



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
EXERCISING ITS ADMIRALTY JURISDICTION
JUDGMENT

CASE NO.: AC 72/2016

In the matter between:

ELGIN BROWN & HAMER NAMIBIA (PTY) LTD

APPLICANT

And

HYDRODIVE OFFSHORE INTERNATIONAL LIMITED

RESPONDENT

Neutral citation: *Elgin Brown & Hamer Namibia (Pty) Ltd v Hydrodive Offshore International Limited (A 72/2016)* [2017] NAHCMD 175 (26 June 2017)

Coram: NDAUENDAPO J

Heard: 6 February 2017

Delivered: 26 June 2017

Flynote: Admiralty – Application for condonation for manner of service of the application – Application for the defendant to be declared a co-defendant in the action *in personam* – Manner of service of the application a flagrant disregard for a court order and court rule – Application for condonation is unsuccessful and the application is struck from the roll.

Summary: The applicant seeks an order condoning the manner of service of this application on the respondent by it. The applicant was the plaintiff in the action *in rem*

against the MV “Challenger Marine”. An order for the judicial sale of the vessel was granted by this court and the proceeds thereof were used to pay for the preservation costs. The claim of the applicant thus remained unsatisfied. In the action in rem, the respondent had entered appearance to defend. The applicant now seeks an order declaring the respondent a co-defendant *in personam* in the action *in rem*. The applicant therefore applied to this court for an order to serve the respondent with this application by edictal citation in terms of Rule 11(1)(a) in Nigeria. This application was granted, however, the applicant failed to effect service in terms of that court order and Rule 11(1)(a).

Held; That there is no satisfactory explanation, none at least to the satisfaction of this court for the non-compliance with the court order allowing the applicant to serve the respondent by edictal citation.

Held; Further, that condonation for non-compliance with court rules is refused and the application is struck from the roll for lack of service as provided by Rule 11(1)(a).

ORDER

In the result,

1. The application to condone the manner of service of this application on the respondent is unsuccessful and the application is struck from the roll with costs. Costs shall be for one instructed and one instructing counsel.

REASONS

NDAUENDAPO, J:

Introduction

[1] This is an application in terms whereof the applicant seeks an order condoning the manner of service of the application on the respondent as well as an order declaring the respondent to be liable *in personam* and to be declared a co-defendant in the proceedings *in rem*. The applicant is represented by Mr. Wragge SC and the respondent is represented by Mr. Frank SC.

[2] The applicant is Elgin Brown & Hamar Namibia (Pty) Ltd, a company with limited liability, duly incorporated in accordance with Namibian law, carrying on business as a ship repairer at c/o 2nd East Street and Hanna Mupetani Road, Synchro Lift, Industrial Area, Walvis Bay, Namibia. The respondent is Hydrodive Offshore International Ltd, a company duly incorporated in accordance with the laws of the British Virgin Islands, carrying on business as a supplier of services in the offshore oil industry, with its principal place of business now in dispute.

Factual background

[3] In 2011, the applicant instituted action proceedings *in rem* against MV 'Marine Challenger' (hereafter, the vessel). In terms of this action, the applicant then the plaintiff, sued the vessel US\$ 4 461 091.52. This US\$ 4 461 091.52 was the sum of the expenses incurred by the applicant for repairs that it effected on the vessel. When the applicant instituted the proceedings *in rem*, it instituted the action only against the vessel and not the owners of the vessel and all others interested in her. In the year 2011, the applicant entered appearance to defend this action *in rem* and duly delivered a declaration. On 14 December 2012, this court exercising its admiralty jurisdiction as governed by the Colonial Courts of Admiralty Act, 1890, granted an order for the judicial sale of the vessel. The proceeds of the sale of the vessel were N\$ 1 000 000.00 and were used to pay the admiralty marshal's preservation costs. Undeniably, this amount was not nearly enough to satisfy the claim of the applicant. On 18 July 2014, the matter was then enrolled for trial before Mr. Justice Geier, to commence on 2 February 2015. On 2 December 2014, the respondent's legal practitioners delivered a notice of withdrawal at the applicant's Windhoek legal practitioners. On 2 February 2015, Mr. Justice Geier granted a default judgment against the vessel.

