



CASE NO A 3545/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between

ALCIDES PASCOAL BAILUNDO PATACA

PLAINTIFF

AND

HILLENI TWAMONENI PATACA

DEFENDANT

Heard on: 26 MARCH 2012

Delivered: 28 JUNE 2012

UEITELE A J [1] On 17 OCTOBER 2011 the plaintiff husband was granted leave to institute action by way of edictal citation against the defendant wife.

The Court Order amongst others reads as follows:

“Having heard Ms *Prollius*, Counsel for the Applicant and heaving read the Notice of Motion and other documents filed of record:

1 That the applicant is hereby granted leave to proceed against the Respondent by way of Edictal Citation for:

1.1 a final order of divorce.

Alternatively

- 1.2 An order to restore conjugal rights to the Plaintiff and failing compliance therewith;
- 1.3
- 2 That service be affected personally on the Respondent by the Deputy Sheriff/Process serve for Redland Way, Streatham Hill, London SW23LT at: **27 Elstad House, Redland Way, London SW23LT.**
- 3 ...”

[2] On 13 February 2012 the plaintiff’s legal practitioners set the matter down for hearing on the unopposed motion roll of 20 February 2012 for purposes of applying for an order directing the defendant to reconstitute conjugal rights to the plaintiff and failing therewith a final order of divorce.

[3] The Court Order of 20 February 2012 which is on the Court file indicates that on that day (i.e. 20 February 2012) the matter was removed from the roll. Ms Von Kunow who appeared for the plaintiff informed me that the reason why the matter was removed from the roll is because it was prematurely set down.

[3] On 13 March 2012 the legal practitioners for the plaintiff again set the matter down on the unopposed motion roll of 19 March 2012. On 19 March 2012 the matter was called before me for purposes of leading evidence in respect of the application for a *rule nisi* directing the defendant to show cause why she should not return to or accept the Plaintiff and failing compliance therewith a final order of divorce.

[4] Before the plaintiff was sworn in to present his evidence a return of service was handed up to prove that the summons was served on the defendant. I will quote the most relevant parts of that return of service below:

“COMBINED SUMMONS

RETURN OF SERVICE

I the undersigned ASHLEY NAYLOR hereby certify that I have on the 13th day of January 2012 at 5.45 am, duly served on HILLENI TWAMONENI PATACA (BORN HALUOODI) the attached COMBINED SUMMONS and the PARTICULARS OF CLAIM by exhibiting the original document to her, and at the same time handing to her personally a true copy thereof and explaining to her the nature and contents thereof.

DATED this 13th day of January 2012

Signed

ASHLEY NAYLOR
SHERRIFF’S HIGH COURT ENFORCEMENT LTD
AIRPORT HOUSE.
PURELEY WAY
SUREY CRO OXZ”

[5] I asked Ms Von Kunow whether the return of service complies with Rule 4 of this Court’s Rules and paragraph 2 of the Court Order of 17 October 2011 (quoted above). Ms Von Kunow admitted that the return of service does not comply with Rule 4 but submitted that I could condone such none compliance. I asked her to give me authority for her submission, but since she did not have any at hand I postponed the matter to 26 March 2012 for argument.

[6] On that day (i.e., 26 March 2012) Ms Von Kunow argued that since the service of the summons was ordered by the Court it was not covered by Rule 4(3) & (4) and therefore the authentication of the certificate of service was not

really required. She further argued that if I, however, found that authentication was still required the requirement relating to authentication was not mandatory and I had the discretion to accept a return of service which was not authenticated.

