REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A267/2006

In the matter between:

CHRISTOPHER LYN JOHNSTON **APPLICANT**

and

KAREN SUE JOHNSTON **RESPONDENT**

Neutral citation: *Johnston v Johnston* (A267-2006) [2013] NAHCMD 346 (20 November 2013)

Coram: VAN NIEKERK J

Heard: 2 March 2010

Delivered: 20 November 2013

Flynote: **Practice** – Application for condonation for non-compliance with rule 4(5)(b) and 17(3) of the rules of the High Court – Practice regarding form of edictal citation set out – Fact that edictal citation not signed by registrar leads to irregularity but not nullity – Application refused because of delay in bringing application for condonation combined with unsatisfactory explanations for delay and non-compliance with rules.

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ORDER

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1. The applicant's application to strike is granted with costs.
2. The respondent's application to strike is refused with costs.
3. The applicant's application for condonation is refused with costs.

JUDGMENT

VAN NIEKERK J:

[1] This is an application for condonation for the applicant's non-compliance with rule 4(5)(b) and rule 17(3) of the rules of this Court. The application is opposed.

The allegations in the affidavits filed

[2] The application is supported by an affidavit by the applicant's legal representative, Mr Böttger, in which he states that the applicant was on 25 September 2006 granted leave by this Court to sue the respondent, who resides in the United States of America, for divorce by way of edictal citation. After leave was granted, he drafted the citation and attached the intendit which formed part of the application for leave. He signed the citation and sent it to the registrar in terms of rule 17. Upon the return of the citation from the registrar's office, he proceeded to have same served on the respondent in terms of the court order. On 27 November 2006 the respondent entered an appearance to defend and after further particulars were requested and provided, filed a plea and counter-claim. After pleadings had closed, he applied for a trial date. However, the registrar then advised him that there was non-compliance with rules 4(5)(a) and (b), 17 and 7. In this regard he attaches a memorandum dated 14 July 2008 from the registrar.

[3] Before I deal in more detail with the memorandum, it is useful to set out the relevant rules.

[4] Rule 4(5) provides:

> ‘(a) Unless the official language or one of the official languages of the foreign country concerned is English or unless the court for sufficient reasons otherwise directs, any process of court or document to be delivered in such country shall be accompanied by a sworn translation thereof into an official language of that country or part of that country in which the process or document is to be served, together with a certified copy of the process or document and such translation.
>
> (b) Any process of court or document to be served as provided in sub-rule (3), shall be delivered to the registrar together with revenue stamps to the value of N$50 fixed thereto .....
>
> (c) Any process of court or document delivered to the registrar in terms of paragraph (b) shall, after defacement of the revenue stamps affixed thereto, be transmitted by him or her together with the translation referred to in paragraph (a), to the Permanent Secretary for Foreign Affairs or to a destination indicated by the Permanent Secretary for Foreign Affairs, for service in the foreign country concerned, and the registrar shall satisfy himself or herself that the process of court or document allows a sufficient period for service to be effected in good time.’

[5] Rule 4(b) refers to sub-rule (3), the relevant part of which provides:

> ‘(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) .....'

[6] Rule 7(1) provides:

'(1) Before summons is issued in any action at the instance of the plaintiff's counsel, the counsel shall file with the registrar a power of attorney to sue.....'

[7] Rule 17(3) states:

'(3) Every summons shall be signed by the counsel acting for the plaintiff ..... or, if no counsel is acting, it shall be signed by the plaintiff ..... and shall thereafter be signed and issued by the registrar and made returnable by the sheriff to the court through the registrar.'

[8] In the memorandum, directed to "The Presiding Judge" and copied to the lawyers for the parties, the registrar *inter alia* states the following:

‘Upon receipt of an application for a hearing date – dated 03 October 2007, the Registrar refused to allocate a hearing date for the divorce action on the basis that no divorce action was formally instituted.

The basis/ground upon which the Registrar answers that no divorce action was instituted are as follows:

.... Where edictal citation has been ordered, the practice hitherto has been to issue a citation (the equivalent of a summons) and to follow this up with an intendit (the equivalent of a declaration) which may or may not be served simultaneously with the citation. The citation is usually drafted in the format of Form 1 of the First Schedule of the Rules of the High Court which citation (summons) is issued and signed by the Registrar in compliance with Rule 17 of the Rules of the High Court.’

[9] Having dealt with the provisions of rule 17, rule 7 and rule 4(5)(a) and (b), the registrar continued:

‘The circumstances of the above case are as follows:

1. The edictal citation (summons) was never laid before the Registrar for issuing purposes as is required by Rule 17 ..... and never issued and signed by the Registrar, therefore no action was instituted.

