



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING ON SPECIAL PLEA**

Case No: HC-MD-CIV-ACT-OTH-2017/01508

In the matter between:

<b>VERIKOUYE KAPUIRE</b>	<b>1<sup>ST</sup> PLAINTIFF</b>
<b>NAPOT KOTJIPATI</b>	<b>2<sup>ND</sup> PLAINTIFF</b>
<b>PETRUS LUKAS TILEINGE DUMENI</b>	<b>3<sup>RD</sup> PLAINTIFF</b>
<b>HERMAN DE KLERK</b>	<b>4<sup>TH</sup> PLAINTIFF</b>

and

<b>MINISTER OF SAFETY AND SECURITY</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>THE COMMISSIONER-GENERAL OF THE NAMIBIAN CORRECTIONAL SERVICES</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>SENIOR SUPERINTENDENT OF THE NAMIBIAN CORRECTIONAL SERVICE: SILAS MATHEWS</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**Neutral citation:** *Kapuire v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2017-01508) [2017] NAHCMD 297 (18 October 2017)

**CORAM:** MASUKU J  
**Heard:** 12 September 2017  
**Delivered:** 18 October 2017

**Flynote:** Practice – Rules Of Court – Service of process initiating action proceedings - Rule 8 (1), 8 (3) (e) and 8 (6) considered – Whether non-compliance with Rule 8 (1) is fatal and whether the court may condone non-compliance – Considerations to be taken into account in deciding to condone con-compliance.

**Summary:** The plaintiffs, who are in-mates at the Windhoek Correctional Facility sued the defendants for damages allegedly resulting from torture allegedly perpetrated on them by members of staff of the said Correctional facility. The plaintiffs, in serving the combined summons, did not employ the services of the deputy-sheriff, but effected service of same on the Government Attorney. The defendants cried foul, claiming that the service was not in compliance with Rule 8 (1) which requires service of process initiating action proceedings to be served by the deputy sheriff. They raised a special plea for the court to set aside the service as irregular and the non-compliance fatal.

*Held* – that it is important to consider and distinguish between irregular service and non-service. It was found that in the instant case, although the service was not rule compliant, it did however, serve to bring the action against the defendants to their attention, which after all, is the whole purpose of service of process.

*Held further* – that the service on the defendants was upon their legal practitioners, who knew what the matter was about and that there was no prejudice that was suffered by the defendants as a result of the service on their legal practitioners. They were in any event able to defend the matter and also to file their defence by raising a special plea and also filed a plea on the merits.

*Held further* – that the plaintiffs' position as persons who are unlettered in law who, more importantly, are in custody, must be favourably considered in that they do not enjoy the freedom of movement to have been able to fully comply

with the rule, considering that in effect the proceedings did come to the defendants' notice and they defended the matter.

*Held* – that the plaintiffs' reliance on service in terms of Rule 8 (6) is misplaced as it applies to applications and interlocutory matters in respect of which service is effected on the other party's legal practitioner of record, who is already seized with the matter.

*Held further* – considering the relative success of the plaintiffs and the plaintiffs' non-compliance as pointed out earlier, it was appropriate not to make an order for costs in the matter.

The special plea was accordingly dismissed and the matter was ordered to proceed to the stage of judicial case management.

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### ORDER

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1. The defendants' special plea of improper service of the combined summons on the defendants is dismissed.
2. The plaintiffs' defective service of the combined summons on the defendants is hereby condoned.
3. There is no order as to costs.
4. The matter is postponed to **15 November 2017** at **15:15** hours for a case management hearing conference.

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### RULING

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**MASUKU J:**

Introduction

[1] Presently serving before court is a special plea filed by the defendants relating to the propriety of service of a combined summons on the defendants

by and at the instance of the plaintiffs. The special plea arises in the circumstances described below.

### Background

[2] The plaintiffs are Namibian male adults, who are presently detained at the Windhoek Correctional Facility. They sued the above-named defendants for damages for payment of an amount of N\$ 500 000 in respect of the first claim and N\$ 1 000 000 in respect of the second claim. It is alleged by the plaintiffs that they suffered damages as a result of being tortured by members of the Namibian Correctional Service Staff, in pursuance of orders issued by the 3<sup>rd</sup> defendant. The names of the officers who allegedly tortured the plaintiffs are unknown to them. It is unnecessary, for present purposes, to describe particulars of the alleged methods of torture employed.