[7] Rule 4(3), (4) & (8) of this Court's Rules provide as follows:

“3 Service of any process of the court or of any document in a foreign country shall be effected -

- (a) by any person who is, according to a certificate of-
 - (i) the head of any Namibian diplomatic or consular mission, any person in the administrative or professional division of the public service at a Namibian diplomatic or consular mission or any Namibian foreign service officer grade VII;
 - (ii) any foreign diplomatic or consular officer attending to the service of process or documents on behalf of Namibia in such country;
 - (iii) any diplomatic or consular officer of such country serving in Namibia; or
 - (iv) any official signing as or on behalf of the head of the department dealing with the administration of justice in that country, authorized under the law of such country to serve such process or document; or
- (b) by any person referred to in sub-paragraph (i) or (ii) of paragraph (a), if the law of such country permits him or her to serve such process or document or if there is no law in such country prohibiting such service and the authorities of that country have not interposed any objection thereto.

(4) Service of any process of the court or of any document may, notwithstanding the provisions of sub-rule (3), also be effected -

- (a) in the Republic of South Africa by a sheriff as defined in any rule of court regulating the conduct of proceedings of the various Provincial and Local Divisions of, the Supreme Court of South Africa and who is authorized to serve the process of that Court;

(b) in Australia, Botswana, Finland, France, Hong Kong, Lesotho, Malawi, New Zealand, Spain, Swaziland, the United Kingdom of Great Britain and Northern Ireland and Zimbabwe by an attorney, solicitor, notary public or other legal practitioner in the country concerned who is under the law of that country authorized to serve process of court or documents.

(5) ...

(8) Subject to the provisions of subrule (7), service of any process of court or document in a foreign country, shall be proved -

(a) by a certificate of the person effecting service in terms of paragraph (a) of sub-rule (3) or sub-rule (4) in which he or she identifies himself or herself, states that he or she is authorized under the law of that country to serve process of court or documents therein and that the process of court or document in question has been served as required by the law of that country and sets forth the manner and the date of such service: Provided that the certificate of a person referred to in sub-rule (4) shall be duly authenticated; or

(b) by a certificate of the person effecting service in terms of paragraph (b) of sub-rule (3) in which he or she states that the process of court or document in question has been served by him or her, setting forth the manner and date of such service and affirming that the law of the country concerned permits him or her to serve process of court or documents or that there is no law in such country prohibiting such service and that the authorities of the country have not interposed any objection thereto.

[8] I do not agree with Ms Von Kunow that, because the service of the summons was ordered by this Court, sub-rules (3) or (4) of Rule 4 do not apply. My reason for disagreeing with her is that both sub-rules (3) and (4) regulate the service of court processes or court documents in a foreign country

irrespective of who ordered such service. I thus find that the certificate of service must be authenticated as required by Rule 4(8)(a).

[9] Ms Von Kunow submitted in the alternative that even if I found that the authentication of the certificate of service is required I have the discretion to condone the failure to observe the provisions of the rules relating to the service of the process and orders of Court in foreign countries where it appears that the correct person had been served and that such defendant understood and appreciated the serious import of the document served upon him or her. She then refers me to Rule 63(4).

[10] It is true that Rule 63 is only directory and not mandatory, see the case of ***De Roeck v Campbell and Others*** 1990 NR 28 (HC), but there must still be substantial compliance with Rules.

[11] Rule 4(8) provides that service of any process of court or court document in a foreign country, shall be proved by a certificate of the person effecting service. The certificate must-:

- (a) identify the person,
- (b) state that the person is authorized under the law of that country to serve process of court or documents therein;
- (c) state that the process of court or document in question has been served as required by the law of that country;

(d) set forth the manner and the date of such service:

[12] The return of service that is on the Court file does not:

- (a) fully identify the person who served the summons,
- (b) state that the person who served the summons is authorized under the law of the United Kingdom to serve process of court or documents of court in the United Kingdom, and
- (c) state that the summons has been served as required by the law of United Kingdom.

I am thus not satisfied that there is substantial compliance with Rule 4 of this Court and I refuse to exercise the discretion and to accept the return of service.

[13] In the result I make the following order.

13.1 The matter is hereby removed from the roll.

UEITELE, AJ

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ON BEHALF OF THE PLAINTIFF:

MS VON KUNOW

INSTRUCTED BY:

DU PISANI LEGAL PRACTITIONERS

ON BEHALF OF THE DEFENDANT

NO APPEARANCE