2. No Power of Attorney was filed as required by Rule 7.

3. The provisions of sub-rules 5 (a) and (b) of Rule 4 were not complied with.

To date no divorce action complying with the provisions of Rule 17 and 7 was instituted, therefore the applicant is not entitled to apply for hearing dates on divorce floating roll.

> Mr Böttger, legal practitioner of record for the applicant, was during October 2007 and thereafter on various occasions before 18 June 2008 informed of these irregularities but he refused to accept it as such and insisted that the application for leave to sue by way of edictal citation was or may be converted into a divorce action, therefore it would be proper to enrol the "divorce action" under the application file.
>
> Having discussed the circumstances of this case as well as Mr Böttger's insistence that trial dates for the divorce be allocated, with the Judge-President, the matter was enrolled and set down on the divorce floating roll during the week 23 to 26 September 2008 in order for the presiding judge to deal with the irregularities mentioned above and to give procedural guidelines/directions regarding the institution of an action where leave to sue by way of edictal citation was granted by the court.'

[10] Mr Böttger states further that, having received the memorandum, he more closely inspected the court file and realized that, although he forwarded the edictal citation, the registrar never signed same. He further realized that the N$50 revenue stamp required on the edictal citation was, instead, affixed to the applicant's power of attorney, a copy of which he attaches to his affidavit. He admits that there was thus non-compliance with rule 4(5)(b) and rule 17(3). However, in his view rule 4(5)(a) does not apply to this matter and rule 7 was complied with as the proper power of attorney was indeed filed.

[11] Counsel states that there were oversights at his office and at the office of the registrar. From the papers it becomes evident that the oversight at the latter's office was that the citation was never signed and issued and that a divorce action number was never allocated to the matter.

[12] Counsel at this stage contacted Mr Hohne of the respondent's legal practitioners to discuss the matter with him in light of the fact that the parties had already

exchanged pleadings. He says that they decided not to take the matter further but to have the case set down for hearing. He states, in his own words, 'I then trusted that the matter had been addressed and would not cause any difficulties further.' The case was then set down for hearing on the fixed roll from 26 to 28 May 2009.

[13] On the first day of the hearing Tomassi, J informed the parties that the non-compliance with the rules should be addressed before the matter is to proceed, hence the application for condonation.

[14] In opposing papers Mr Hohne deposes to the main affidavit on behalf of the respondent. He states, *inter alia* (I underline certain words in the quotation to facilitate adjudication below of the applicant's application to strike):

> '8.2 It is submitted that the Deponent, being an officer of this Honourable Court is not being truthful to this Honourable Court and for the following reasons:
>
> 8.2.1 The Edictal Citation so attached as annexure "MB2" was part and parcel of the original "**Application for leave to have sued by way of Edictal Citation**" and was not "**Subsequently being drafted in accordance with the rules**" as alleged by the Deponent.
>
> 8.2.2 As is evident from the date as it appear (*sic*) on the "**Edictal Citation**" (annexure "M2") such document was drafted on 19 September 2006 i.e. prior to 25 September 2006 when the order for "**Leave to sue by way of Edictal Citation**" was granted and not subsequent" as the Deponent falsely states in his affidavit.
>
> 8.2.3 The "Edictal Citation" annexed as annexure "MB2" was never independently and subsequently addressed to the Registrar as alleged but was only an annexure to the original application for

“Leave to sue by way of Edictal Citation” and was never independently and subsequently addressed to the Registrar of this Honourable Court as is <u>falsely</u> alleged by the Deponent.

8.2.4 The Intendit so annexed as annexure “MB3” was also never independently issued by and directed to the Registrar and was also only an annexure to the original Application to sue by way of Edictal Citation.

8.2.5 <u>It is consequently a blatant untruth that “**Same was then accordingly signed by myself and forwarded to the Registrar of this Honourable Court in terms of rule 17**” because</u> both annexures “MB2” (Edictal Citation) and “MB3” (Intendit) were already signed at the time when Application was made for leave to sue by way of Edictal Citation.’

[15] In paragraph 11.2 Mr Hohne deals with the registrar’s memorandum and in paragraph 11.3 he states (again the underlining is mine):

’11.3 <u>The aforesaid quoted is another indication that Mr Böttger is not telling the truth and especially also</u> with regard to the allegations made in paragraph 5 i.e. “**Upon return of the Edictal citation from the Registrar’s office...”** As well as in paragraph 6 i.e. **“Same was then signed by myself and forwarded to the Registrar of this Honourable Court in terms of rule 17”** because it is clear from the memorandum of the Registrar (annexure “MB5”) that Mr Böttger refused to listen to the advice of the Registrar but proceeded to have the Edictal Citation and Intendit converted into an action and refused to have followed the correct procedure which would have allowed the Registrar to have signed and issued the Edictal citation (Summons) which he did not do because the incorrect procedures were followed.’