[4] The applicant alleges that the respondent became impleaded in the action by entering an appearance to defend. It is argued that from the moment a party enters appearance to defend, the matter proceeds against that party not only as an action *in rem*, but also as an action *in personam* against that party. As a result, it is alleged that the respondent is personally liable and the judgment may be enforced against the respondent. It is on this basis that the applicant now seeks an order declaring the respondent to be liable *in personam* for the applicant's claim. The applicant seeks this order on the basis that the respondent entered appearance to defend for the simple

reason that it was the beneficial owner of the vessel. The applicant's main argument is that they cannot proceed against the registered owner of the vessel as the registered owner was a one ship company, whose sole purpose was to be the owner of the vessel and since the vessel was sold, the registered owner is now a shell company with no assets. The failure to cite the respondent as a party in the proceedings *in rem* made it impossible for the applicant to enforce the default judgment on the respondent and it is for that reason that they now wish the respondent to be declared co-defendant.

[5] In terms of a court order dated 12 February 2016, this court on application by the applicant, granted the applicant leave to serve the respondent with this application by way of edictal citation in terms of Rule 11(1)(a) of the Rules of the High Court (hereafter, the High Court Rules) at the respondent's principal place of business at 17 Wharf Road, Apapa, Lagos, Nigeria.

[6] In terms of the return of service filed of record, a certain Mr. Martins Inyang, a barrister and solicitor in Nigeria served the application (the notice of motion and accompanying documents) in terms of Rule 8(3)(a) of the High Court Rules. It appears from the return of service that service was effected on the respondent 'by leaving a copy of the process at the premises of the respondent'. It further appears that the process was served by leaving it at such premises after explaining same to a certain Mr. Tochi Mwogu, 'a responsible employee of the respondent'.

[7] It is glaringly apparent from the return of service that service was effected in terms of Rule 8 and not Rule 11 of the High Court Rules as directed by the court order of 12 February 2016. Furthermore, the address where service was effected was not specifically indicated in the return of service and Rule 11(1) (a) was not complied with insofar as it deals with the persons authorised to effect service in terms of this Rule. Furthermore, In an affidavit, Mr. Tochi Mwogu, explains that he is an employee of Hydrodive Nigeria Ltd and not the respondent.

[8] Somehow the respondent became aware of this application and entered appearance to oppose on grounds that service was not proper and that the application should be dismissed and if the court is not so inclined, than the application should be dismissed as it is not the owner of the vessel and thus cannot be declared a co-defendant.

Facts in dispute

[9] Three major disputes of fact are apparent in this application. The first is that, the applicant avers that the respondent's principal place of business is 17 Wharf Road, Apapa, Lagos, Nigeria, whereas the respondent insists that its principal place of business is in the British Virgin Islands. The second is that the applicant avers that the contract pursuant to which work was effected on the vessel was concluded by Messrs Sperling and Walle on behalf of the respondent, the owner of the vessel, whereas the respondent avers that it concluded the contract with the applicant not as owner of the vessel, but as agent of the owner of the vessel. Furthermore, the applicant avers that the respondent was the beneficial owner of the vessel and the registered owner was Challenger Marine Ltd. The respondent counters this averment by stating that it was merely the manager of the vessel and not its beneficial owner.

Issues

[10] The two primary issues which need to be determined in this matter are:

- a) Whether the manner of service of the application on the respondent by the applicant may be condoned?
- b) Whether the respondent may be declared co-defendant in the proceedings *in rem*?