[3] The defendants, as they were entitled to at law, filed a notice of intention to defend the claim and also filed a special plea in which they allege that the plaintiffs did not comply with the provisions of the rules of court, relating to service of the combined summons on them. Furthermore, the defendants also filed a plea on the merits, in which they denied liability for the plaintiffs' claim.

[4] It is the sustainability of the special plea that will be considered and determined in this ruling.

### The special plea

[5] In their special plea, the defendants allege that the combined summons served on them were not served by or through the office of the Deputy Sheriff as required by this court's rules. This omission, they claim, is fatal as it does not comply with what are mandatory requirements of rule 8 (1). It is the correctness of the defendants' contention that shall be determined by the court in the ensuing paragraphs of this ruling.

Provisions of Rule 8 (1) and discussion thereof

[6] Rule 8 (1) provides the following:

‘Service of any process of the court directed to the deputy-sheriff and any documents initiating application or action proceedings must be effected by the sheriff in one or other of the ways set out in this rule.’

[7] Mr. Ncube, in his able argument, submitted strenuously that a reading of the above subrule suggests that the tone of the rule-maker is peremptory and that non-compliance therewith is therefor fatal. He argued that in the instant case, the plaintiffs did not utilise the services of the deputy sheriff to serve the combined summons, although the summons was served to initiate an action within the meaning of the subrule quoted above.

[8] For their part, the plaintiffs sought to find refuge in rule 8 (6) and argued that it was in terms of the provisions of the said rule that they effected service. The said rule provides the following:

‘Where a person to be served with any process or document initiating application proceedings is already represented by a legal practitioner of record in the matter to which the application is interlocutory or incidental, the process may be served by the party initiating the proceedings on the legal practitioner and if that legal practitioner is a registered user of e-justice, service must be effected by e-justice.’

[9] I must deal with the argument raised by the plaintiffs first and without further ceremony, if I may add. I intimated to them in argument that their reliance on this sub-rule is misplaced for the reason that a reading of the subrule shows clearly that it applies to applications. The instant proceeding, it cannot be doubted, is not an application but an action. Secondly, this subrule applies in application proceedings that are interlocutory or incidental to proceedings that had already been launched and served on the relevant parties and as a result of which a legal practitioner of record had entered his or her appearance. In this regard, it becomes unnecessary to serve the

papers on the litigant but rather on the legal practitioner of record, as the litigant to be served, would already have been represented in those proceedings.

[10] In the instant case, the proceedings are not only different in that they are action proceedings, but also because the combined summons in this case served to initiate new proceedings, namely, action proceedings, in which case there would ordinarily not be any legal practitioner on record, already representing the defendants. For that reason, service was to be effected in terms of the rule dealing with process, which serves to initiate fresh proceedings, namely, rule 8 (1). I accordingly find that in relying on this subrule, the plaintiffs are barking the wrong tree and nothing more needs to be said about their argument, based as it is, on the wrong subrule.

[11] Turning to rule 8 (1), it is important to comment on a few matters. The subrule, in my view, deals with two different scenarios. First, it deals with service of process directed to the deputy-sheriff and directs that same must be served by the sheriff. The second species, which applies in the instant case, falls into two further sub-categories. First, it refers to documents initiating application proceedings and secondly, documents initiating action proceedings. The commonality of the latter categories is that whether the process initiates action or application proceedings, it must be served by the sheriff in any one of the manners set out in subrule (2). (Emphasis added).

[12] What this boils down to is that Mr. Ncube is eminently correct that since the instant process served to initiate action proceedings, same had to be served by the sheriff or, if I may add, by his or her lawful deputy. To this extent, Mr. Ncube is on solid ground and the plaintiffs are contemporaneously on shaky ground, leading to a finding that the service they purported to effect is not in line with the provisions of rule 8 (1), which as I have previously indicated, is couched in peremptory terms, ordinarily suggesting that non-compliance therewith, may be fatal.

[13] In an anticipatory fashion, and appreciating the plaintiffs' relative disadvantage in that they are self-actors, who are furthermore unlettered in law, Mr. Ncube referred the court to a judgment of this court in *Nghlimbwasha & Another v The Minister of Justice & Others*<sup>1</sup> from which he quoted liberally.