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[16] Mr Hohne states that Mr Böttger did approach him with regard to the issues under discussion, but he denies that he agreed not to take the matter any further. He states that he conveyed to Mr Böttger that 'since the Court has *mero motu* raised the issue we would not take the point if the Judge President was of the opinion and satisfied that the Rules of Court were complied with as I was made to understand from Mr Böttger which turned out not to be the case.' He further denies that the respondent ever waived the right to object to non-compliance with the rules; that the respondent only proceeded to file a plea and counter-claim in order to prevent the applicant from obtaining judgment against her by default.

[17] Mr Hohne further states that the respondent had already instituted divorce proceedings in the United State of America, this country being her domicile and the place of marriage and in respect of which the parties hold citizenship; that the proceedings are at an advanced stage and that his client will suffer prejudice if the application for condonation is granted.

[18] The respondent annexed a confirmatory affidavit by the registrar in which, *inter alia*, any oversight as alleged is denied and the memorandum confirmed. It is also denied that the edictal citation was ever forwarded to his office to be signed and stated that receipt of it was never recorded in any of the registrar's books and that no divorce action number was allocated to it. He points to the fact that the power of attorney attached to the founding affidavit is dated 6 June 2008 and re-iterates that there was no power of attorney on the court file when the application to sue by way of edict was made.

[19] In reply Mr Böttger states on behalf of the applicant that he in fact sent the edictal citation and intendit to the registrar's office on 8 November 2006. He says that the documents attached to the founding affidavit ("MB2" and "MB3") are the wrong documents and he attaches a copy of the edictal citation and intendit dated 8 November 2006 as "MB1" and "MB2". He denies that Mr Hohne has any personal

knowledge of whether these documents were sent to the registrar's office. He further points out that the registrar does not personally deal with all documents sent to his office and that he can also not state categorically that the documents were never received. He mentions that it is not uncommon that mistakes are made by the staff in the registrar's office and that sometimes documents are sent back to lawyers without being signed as required.

[20] He further records astonishment at Mr Hohne's denial that he ever agreed not to take the matter any further. He denies that he indicated to Mr Hohne that the Judge-President was satisfied that the rules have been complied with, but states that he indicated to Mr Hohne that the matter may be enrolled subsequent to a letter which he had addressed to the Judge-President. He attaches a copy of this letter dated 24 June 2008 as "MB". In it he states, *inter alia*:

> 'My dilemma concerns procedural aspects pertaining to an Edictal Citation and the subsequent process of a divorce matter currently pending in the High Court.
>
> The procedural history of the matter, which I will set out below, serves to illustrate the nature of the dilemma which has befallen this matter.
>
> On the 20th September 2006, I enrolled an application for leave to sue by way of Edict in the High Court of Namibia. That order was granted on the 25th of September 2006 by the Honourable Mr. Justice Silungwe. The granted Edict together with the Intendit was then served by a Process Server in the United State of America on the Respondent on the 21st of November 2006.
>
> At this stage, the Application number initially allocated to this matter was used on all subsequent pleadings filed. With the benefit of hindsight, I submit that it is at this stage where the clerks at the office of the registrar ought to have issued an appropriate case number used for action proceedings.

> After service of the citation and the intendit upon the respondent in Kansas, USA, the respondent instructed Messrs Stern & Barnard, who then files a Notice of Appearance to defend. Further pleadings, including a plea, a counterclaim and a plea to counterclaim were exchanged between the parties, all using the initial case number being A 267/2006.
>
> I would now like to apply for a hearing date to hear this divorce, but my attempts to enrol this case have been thwarted on repeated occasions by the Registrar, who refuses to allocate a date. Despite my attending on his office more than once, and indicating to him that no more is required than converting the Application number to an Action number, he remains unwilling to do that.
>
> I have showed him the authorities on the matter, most eminently Erasmus on Superior Court Practice, and showed him other divorce actions in which I have been involved, which have run the full course from Edictal Citation to a Final Order, which are no different in procedure to this particular matter, barring the technicality of the allocation of an "A" number to the file.
>
> .....
>
> As stated earlier, and upon Counsel's suggestion, I now address this letter to you in an attempt to solve this matter which requires no more than the mere issuance of an Action number on the Court file and the allocation of a hearing date.'