Arguments by counsel for the applicant

[11] The respondent had its principal place of business or at least a place of business at 17 Wharf Road, Apapa, Lagos, Nigeria. This address was given by the respondent's previous legal representatives in their notice of withdrawal as the respondent's last known address and the address is also reflected on the equasis website as the address of the respondent. Counsel further stated that in terms of Rule 44(6) and 44(8) of the Rules of the High Court, the respondent had the duty to, within ten days from the date its legal practitioners withdrew, inform the applicant of their new address, but failed to do so. Furthermore, that service of the process at 17 Wharf Road, Apapa, Lagos, Nigeria brought the application to the attention of the respondent and it thus entered an appearance to oppose through its Namibian legal representatives. The purpose of service was to bring the application to the attention of the respondent. It was therefore argued

that this is not a case of failure of service, but rather of defective service. It was further submitted that the applicant did not allege that it has been prejudiced by the manner in which service was effected. Service was not patently bad and there is therefore no reason why this court should not condone the applicant's failure to effect service in terms of Rule 11 of the Rules of the High court as directed by the court order.

Arguments by the counsel for the respondent

[12] Service of the process was effected in terms of Rule 8(3)(a) and not Rule 11(1)(a) of the Rules of the High Court. Service was not effected at the respondent's registered address or principal place of business. The documents were left at an address despite the fact that the person who attempted service was informed that the respondent had no registered office or branch office in Nigeria. Further, the return of service indicates that service was effected on the respondent at its offices. The return of service however, does not specify the place of service. The respondent gave its address as being Isle Building, Road Town, Tortola, British Virgin Islands, to the applicant in its plea in the action in rem. However, the applicant forsook to effect service at that address. Service of the process was effected by a lawyer and not an official in terms of Rule 11(1)(a). The company where service was effected was Hydrodive Nigeria Ltd and not the respondent. It is for the above reasons that it was argued that this is not a case of defective service, but rather one of no service. The respondent further argued that in light of the manner in which the return of service was phrased, it had three options, namely; firstly to ignore the service- which would have resulted in a judgment against it; secondly, to acquiesce in the bad service and simply enter its notice of opposition or thirdly, to deal with the matter as one where there was no service at all. The respondent opted for the third option.

[13] Before this court makes a determination whether or not to declare the respondent as co-defendant, it must necessarily first determine whether service was good in law or not.

Issues Analysed

Whether this is a case of no service or defective service?

[14] In terms of Rule 11(1)(a) of the High Court Rules, 'Service of process or any document in a foreign country must be effected (a) where there is no law in that country prohibiting such service or the authorities of that country have not interposed any objection to such service by (i) the head of any Namibian diplomatic or consular mission in that foreign country

authorised to serve such process or document; (ii) any foreign diplomatic or consular officer of the foreign country to Namibia who attends to the service of process or documents on behalf of Namibia in that foreign country; (iii) an official signing as or on behalf of the head of the department dealing with the administration of justice in that foreign country and is authorised under the law of that country to serve process or document. . . ‘

[15] Rule 56 of the High court rules provides that: ‘(1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including (a) whether the application for relief has been made promptly; (b) whether the failure to comply is intentional; (c) whether there is sufficient explanation for the failure; (d) the extent to which the party in default has complied with other rules, practice directions or court orders; (e) whether the failure to comply is caused by the party or by his or her legal practitioner; (f) whether the trial date or the likely trial date can still be met if relief is granted; (g) the effect which the failure to comply has or is likely to have on each party; and (h) the effect which the granting of relief would have on each party and the interests of the administration of justice. (2) An application for relief must be supported by evidence.

The managing judge may, on good cause shown, condone a non-compliance with these rules, practice direction or court order.’

[16] In terms of Rule 44(6) of the Rules of the High Court, ‘where a legal practitioner acting in any proceedings for a party ceases so to act he or she must without delay deliver notice of his or her ceasing to act as legal practitioner to that party, the registrar and all other parties’.

