



CASE NO.: I 2606/2009

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PHINCON ENTERPRISES (PTY) LTD

PLAINTIFF

and

LUIS ARSENIO SALVATERRA DOS SANTOS

DEFENDANT

CORAM: MILLER, AJ

Heard on: 06 February 2012

Delivered on: 07 February 2012

RULING (Ex-Tempore):

MILLER, AJ: [1] In this matter there is an application by the Defendant brought in terms of Rule 30 of the Rules of this court, to set aside the filing of the Plaintiff's Amended Particulars of Claim as an irregular step.

[2] The matter arises in the following way. The matter became partly heard during the latter part of last year and was then postponed until yesterday, 6th February in order for the trial to continue.

[3] In the interim and on the 16th December 2011, the Plaintiff prepared a notice of its intention to amend its particulars of claim. That notice was filed with the

Registrar and it is common cause that it was on that date transmitted by email to the legal representatives of the Defendant.

[4] There was apparently an agreement between the legal representatives of the Plaintiff and those of the Defendant that the notice, which had been emailed will be delivered to the Defendant's legal representatives once their offices opened early in January 2012.

[5] That however never transpired and thereupon the Plaintiff filed its Amended Particulars of Claim. That in turn, as I have indicated, prompted an application on behalf of the Defendant to set aside the filing of the Amended Particulars of Claim as an irregular step.

[6] Mr Phatela, who represents the Plaintiff in this matter, contends that the transmission of the Notice of the Plaintiff's intention to amend constitutes compliance with the provisions of Rule 28 of the Rules.

[7] He contends that Rule 28(1) requires merely that a party desiring to amend its pleadings shall notify all other parties of its intention to do and shall furnish particulars of the amendment. He contends in argument that transmitting the notice via email constitutes a notification to the other party of his intention to amend.

[8] To my mind the answer is not to be found simply in Rule 28(1). Rule 28(1) should be read together with Rule 28(2).

Rule 28(2) reads as follows:

“The notice referred to in sub-rule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.”

[9] Erasmus, in his works Superior Court Practice at B1 to B1-77 states the following:

“Sub-rule 2 refers to delivery of the notice, i.e. in terms of Rule 1, copies of the notice must be served on all parties and the original filed with the Registrar.”

[10] Rule 1 which relates to service contains no provision for delivery by way of electronic mail.

[11] In my view the Learned Author correctly sets out the position. I am fortified in my conclusion *albeit* it in an indirect way, by a passage appearing in the work by ***Cillers, Loots and Nel, The Civil Practice of the High Courts of South Africa, 1st Edition*** at page 383 where the Learned Authors deal with the transmission of process in the ordinary course by way of electronic means, and I quote from the following passage:

“More recently the court has ordered service by facsimile transmission to be followed up dispatch of the documents by registered mail. Presumably the court will in appropriate circumstances and provided safeguards as to authenticity are present, also allow service by email.”

[12] It would seem to me that in the circumstances there has been non-compliance with the provisions of Rule 28(1) and 28(2) and accordingly the filing of the Amended particulars of Claim is an irregular step which ought to be set aside.

[13] In the circumstances the application brought in terms of Rule 30 succeeds with costs.

MILLER AJ

ON BEHALF OF THE PLAINTIFF:

Instructed by:

Mr. Phatela

Shikongo Law Chambers

ON BEHALF OF DEFENDANTS:

Instructed by:

Mr. Dicks

Krüger, van Vuuren & Company