The applicant's application to strike

[21] The applicant applied in the replying papers that the allegations that Mr Böttger had been untruthful and made false statements under oath be struck as being scandalous and/or vexatious. These allegations are by their very nature extremely serious and prejudicial as they project the legal representative of the applicant and an officer of the court in such a light that the very application for condonation

becomes suspect. In my view litigants should be very careful before they make such allegations under oath. I find it most regrettable that in this case the allegations were made about one officer of the court by another. Such allegations tend to cause acrimony, to turn the hearing into an unbecoming display and to divert the attention from the real issues before the court. While there are cases where such allegations may justifiably be made, it is in my view generally better to leave it to the court to pronounce itself on the cogency or otherwise of evidence before the court. A party can usually with ample clarity and emphasis deny factual allegations made by its opponent and present contradictory evidence or point out discrepancies or inaccuracies without attaching the label of falsehood to them under oath. It should also be borne in mind that what may at first appear false may turn out to be quite the opposite when the other side of the matter has been heard or when all the facts are considered.

[22] My ruling in this regard is that the words underlined in the quotation in paragraph [14] and [15] *supra* be struck from the respondent's main opposing affidavit.

[23] The applicant also applied that paragraph 18.9 of the main opposing affidavit be struck. The last sentence contains scandalous, vexatious and irrelevant comments about Mr Böttger. I agree that this sentence should be struck.

The respondent's application to strike

[24] The respondent applied for the striking of matter in the following paragraphs of the applicant's replying affidavit, with I shall deal *seriatim.*

Ad paragraph 4

[25] Part of the complaint is directed at the allegation that the edictal citation and the intendit were sent to the registrar on 8 November 2006, whereas in the founding

affidavit the date was not mentioned. Further complaint is directed at the two documents attached in place of the documents attached as “MB2” and “MB3” to the founding affidavit, namely the edictal citation dated 8 November 2006 in place of the edictal citation dated 19 September 2006 and the intendit dated 8 November 2006 in place of the intendit dated 5 September 2006.

[26] Mr *Mouton* on behalf of the respondent submitted that these documents constitute new matter which should have been annexed to the founding affidavit. Counsel is quite correct that these should have been so annexed. However, the documents are identical in all respects, except for the dates mentioned and for the handwriting in which the case number (“(P) A 267/06”) is inserted in the open space at the top of the edictal citation. The copy of the court order issued on 25 September 2006 and which is attached to the founding affidavit as “MB1” also bears the registrar’s stamp dated 8 November 2006. One of the inferences that may in my view be drawn is that a copy of the court order was, for whatever purpose, received and stamped by the registrar on 8 November 2006. In the circumstances the order, read with the edictal citation and intendit dated 8 November 2006, affords evidence that these documents may indeed have been forwarded to and received by the registrar on that date, although one does not know for what purpose.

[27] If these documents are permitted to remain on record, it does negate some of the material allegations on which the respondent’s case is based. However, it seems to me that one could easily have attached the wrong edictal citation and intendit by mistake. My attention was drawn during argument to the fact that the original court order bound as part of the record in the action proceedings before Tomassi J also bears this date stamp and that the original edictal citation and intendit following thereon are also dated 8 November 2006. I further bear in mind that the edictal citation and intendit were served on the respondent on 21 November 2006, which affords some probability to the chronology of events as alleged by the respondent. It

was also open to the respondent to attach the documents actually served on her to show that they were not dated in September 2006, but she did not do so.

[28] While I take Mr *Mouton's* point that the respondent and the registrar did not have the opportunity to answer to the allegation that the documents were received by the registrar on 8 November 2006, it should also be noted that they were at liberty to apply for leave to file a further set of affidavits if they were able to provide further evidence. In the circumstances I cannot imagine that this relief would have been refused.

[29] While it is further so that a deponent should take utmost care in attaching the correct documents to its founding papers, I am inclined, somewhat reluctantly, to the view that, considering all the facts and circumstances of this particular case, the application to strike should not succeed in this respect.

Ad paragraph 10, 13, and 15 and annexure "MB3" to the replying affidavit

[30] This application relates to the letter addressed to the Judge-President and allegations relating thereto. The application was abandoned during argument.

Ad paragraph 12

[31] This paragraph contains allegations that it is well known that documents are often lost (i.e. mislaid) at the registrar's office; that it is not uncommon that documents are returned unsigned; that the registrar cannot be personally aware of each and every document filed in that office and so on. The complaint is that the allegations are pure speculation and consequently irrelevant, alternatively, hearsay. In my view there is no merit in this aspect of the application. The circumstances sketched in this paragraph were indeed well known to persons who regularly had business at the registrar's office and to staff and judges of the Court at the time the affidavit was deposed to and do not amount to speculation.

Ad paragraphs 16 and 17 and annexure "MB4" to the replying affidavit

[32] The complaint is that new matter is introduced in reply. My view is that the allegations and "MB4" constitute a relevant reply to allegations made in the main opposing affidavit. They are consequently not struck.