[17] And in terms of Rule 44(8) of the Rules of the High Court, ‘a party that was formerly represented must, within 10 days after the notice referred to in subrule (6) has been served on him or her, notify all other parties of a new address for service referred to in subrules (3) or (4) and, unless the court otherwise directs, any of the other parties may before receipt of the notice of his or her new address for service of documents serve any documents on that party at that party’s last known or given address’.

[18] In *Knouwds N.O v Nicolaas Cornelius Josea and Another*,¹ it was reasoned that where there is a complete failure of service, ‘(it) matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding which has taken place without service is a nullity and it is not competent for a court to condone it.’

¹ *Knouwds N.O v Nicolaas Cornelius Josea and Another* Case No.: (P) A 227/ 2005.

[19] In the present case, the applicant alleges that service of process was effected at the respondent's last known address as provided for in the respondent's previous legal representative's letter of withdrawal. The applicant has good reason to take this stance as the respondent was duty bound to inform the applicant of its new address after it received the notice of withdrawal from its previous legal representatives, but failed to do so. The respondent alleges that the applicant knew that its principal place of business was in the British Virgin Island and not Nigeria, as that was provided for in its plea in the action in rem. Regarding its failure to inform the applicant of its new address in terms of Rule 44(8), the respondent is silent. In the circumstances, this court is satisfied that the applicant cannot be faulted for effecting service at 17 Wharf Road, Apapa, Lagos, Nigeria and accepting this to be the respondent's principal place of business.

[20] The above conclusion by the court does not necessarily mean that this court accepts that this service was good in law. To make this determination, this court has to consider whether service was rule compliant and particularly whether service complied with the court order which granted leave to effect service by edictal citation.

[21] In *Arendsnies Sweefspoor CC v Dalia Marcelle Botha*² the South African Supreme Court of Appeal reasoned that 'effectiveness of the service of a court process or substantial compliance should trump the form'.³ Furthermore that 'the courts have a discretion, which must be exercised judiciously on a consideration of the facts of each case, in essence, it is a matter of fairness to both parties . . . Rules of court are delegated legislation, having statutory force and are binding on the court, subject to the court's power to prevent abuse of its process. . . and these rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice.'⁴

[22] The reasoning in *Arendsnies Sweefspoor CC* above is certainly persuasive authority for the view that substance should trump the form and that litigation should be completed in an inexpensive and expeditious manner. However, each case must be decided on its own facts and a rubber stamp approach should be avoided. In the present case, the return of service did not stipulate specifically the address where service was effected and service was not effected by an official authorised in terms of Rule 11. The Rule in terms of

² *Arendsnies Sweefspoor CC v Dalia Marcelle Botha* (471/12) [2013] ZASCA 86 (31 May 2013).

³ *Arendsnies Sweefspoor CC v Dalia Marcelle Botha* para 14.

⁴ *Arendsnies Sweefspoor CC v Dalia Marcelle Botha* paras 18-19.

which service was to be effected was not complied with. In light of these issues, form cannot bow down to substance.

[23] Regarding the non-compliance with Rule 11, the applicant in its replying affidavit explained that it's Windhoek Attorneys Engling and Stritter, made contact with Mr Olukayode Dada of the law firm Udo Udoma & Belo-Osagie, lawyers in Nigeria and instructed same to effect service of the notice of motion and the court order on the respondent at its offices in Apapa, Nigeria. In terms of the letter of instruction (marked as "HWU 1") to the Nigerian attorney, the applicant's legal practitioner gave instructions that service be effected in terms of Rule 8(3)(a) and Rule 11 of the High court Rules. The legal practitioner further attached a template of what the return of service should look like. In this template, it is indicated that service was effected in terms of Rule 8(3)(a), on a responsible employee of the respondent who was over the age of 16 years and was in charge of the principal place of business of Hydrodive Offshore international (Pty) Ltd. This explanation is not tendered in the founding affidavit of the applicant, but only in the replying affidavit. The applicant alleges that Mr. Olukayode the Nigerian lawyer, attempted service at Hydrodive Nigeria Ltd and Dr. Nwogu, the general counsel of Hydrodive Nigeria Ltd informed him that the respondent did not have a registered office or a place of business in Nigeria, this explanation is not on the return of service. The applicant's legal practitioners instructed the Nigerian lawyer to leave a copy of the documents at the premises. The Nigerian lawyer by email notified the applicant's lawyers that he served the process on Hydrodive Offshore International (Pty) Ltd by leaving a copy at the premises at 17 Wharf Road, Apapa, Lagos.

