolve their differences and that the defendant would thus not oppose the application, for example.

[26] Most importantly this interpretation, is in my view, supported by Ms Losper's submissions, which I uphold, namely that the regulation of a procedure by a court would generally never absolve the parties from complying with the rules of court, in so far as such rules may still have a bearing on an interlocutory procedure, even if such proceedings have been regulated, to some extent, as was the case in this instance. I thus believe that she was also correct in her further submission that the direction, which Miller AJ, gave on the 29th of September 2017, would always have to be seen- and to be the interpreted with regard to- and within the context of the rules of court.

[27] It is for these reasons that I believe that the applicant/plaintiff, for purposes of the directed re-instatement application, was also always obliged, to again, comply with the requirements set by Rules 32(9) and (10), before its delivery.

[28] As the compliance with High Court Rules 32(9) and (10) is peremptory for all interlocutory applications[9] - the application for re-instatement will thus also have to be struck from the roll with costs, due to the applicants non-compliance with Rules 32 (9) and (10)'

[19] I wish to add, by stating the obvious, that just because any case is unopposed, or has become unopposed through amicable resolution, this fact alone would never absolve a Court from scrutinising the subject matter of the case serving before it in the determination of whether or not the relief sought should be granted or not.[10] It is however in this realm that the consideration of whether or not the parties before Court have

[9] See generally also: *Mukata v Appolus* 2015 (3) NR 695 (HC) at [6]. .*CV v JV* 2016 (1) NR 214 (HC) at [8] to [12], and *Bank Windhoek Ltd v Benlin Investment CC* 2017 (2) NR 403 (HC) at [8].

[10] Compare for instance *Namdeb Diamond Corporation (Pty) Limited v Mineworkers Union of Namibia* (HC-MD-LAB-MOT-GEN-2019/00056) [2019] NALCMD 37 (04 November 2019) at [36] to [38].

reached an amicable resolution on any particular issue may also play a role. This demonstrates beyond doubt that the Rule 32(9) engagement and the report, filed in terms of Rule 32(10) for the benefit of the Court, is not meaningless or will not be of assistance to the Court or will not be in line with the case management principles as found by Prinsloo J.

[20] As it so becomes clear that the decisions made in *Langer Heinrich Uranium (Pty) Ltd v Flook*, *Minister of Urban and Rural Development v Witbooi* and *Walenga v Nangolo* do not analyse and explain why the plethora of decisions not followed – ie. those holding that the requirements imposed by Rule 32(9) and (10) are imposed on all interlocutory applications, including condonation applications - where wrongly decided – and - why they should no longer be regarded as precedent setting - I will decline to follow them.

[21] In any event I believe further that the decisions made in *Langer Heinrich Uranium (Pty) Ltd v Flook*, *Minister of Urban and Rural Development v Witbooi* andi n *Walenga v Nangolo* create confusion. A party wishing to bring any interlocutory condonation application will now – in accordance with the above cited *Walenga, Witbooi* and *Flook* decisions have to determine what they are to do as Rules 32 (9) and (10) ' … *do not apply in a mandatory manner* …' [11] - and where they thus will have to determine in what other manner, if at all, the rules should still apply as they are '… *not strictly required to comply with the subrules in question* …'[12] - all in circumstances where, in direct contradiction, all the referred to judgments, inclusive of *Walenga, Witbooi and Nangolo,* are at least *ad idem* that the requirements, in regard to all interlocutory applications, set by rule 32(9) and (10), are clear and peremptory[13] and which rules obviously and consequentially also impose on the parties the duty to comply with them.

[22] All this means, at the end of the day, for the case now serving before the court - and in circumstances where the clear and admitted non-compliance with Rules 32(9) and (10) was inexcusably mounted on the wrong horse - that the application for condonation falls to be struck in line with the abovementioned case law.

[23] In this regard I wish to add that I would, in any event, not have upheld the applicants' point *in limine* regarding the additional reference to the Deputy- Sheriff and the Labour Inspector in the heading of the answering affidavit. These two parties never

[11] As per *Walenga v Nangolo* at [21].
[12] As per *Langer Heinrich Uranium (Pty) Ltd v Flook* at [44].
[13] Since *Mukata v Apollus* 2015 (3) NR 695 (HC at [6], *CV v JV* 2016 (1) NR 214 (HC) at [10] – [11], *Bank Windhoek Ltd v Benlin Inv CC* 2017 (2) NR 403 (HC) at [7] – [8].

played any role in this case as they were never cited by anyone in body of the affidavits filed of record and on whom the papers were also never served. The affidavits exchanged in the condonation application fully 'speak to each other' and absolutely no prejudice was occasioned to anyone in this regard. The reference to these parties in the heading of the answering papers was of no significance at all and was clearly an error which can thus be ignored. Most certainly this obvious error does not render the answering papers materially defective or liable to be struck.