The requirements for an application for condonation

[33] Rule 27(3) provides that the Court may, on good cause shown, condone any non-compliance with the rules of this Court. The sub-rule clearly gives a very wide discretion. As to the requirement of showing good cause, it is trite that the applicant 'must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.' (*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (AD at p353A; *Van Zyl and Another v Smit and Another* 2007 (1) NR 314 (HC) at 0315F-G).

The argument that the edictal citation is a nullity and incapable of being condoned

[34] Mr *Mouton* on behalf of the respondent submitted that the fact that the citation was not signed and issued by the registrar means that it is a nullity and of no force and effect. As such it is incapable of being condoned, he submitted. If this argument is upheld, it is not necessary to consider the merits of the application for condonation. I therefore deal with it first.

[35] Counsel relied on authority which deals with the effect of a failure to have an ordinary summons or combined summons signed and issued by the registrar. In this regard he referred to *Chasen v Ritter* 1992 (4) SA 323 (SE) where the court stated (at p327B –C):

> 'According to Rule 17 to 'sign' a summons and to 'issue' are separate elements standing next to one another, joined by the conjunctive 'and'. There is no indication in the Rules of what is meant by 'issued by the Registrar', but

> it must signify something else than signature by the Registrar. 'Issued by the Registrar' probably covers the steps taken by the Registrar which are not expressly stated: noting it in the records of his office, allocation of a number, cancellation of the revenue stamps, stamping it with the stamp of his office and delivery for transmission to the deputy sheriff. One decision defines it merely as 'to send (hand) out, publish or put in circulation'. See *Protea Assurance Co Ltd v Vinger* 1970 (4) SA 663 (O) at 664-5 for the meaning of 'issue'.'

[36] The court earlier (at p326B) referred to what it stated is an *obiter dictum* in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780G, where Rumpff JA (as he then was) said:

> "n Dagvaarding wat nie deur die Griffier uitgereik is nie, sou 'n nulliteit wees en deur betekening van so 'n dagvaarding sou geen geding ingestel word nie.';

and then continued to say (at p327F-G):

> 'If I am correct in the meaning of 'issue' set out above, the *obiter dictum* of Rumpff JA is understandable and valid: a summons that is not 'issued' by the Registrar is a document to which the Registrar is not a party. A document that has not taken the course through the office of the Registrar is a 'nullity'. If the document has followed the proper course through the Registrar's office, but somewhere along the way it happened that one requirement of the Rules was not complied with, it can be condoned in terms of Rule 27(3).'

[37] In this regard Mr *Mouton* submitted that, as it is clear that the citation had not taken the required course though the office of the registrar, it is a nullity.

[38] Mrs *van der Westhuizen* for the applicant, on the other hand, submitted that the matter before me is distinguishable because in this case the Court had already given leave that action be instituted by way of the citation as opposed to a case where a

summons had not been issued and signed by the registrar and therefore the process was not clothed with the necessary authority.

[39] I think there is merit in this submission. There is a difference between a summons and a citation. The learned author Erasmus, *Superior Court Practice* (See commentary under rule 5(1)) explains it thus:

> 'In superior court practice a litigant does not direct a summons at his opponent; the registrar directs it to the sheriff who then serves it upon the opponent. If a litigant want to proceed by way of edict (which means by way of a demand directed at his opponent by the *court*), he obviously has to ask the court to direct this demand. Hence the necessity for obtaining leave to *sue* by edict in the superior courts.'

[40] In *Mcguire v Fourie* 1962 (3) SA 302 (SR) 304D the court had this to say:

> 'Although there is no difference in effect between the issue of a summons and the issue of edictal citation, the two processes are different. A summons is addressed to the Sheriff who is directed to command the defendant to answer the plaintiff's claim. An edictal citation on the other hand is addressed to the defendant, presumably because the Sheriff has no power outside the jurisdiction of the Court.'

[41] In *Pretoria-Noord se Stadsraad v Stander* 1964 (3) SA 210 (T) the court explained it as follows (at p212B-213G):

> 'Daar heers heelwat verwarring oor die begrip wat deur 'edik' of 'ediktale sitasie' weergegee word, en voordat oorweeg word of bogenoemde Reël daardie begrip insluit, moet groter helderheid oor die begrip self verkry word. In ons prosesreg, soos in die prosesreg van Holland onder die Romeins-Hollandse regstelsel, kan 'n prosesstuk wat vir betekening aan 'n persoon of party uitgereik word, een van twee vorms aanneem. Dit kan 'n opdrag, in naam van die Staat of die Staatshoof, aan die balju wees om die stuk aan die persoon wie se naam daarin genoem word, te beteken; of dit kan 'n opdrag van die Hof, in naam van die Regter-President en Regters, regstreeks aan die persoon wees om voor die Hof te verskyn. Laasgenoemde is 'n edik en dit word gebruik waar die adres van die persoon onbekend is of waar hy hom op 'n plek bevind waar die balju hom beswaarlik of glad nie kan bykom nie, hetsy binne die landsgrense hetsy daarbuite. So 'n edik kan rugbaar gemaak word

