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REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 351/2013

In the matter between:

1.1.1.1.

**R A H
APPLICANT**

and

N S

RESPONDENT

Höfelein v Sharma (A 351/2013) [2014] NAHCMD 63 (21 February 2014)

Coram: Smuts, J

Heard: 5 February 2014

Delivered: 21 February 2014

Flynote: Application seeking a variation of a final order of divorce and

declaring the respondent in contempt. Final order granted on 7 April 2011. Application launched in October 2013 and served on the legal practitioners who represented the respondent in the divorce proceeding. In the absence of written authority to accept service, this form of service is ineffective as the application is not covered by rule 4(1)(b). Application struck from the roll.

ORDER

(b)

This application is struck from the roll with no order as to costs.

JUDGMENT

Smuts, J

(c) The issues raised for determination in this application are whether there had been proper and valid service of the application upon the respondent and whether this court has jurisdiction to hear the application.

(d) These issues arise in the following way. The applicant resides in Namibia. The respondent currently resides in Germany. The applicant referred to their final order of divorce handed down by this court on 8 April 2011, with reasons handed down for the order on 21 April 2011. The parties initially appealed against the order and judgment but the appeal has long since lapsed.

(e) The final order of divorce granted by this court on 8 April 2011 included orders relating to the control and custody of the minor child adopted by the parties. The order granted the respondent control and custody of the minor child and granted her leave to relocate to India with the minor child. The applicant's access to the minor child is set out in some detail in an arrangement contained in the final order of the divorce. It concluded as follows:

'The aforesaid arrangement in respect of the defendant's right of access is to be

maintained up and until the end of the winter holiday during 2012. During the winter holiday an evaluation by Mr Annandale, alternatively a clinical psychologist, appointed by the Registrar of the Honourable Court should be conducted in Namibia during the winter school holiday as to whether these access arrangements should continue in future or whether different arrangement(s) for access should be made. If necessary and if so requested by the expert both parties are ordered and directed to make themselves available for evaluation at their own costs. The costs of the evaluation are to be borne by the parties in equal shares. Any amendment to access rights shall only become enforceable once an order of this court is obtained.'

(f)

(g) The applicant launched this application in October 2013 for an order seeking to confirm and make permanent the interim access rights which were granted to the applicant in the final order of divorce. The applicant also seeks an order amending the court order so that the reference to India be removed and be replaced by the minor child's place of residence. The applicant also seeks an order declaring that the respondent has acted in contempt of the court order relating to the applicant's access to the minor child.

(h) The application was served upon the firm of legal practitioners which had represented the respondent in the divorce proceedings, namely AngulaColeman Attorneys. It was not even served by way of Deputy-Sheriff but merely at the service address of that firm at the Law Society.

(i)

(j) When the matter came before me in case management on 11 December 2013, I enquired from Mr Marcus, representing the applicant, whether there had been proper service upon the respondent and also whether this court has jurisdiction to hear the matter, by reason of the fact that the respondent and the minor child are currently in Germany. The former enquiry was made by virtue of a letter which had been sent by Ms Angula of AngulaColeman to Mr Marcus' office and copied to the court. It is dated 15 October 2013. After referring to the service of the notice of motion upon the service address of her firm, it stated:

'Whilst we did act on behalf of Ms Sharma in the preceding court cases, we do not have authority or instruction from Ms Sharma to accept service on her behalf. In that regard, we propose that you serve same on her to her address in

Germany.'

(k) Ms Angula was present in court on 11 December 2013 but did not appear when the matter was called. She confirmed that the papers had not been served upon her client when I enquired from her as to her presence in court. She also indicated that she held the view that the court furthermore in any event did not have jurisdiction to hear the application.

(l)

(m) I then postponed the matter to hear argument on these questions to 5 February 2014.

(n) In advance of the date of hearing, Mr Marcus provided detailed heads of argument on these questions and Ms Angula provided a note dealing with both service and jurisdiction. I am grateful to them for their industry.

(o) Both counsel dealt in some detail with the question of jurisdiction. Mr Marcus relied heavily upon a recent well reasoned judgment of Savage AJ in *Corr v Corr*.¹ Ms Angula sought to distinguish that matter. They both initially addressed the question of jurisdiction. I however intend to first deal with the question of service.

(p) Rule 4 of the rules this court requires how service which initiates proceedings should be effected. The primary means of service is by the Deputy-Sheriff, although rule 4(1)(b) provides:

'Where the person to be served with any document initiating application proceedings is already represented by an attorney or record, such documents may be served upon such attorney by the party initiating proceeding.'

(q) This sub-rule contemplates pending proceedings such as interlocutory applications which are ancillary to the original proceedings. Ms Angula pointed out that these proceedings are not interlocutory or ancillary to original proceedings. She submitted that the final order of divorce of 7 April 2011, followed with reasons, constituted a final judgment and order and pointed out

¹Unreported Western Cape High Court case number 2822/2012 delivered on 19 March 2013.

that it was appealed against by the parties in 2011.

(r)

(s) Ms Angula contended that this application, whilst linked to the previous proceedings, raises new issues not addressed in the previous proceedings.

(t) Mr Marcus correctly agreed that rule 4(1)(b) applies to proceedings already instituted such as interlocutory applications and proceedings ancillary to the original proceedings. But he contends that the firm of AngulaColeman Attorneys continues to represent the respondent in respect of the liquidation of the joint estate and that service of this application upon that firm sufficed.

(u) Mr Marcus also contended that the proceedings are ancillary and are incidental to the original proceedings by seeking to address the respondent's non compliance with the access order and to finalise access arrangements. An interlocutory order is thus described in the latest edition of Herbstein and Van Winsen:²

'An interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties.'

(v) Even though this application seeks to address the arrangement set out in the final order of divorce which was to continue until the winter holiday of 2012, this application, even though related to previous proceedings and the previous order, is a fresh substantive application and not interlocutory in substance and affect and thus not covered by rule 4(1)(b). It was in my view incumbent upon the applicant to serve these papers upon the respondent and initiate them in accordance with the rules of this court. It would follow that the application is to be struck from the roll.

(w)

(x) In view of the conclusion I have reached concerning service, it is not necessary for me to enter into debate as to whether this court has jurisdiction to

²*Cilliers Loots Nel Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* (5th ed) vol 2 at 1204.

grant the relief sought. I accordingly decline to do so. As Ms Angula has indicated that she does not have instructions from her client in relation to this application, I decline to make any order as to costs.

(y) The order I make is:

This application is struck from the roll with no order as to costs.

D SMUTS

Judge

APPEARANCES

APPLICANT:

N Marcus

Instructed by Nixon Marcus Public Law
Office

RESPONDENT:

E Angula

Instructed by AngulaColeman