[14] In that case, the applicants, who were awaiting trial in custody, moved an urgent application seeking specified relief that is not relevant for present purposes. In moving the said urgent application, they, however, quoted a wrong rule dealing with urgency and further failed to show, as required by rule 73, why their matter was urgent and why they claimed that they could not be afforded substantial redress at a hearing in due course.<sup>2</sup>

[15] In dealing with the need to bring uniformity and observance in the application of the rules of court, regardless of whether the litigant is represented by a legal practitioner or appears in person, the court expressed itself in the following terms, at paragraph 25 of the cyclostyled judgment and upon which Mr. Ncube harped in argument:

'In the instant case, it is clear that the allegations relating to urgency are procedural in nature and the need to be complied with by parties who seek to have the urgency procedures invoked. If it were otherwise, namely, that lay litigants do not have to comply with procedural requirements, then there would be chaos, inconsistency and confusion in the conduct of litigation. There would be two sets of rules in operation i.e. for those with lawyers and those without. '

[16] In this regard, Mr. Ncube urged the court to hold the plaintiffs, despite their disadvantage referred to earlier, to the same standards that apply to all other litigants when it comes to the service of court process initiating action proceedings. He argued that in the instant case, the defendants were not being pedantic by insisting on the application and full observance of the rule, but that the defendants were prejudiced by the manner of service resorted to

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<sup>1</sup>*Nghlimbwasha & Another v The Minister of Justice & Others* (A 38/2015) [2015] NAHCMD 67 (20 March 2016).

<sup>2</sup> Rule 73 (4) (a) and (b).

by the plaintiffs in that it affected their ability to timeously get the necessary instructions and information to mount their defence to the claim.

[17] I am not certain whether the circumstances in *Nghiimbwasha* are the same as the present ones. I say so because I entertain a doubt whether the matters in issue concern what the court referred to as procedural questions in *Nghiimbwasha*. I need not, however, detain myself or this judgment on this issue, as there are other major issues that seem to show the way paved with tarmac that leads to justice in this matter.

[18] The first question to ask is this: where did the plaintiffs serve the process albeit wrongly, in the sense that it was not served by the sheriff or the lawful deputy? An examination of the return of service shows that service was effected at the office of the Government-Attorney. Rule 8 (2) (e), which deals with service of process on the State and other government officials provides for service:

‘on the State, a minister, deputy minister or other official of the State in his or her official capacity by handing a copy to a responsible employee at the office of the Government Attorney or the relevant ministry or organ of the State respectively.’

[19] Whatever the plaintiffs’ non-compliance may be, what is obvious is that the process was served at the correct address, albeit served by the party who should not have done so on a strict reading of the relevant rule. The next question is whether this service should be treated as no service at all and have the plaintiffs start the process afresh?

[20] Mr. Ncube was unequivocal in his response. His submission was that this was no service at all. Furthermore, he contended, that some prejudice had been suffered by the defendants in that where there are allegations against charges of the Government, these should be investigated promptly in order to avoid unnecessary and costly litigation. He submitted that the delays incurred in the instant case were egregious and made investigation and



tracing some of the information required for the defence of the defendants extremely difficult.

[21] With everything said and done, can it be said that there was any damage or prejudice suffered by the defendants as a result of the service of the process at the proper office by the plaintiffs? I think not. I say so for the reason that the defendants filed their notice to defend and proceeded to file their special plea presently under consideration and further proceeded to file their respective pleas on the merits of the action. It cannot be said with a straight face and without any compunction, that the defendants have been prejudiced in this matter in a manner that has seriously affected their right to fully and properly defend themselves in this matter as a result of the service of the process by the plaintiffs.

[22] In *Witvlei Meat (Pty) Ltd & Others v Disciplinary Committee for Legal Practitioners & Others*<sup>3</sup> Smuts J, stated the following at paragraph 17 of his judgment:

'There was service on the Government Attorney in respect of a committee whose secretary is an employee of the Ministry of Justice. But any defect as far as that was concerned would in my view be cured by the entering of opposition by the Committee. The fundamental purpose of service after all is to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, that fundamental purpose has been met, particularly where that the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate the import.) (Emphasis added).

[23] The findings and conclusions of the learned Judge are in my view impeccable and resonate with my own thinking in this case. What is important to mention is that the learned Judge came to the conclusion he did in the *Witvlei* matter, having had the benefit of considering the case to which Mr.

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<sup>3</sup> *Witvlei Meat (Pty) Ltd & Others v Disciplinary Committee for Legal Practitioners & Others* Case No. A 212/2011 (HC).