> deur dit op die voordeur van die Hof aan te bring, in koerante te publiseer, deur iemand anders as die balju of geregsbode te laat beteken, deur die pos te versend, ens.
>
> .....
>
> Vir 'n edik wat in die buiteland moet geld, moet die eiser hom noodwendig tot die Hooggeregshof wend, wat sedert oudsher regsgesag ook ten aansien van persone in die buiteland het waar die skuldoorsaak binne die Hof se regsgebied ontstaan het. 'n Aksie teen 'n persoon wat in die buiteland woon, kan derhalwe alleen in die Hooggeregshof gevoer word.'

[42] In *Kerbel v Kerbel* 1987 (1) SA 562 (W) at p566D-F clarifies it further:

> '.....in earlier times it was the sovereign who issued this edict but later it was the *praetor,* when the summons could not be served. In our modern practice, the Court gives leave to sue in this manner when by ordinary summons, the action can not be commenced, because our ordinary summons is a command to the Sheriff (that is a South African Sheriff) to do certain things; amongst others, to serve the summons. A South African Sheriff can obviously not serve the summons in a foreign country. Nor can a South African Court command an official in a foreign country to do anything. If the Court is satisfied that it has jurisdiction, the applicant for leave to sue by edict is to my mind entitled as of right to obtain leave to sue in this fashion.'

[43] As far as I am aware the practice of this Court is that the edictal citation is dated and signed by the legal practitioner for the plaintiff and the registrar after the court has given leave for the action to be instituted by way of edict. The registrar states in his memorandum that the citation is usually drafted in the format of Form 1 of the First Schedule of the rules. This Form provides for a short form of process and may, according to rule 5(2), be used where service by publication is ordered. In this regard rule 5(2) states that 'where service by publication is ordered, it may be in a from as near as may be in accordance with Form 1 of the First Schedule, approved and signed by the registrar.' This makes sense, as service by publication is costly and the shortened form is meant to cut costs.

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[44] For the above reason I do not agree with the view that the citation should be drafted in the format of Form 1, (unless service by publication is ordered), as can also be seen from the many available precedents of this Court. The form used in the instant matter is the customary long form of process. In Namibia it is also customary to provide that a copy of the application for leave to sue by way of edict, the court order, and the intendit (sometimes also referred to as the particulars of claim), be served with the edictal citation.

[45] In this case the intended edictal citation is attached to the application for leave to sue by edict and was approved by the Court to be served 'in the form (or substantially in the form) annexed to the application. Bearing in mind that the actual citation served in this case is in that form and that all the papers and the Court's order were served on the respondent, it seems to me that, although the citation was not signed by the registrar and is irregular, the citation in itself is not a nullity.

[46] I pause to state that I have given consideration to the question whether the Court, by authorising the form of the citation, did not authorise the use of a citation which does not provide for the registrar to sign it. However, bearing in mind the practice of this court to require the registrar's signature; the provisions of rule 17(3) which in the case of a usual summons requires the registrar's signature; that the citation is the equivalent of a summons; and the fact that the Court communicates with litigants through the registrar, one would at least have expected an application for condonation or leave to omit the requirement of the registrar's signature for whatever reason. There is no such relief sought in the application for leave to sue by edict. It would appear that the failure to provide for the registrar's signature was simply overlooked by the Court.

<u>The delay in launching the condonation application</u>

[47] It is trite that an application for condonation should be made as soon as the defaulting party becomes aware of the non-compliance. This is part of the requirement of showing good cause for condonation as is required by rule 27.

[48] From the affidavit filed by the registrar it is abundantly clear that the applicant's legal representative knew since October 2007 what the registrar's objections were concerning the matters under discussion. It is common cause that these objections were concerned with the non-compliance with rules 4(5), 7 and 17. These same objections were subsequently repeatedly pointed out to and debated with him. Yet no application for condonation was launched until after the matter was called before Tomassi, J.

[49] Mr Böttger's explanation is to the effect that because he and Mr Hohne had agreed some time after receipt of the registrar's memorandum of 14 July 2008 not to take the matter any further but to set the matter down for hearing, he then trusted that the matter had been addressed and would not cause any difficulties further. He further states in paragraph 10 of the founding affidavit:

> '10. On the first day of the hearing of this matter the presiding judge, Mrs Justice Tomassi, informed the parties that the non-compliance with the rules as set out *supra,* should be addressed before the matter is to proceed, hence this application. I had however trusted that the matter had been attended to and was no longer a concern as aforesaid. Nevertheless, the parties then agreed that the matter be postponed sine die.'