[24] The manner in which service was effected in this case demonstrates flagrant disregard for the rules of this court and in particular the order of this court. The applicant's legal practitioner applied to this court to serve the application on the respondent by way of edictal citation at a specific address in Nigeria in terms of Rule 11(1)(a). The same legal practitioner instructed a lawyer in Nigeria to effect service of the application in terms of Rule 8(3)(a) and Rule 11. It is important to note that service in terms of Rule 8 only applies to service within the borders of Namibia, because the deputy sheriff does not have jurisdiction to serve beyond the borders of Namibia. Therefore, Rule 11(1)(a) was drafted for the sole purpose to govern the service of process outside Namibia and has empowered particular officials to effect service beyond the borders of Namibia. The instruction by the applicant's legal practitioner to the instructed counsel to serve the

application in terms of Rule 8 was a flagrant disregard of the order of this court, especially because even in the template of the return of service which was forwarded to the Nigerian lawyer, there is absolutely no reference to Rule 11(1)(a). As if this is not enough and perhaps due to the reliance on the wrong rule, service was not effected by an official referred to in Rule 11(1)(a). There is no explanation why the applicant's legal practitioner failed to effect service in terms of Rule 11(1)(a).

[25] In terms of Rule 12(5) of the High Court Rules, 'An order obtained in terms of these rules must be served in the manner set out in rule11.'

[26] There is no certificate in terms of Rule 11(6) of the High Court Rules indicating that the person who effected service of the application on the respondent was a person authorised to serve process.

[27] It is true, despite the inherent issue with the service of the application, the respondent entered appearance, but what else could it do? Ignore the service and have a judgment against it? Or accept the manner of service and proceed as if service was effected properly, perhaps it could, but it was not wrong to challenge the manner of service.

[28] The manner of service of the application demonstrates a flagrant disregard by the applicant's legal practitioner of a court order granted on their own application. In the absence of a good reason of which there is none at least to the satisfaction of this court, this court cannot sacrifice its allegiance to its Rules and own orders on the altar of expeditious finalisation of litigation. Surely, the flagrant disregard of a court order cannot be said to be in the interest of justice, why approach a court for an order if you will not obey it anyway? The administration of justice requires, not only the expeditious finalisation of litigation, but fairness to all parties involved and obedience to the court, its rules and its orders.

[29] Service was not only effected in terms of the wrong rule and in complete defiance to an order by this court, but it was effected by a lawyer who was not an official provided for by Rule 11(1)(a). In the absence of a satisfactory explanation, this court cannot accept that service was good in law. It is for the above reasons that this court concludes that there was no service and that these proceedings are null and void and even if this conclusion is wrong and it is accepted that there was service, albeit irregular, this court is

satisfied that the irregularities are so grave that it will not condone it. In light of the above, this court will not consider the second issue.

[30] In the result, the application to condone the manner of service of this application on the respondent is unsuccessful and the application is struck from the roll with costs. Costs shall be for one instructed and one instructing counsel.

GN NDAUENDAPO

JUDGE

APPEARANCE

FOR THE APPLICANT: M Wragge SC

Instructed by Engling, Stritter & Partners, Windhoek

FOR THE RESPONDENT: T Frank SC

Instructed by Ellis Shilengudwa Inc, Windhoek