[24] The further point relating to the service of the review application also has no prospects of success in circumstances where Rule 5(2)(a)(i) and (ii) of the Rules always allowed for service of the review application on the applicants and also on the representative of the applicants), Mr Pogisho, a labour consultant, all of whom were personally handed a copy of the review on 25 September 2020, on the occasion of the negotiations for a postponement and for settlement, which circumstances disclose beyond doubt that the applicants received proper notice of the review and that the labour consultant was ostensibly mandated to act on behalf of the applicants when he was served with the application for review.

[25] In any event and also - and as far as the merits of the condonation application are concerned - I believe that the applicants would not have been able to satisfy the requirements of good cause underlying such application and in respect of which the main ground on which their explanation for delay is mounted is the inaction of the Legal Aid Directorate from 14 September 2020, the date on which they applied for legal aid, to 16 April 2021, when they were granted legal aid and in respect of which they made only one follow-up visit to the Legal Aid Offices in Katutura on 16 March 2021 and where the current condonation application was eventually made on 28 May 2021, the first application having been withdrawn. It is clear that the application was never made promptly or that the delay was satisfactorily explained as it had to. What is totally destructive of this explanation is the fact that the applicants where in the interim re-instated and were able to continue with their employment gainfully. The respondent has also paid the award and the applicants thus are in receipt on the amount of N$ 143 720.00. This nullifies their reliance on the delay blamed on the Legal Aid Directorate as they clearly could have obtained private legal representation. In any event the delay is clearly egregious and in such circumstances the merits of their opposition of the review does not have to be considered.[14]

[14] *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC) at [56].

Costs

[26] The respondent also asks for a costs order by virtue of the fact that two applications for condonation where launched, one of which was withdrawn, and because the condonation application was brought without sufficient ground. The applicants resist such order on the grounds that they are legally aided.

[27] Although it cannot be said that the applicants where not entitled to ask for condonation, in principle, the basis on which they did so was spurious and without sufficient ground.[15] This is borne out by their reliance on inapplicable case law, the totally meritless points taken in regard to service and their reliance on a patent, but meaningless error committed in the heading of the answering affidavit. Also the condonation application seemingly lacks merit. I believe that in such circumstances the protective shield against a costs order in labour matters is forfeited. I could thus have acceded to the request for a costs order on these grounds alone. But this is not all.

[28] In addition there is the extreme delay between the date on which the review application could have been moved already during September 2020 and the bringing of a first condonation application, which was withdrawn, and the bringing of the second application for condonation, which eventually occurred on 28 May 2021, which will have caused annoyance to the respondent who had in the meantime reinstated the applicants and paid the award and whose right to have the review application heard was delayed substantially through the applicants' inexcusable inaction.

[29] What weighs more are however the opportunistic attempts by the applicants to have the award enforced in circumstances where the review was removed from the roll to afford them the opportunity to settle the matter and to obtain legal aid for opposing the review. This is not the honourable way to litigate. Also, when the respondent brought an urgent application for the stay of the award the applicants were able to promptly obtain legal aid, but when it came to the procuring of Legal Aid for the main case, the review, all promptitude was lost. Also this conduct of the applicants requires censure, particularly as a bond of security was offered all along, which would have safeguarded their interests adequately. Finally it remains inexplicable on which basis the applicants continue to receive Legal Aid, when they seemingly do not satisfy the applicable means- test. I am

[15] See for instance : *Namibia Estate Agent Board v Steen & Another* (HC-MD-LAB-MOT-REV-2017/00019) [2018] NALCMD 33 (14 December 2018) at [19] to [20].

thus and for all these reasons prepared to accede to the requested costs order.

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

1. The application for condonation, delivered on 28 May 2021, is struck from the roll with costs.

2. The Registrar of this Court will be requested to bring this judgment to the attention of the Director of Legal Aid.

3. The case is postponed to 3 November 2021 at 08h30 for a Status Hearing.

Judge's signature	**Note to the parties:**
Geier J	Not applicable.
Counsel:	
Applicants (condonation application)	**Respondent(condonation application)**
PK Kamarenga *of* Muluti & Partners	S Horn *of* Theunissen, Louw & Partners