[50] Without at this stage taking into consideration Mr Hohne's denials regarding the alleged agreement, I fail to see on what basis Mr Böttger could have thought that the matter had been attended to and would not create further difficulty. In the last paragraph of the registrar's memorandum it was plainly spelled out that the trial judge would be dealing with the irregularities.

[51] Moreover, rule 27 which deals with extension of time, removal of bar and condonation for non–compliance with the rules clearly provides for the exclusion of the Court's discretion by agreement between the parties only in cases where there has been non-compliance with time limits (see rule 27(1)). As far as other non-compliance is concerned, an agreement between the parties does not have this effect. Although the attitude towards the non-compliance by the party affected thereby is usually relevant, it certainly does not bind the court, and with good reason. The applicant's lawyer, being acutely aware of the registrar's objections to the applicant's non-compliance which had not been resolved, must have realised that the presiding judge might very well require an application for condonation.

[52] Lastly, there is no explanation whatsoever why no condonation application was launched during the period from 7 October 2007 to the date of the registrar's memorandum.

The applicant's explanation for non-compliance

[53] Mr Böttger states in his affidavit that he forwarded the edictal citation to the registrar 'in terms of rule 17'. If this is accepted it can only mean that he intended the registrar to sign it. Yet he did not make provision for the registrar to sign the citation. The citation is directed at the respondent to take notice that the applicant has obtained leave to sue her by edictal citation and further *inter alia* states that the applicant 'hereby institutes action against you by way of edictal citation, in which action the Applicant claims the relief on the grounds set out in the Intendit annexed hereto.' After further explaining what is expected of the respondent as is usually done in a summons dating the citation, Mr Böttger made provision for himself to sign the citation as legal practitioner for the applicant and indeed signed the citation. Below his signature as is customary in all documents filed with the registrar, the words 'TO: THE REGISTRAR OF THE HIGH COURT WINDHOEK' appear.

[54] He does not attach a copy of any covering letter which accompanied the documents he allegedly forwarded to the registrar to indicate what his request to the registrar was. In the absence of evidence that he requested the registrar to sign the citation and without providing in the document any place for the registrar to sign as is done in the case of a summons or combined summons it is not surprising that it was indeed not signed. I do not think in the circumstances this affords evidence of any oversight by the registrar.

[55] Later in his affidavit Mr Böttger states that he had forwarded the citation to the registrar 'for issuing'. He does not state how the registrar should have issued the citation if no provision was made for the registrar to sign the citation. He also does not explain why he made no provision for the registrar to sign nor does he state that an error was made when he drew the citation.

[56] From his letter to the Judge-President I in fact have the distinct impression that he did not forward the citation to the registrar to be signed and issued. I say this because by then he well knew what the registrar's objections were and that the main objection related to the fact that he never signed and issued the citation. Yet Mr Böttger does not mention anything about this in the letter. He mentions that the order was granted on 25 September and that the granted edict and intendit were served on the respondent. In the following paragraph he states that 'at this stage' the application number initially allocated to the matter was used on 'all subsequent pleadings filed.' He then states: 'With the benefit of hindsight, I submit that it is at this stage where the clerks at the office of the registrar ought to have issued an appropriate case number used for action proceedings.' From this I understand that he later realized that an action number should have been allocated to the matter after the citation and intendit had been served. It may also be that he meant to convey that the action number should have been allocated at some earlier time. However, it is clear from his explanation that the citation was not forwarded to the

registrar's office for the purpose of the clerks issuing an action number, hence the reference to hindsight.

[57] From the rest of Mr Böttger's letter it remains clear that he attempted to resolve the matter on the basis that the registrar's objection is a mere technicality which could be resolved by the 'conversion' of the application number into an action number. This does not align well with the explanation offered in the founding affidavit that there was non-compliance with rule 17(3) because the registrar failed to sign the citation.

[58] During argument counsel for the applicant suggested that, because of the alleged agreement between Mr Böttger and Mr Hohne, the fact that the citation was not signed was 'a non-issue' and therefore there was no reference to this fact in the letter. However, as I understand the founding affidavit, Mr Böttger only contacted Mr Hohne about the 'oversights' he discovered after he received the memorandum dated 14 July 2008 from the registrar. By then the letter had already been written. The letter was also not copied to Mr Hohne.

[59] Since October 2007 the registrar also complained that there was non-compliance with rule 4(5)(a) and (b). I agree with the applicant's submission that sub-rule (5)(a) is irrelevant because the official language in the United States of America is English. However, in regard to the N$50 revenue stamp Mr Böttger states in his affidavit that he found that this stamp had inadvertently been placed on the power of attorney instead of on the edictal citation as required by sub-rule (5)(b). The problem with this explanation is that the particular power of attorney was only signed on 5 June 2008 and therefore could not have been on the file when the application for leave to sue was moved or when the citation was allegedly forwarded to the registrar for signing.

[60] I have noted that this power of attorney states that it is given 'insofar as I need to do so for formal requirements having already authorized most of the undermentioned in a Power of Attorney dated the 6th of September 2006'. The original power of attorney dated 6 September 2006 is not on the court file. Instead there is a document which appears to be a 'file copy' of a document which would normally be held on the files of the applicant's lawyers. This seems to bear out the registrar's complaint that there was no power of attorney on the file when the application for leave was moved or at least at about 7 October 2007.

[61] I do not know whether Mr Böttger means to convey that he attempted to rectify the problem by filing the power of attorney dated 5 June 2008 and also whether there was a subsequent attempt to put right the complaint of the N$50 which was then inadvertently fixed on the second power of attorney. He does not say anything about whether he forwarded any document bearing a N$50 stamp during November 2006. I regret to say that I do not know quite what to make of the explanation. It is not for the Court to search high and low for pieces of the puzzle and to embark on conjecture in an attempt to find a reason to grant what is an indulgence.

[62] To sum up, the various explanations raise more questions than they provide answers. The combined effect of the delay in launching this application, the unsatisfactory explanation for this delay and the unsatisfactory explanation for the non-compliance with the rules is such that I am satisfied that the application for condonation should be dismissed on these grounds alone.

Costs and the question whether the respondent should have brought a rule 30 application

[63] The applicant submitted that the respondent waived her right to oppose the application for condonation because she did not bring a rule 30 application when the irregularities became known to her. I deal with this aspect only because it may have

a bearing on costs. It was contended on behalf of the applicant that the court should not make an order for costs against the applicant because the respondent had waived her right to object.

[64] It was further submitted, at least in the applicant's heads of argument, that it is common cause that the respondent proceeded to take further steps in the proceedings by filing a plea and counterclaim while being aware of the irregularities. This is not correct. These pleadings had already been filed during 2007 about a year before Mr Hohne first became aware of the irregularities at some time after 14 July 2008, the date of the registrar's memorandum. In this context Mr Hohne's statements that the respondent filed a plea and counterclaim 'only' to avoid judgment by default from being taken against her cannot be accepted. It is so, though, that on 20 August 2008 the respondent filed a notice of intention to amend her plea by introducing special pleas of *res judicata* and *lis pendens* and actually filed the amended plea on 6 October 2008. These steps would constitute further steps in the proceedings at a time when there probably was knowledge of the irregularities.

[65] Mr Hohne denies in his affidavit that when Mr Böttger discussed the issues with him he agreed not to take the matter any further. He does not state exactly when the discussion took place. He states:

> '13.4 I at the time conveyed to Mr Böttger that, since the Court has *mero motu* raised the issue we would not take the point if the Judge President was of the opinion and satisfied that the Rules of Court were complied with as I was made to understand from Mr Böttger which turned out not to be the case.'

[66] This explanation is not clear. As I understand it, the discussion took place sometime after 14 July 2008, although neither Mr Böttger nor Mr Hohne states exactly when it took place. The impression is conveyed by Mr Böttger that it occurred shortly after the memorandum was received and he had discovered the

'oversights'. By then the Court had not *mero motu* raised the issue. This only happened at the hearing before Tomassi J in May 2009. However, what is clear is that, by the time Mr Hohne became aware of the irregularities, the matter had already been enrolled and set down on the divorce floating roll at Mr Böttger's insistence and with the approval of the Judge-President. The registrar's memorandum also conveys that the presiding judge would be dealing with the irregularities. In this sense one can understand that the presiding judge would '*mero motu* be raising the issue'. It seems to me that the explanation is clumsily worded, which is unfortunate. However, read with the further contents of Mr Hohne's affidavit, I am satisfied that there was no express waiver of the respondent's right to oppose the application.

[67] Bearing in mind that the respondent only became aware at a very late stage of the irregularities at a stage when the matter had already been set down for trial and with the declared purpose of dealing with those irregularities I am of the view that, in the peculiar circumstances of this case, the fact that the respondent did not bring a rule 30 application, should not be considered to be a bar to opposition of the application for condonation or a reason to mulct her in costs.

[68] The result is then as follows:

1. The applicant's application to strike is granted with costs.

2. The respondent's application to strike is refused with costs.

3. The applicant's application for condonation is refused with costs.

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_____(signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the applicant/applicant: Adv C van der Westhuizen

Instr. by LorentzAngula Inc

For the respondent/respondent: Adv C J Mouton

Instr. by Hohne & Co Legal Practitioners