Ncube referred, and also relied in argument, namely *Knouwds N.O. v Josea & Another*.<sup>4</sup> The learned Judge found that the circumstances of *Witvlei* were distinguishable from those in *Knouwds* and I agree.

[24] In the instant case, it is clear that the process, albeit not served by the correct party, in terms of the rules, was actually served on the defendants' legal practitioners and they became aware of the case their clients had to meet. Furthermore, as indicated, the defendants entered their notice to defend the action and proceeded to file their special plea, together with their plea on the merits. In this regard, the inference is inescapable that the defendants were aware of the case they were being called upon to meet and they did not suffer any prejudice resultant from the non-service of the process by the deputy sheriff that would require the service to be regarded as if it never happened.

[25] Mr. Ncube also referred the court to *Standard Bank of Namibia Ltd v Maletzky & Others*<sup>5</sup> for the proposition that it is a fundamental principle of fairness that litigants be given proper notice of legal proceedings against them. I do not, considering the entire conspectus of the attendant facts, doubt that the defendants' proper notice of the proceedings was in any way impaired so as to affect their constitutional right to defend the action against them.

[26] The Supreme Court in *Maletzky*<sup>6</sup> further held that a distinction should be made between irregular service and failure of service, although this may be question of degree. The court further stated that where the service is not in full compliance with the rules, the court may condone the service effected, albeit irregularly, in order to answer to the important principles of expeditious, cost-effective and fair administration of justice.<sup>7</sup> Lastly, the court also dealt with the issue of prejudice and held process served irregularly may be set

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<sup>4</sup> *Knouwds N.O. v Josea & Another* [2007] (2) NR 792 (HC).

<sup>5</sup> *Standard Bank of Namibia Ltd v Maletzky & Others* 2015 (3) NR 753 (SC).

<sup>6</sup> *Ibid* at para 22.

<sup>7</sup> *Ibid* at para 23.

aside if there has been demonstrable prejudice to the party served. If not, the court may condone the irregular service.<sup>8</sup>

[27] All the three principles mentioned in the immediately preceding paragraph, which emanate from the Supreme Court, it must be mentioned, were arrived at with that court having considered both *Knouwds* and *Witvlei*. The said principles are applicable to this case. On the first, I find that there was no failure of service altogether in this case. The last two are clear and they impel me to find that in the instant case, the irregular service may be condoned and the matter allowed to progress to the next stage of its case management life as there is no prejudice suffered by the defendants as already intimated.

[28] I should also mention that in the instant case, the plaintiffs are not citizens of the Republic, who presently enjoy freedom of spirit and bodily movement in particular, in full measure. They are incarcerated and it is a fact that deputy-sheriffs require a fee to be paid in order to serve process. Although the plaintiffs could and probably should have approached the court to seek directions in relation to their alleged impecunious state, or sought condonation for the irregular service, I cannot, in good conscience, close my eyes to their palpable plight and predicament, and treat them as people in the main stream of life who can do what they wish to do, whenever they wish to and who have the wherewithal immediately at their disposal to pay for what they need.

[29] I am accordingly of the considered view, given the entire matrix of this case, that the non-observance of the rule relating to service did not serve to work a substantial, if any, injustice on the defendants. This is a proper case, in my view, where the court, as stated in *Maletzky*, can, without necessarily creating a precedent, overlook the oversights and deficiencies of the plaintiffs and allow the service to stand, particularly as there was no prejudice suffered by the defendants as a result of the manner of service of the process. The defendants received the process in good order and were thus able to indicate

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<sup>8</sup> *Ibid* at para 24.

their intention to defend, followed by the special plea and the plea in which their defences to the claims were fully set out.

[30] It would be an exercise in sterile formalism, in the circumstances, to regard the service as *pro non scripto* (as if it never happened) and call upon the plaintiffs to serve the same process in the proper way. In this wise, the pleadings are already filed and closed; the discovery made and all the other case management steps that were ordered and complied with, would be a mere waste of time and money, not to mention the effort, on the part of all the parties. Such an approach would hardly be said to meet the overriding objectives of judicial case management set out in rule 1 (3), referred to in *Maletzky*, which are to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively.<sup>9</sup> The opposite, would in fact be the result.

[31] In the premises, I am of the considered view that the defendants' special plea cannot be allowed to stand in the circumstances. It must fail and I so order.

### Costs

[32] Mr. Ncube, moved the court, in case it found that the special plea ought to stand, not to mulct the defendants in an adverse order for costs. This was a fair and humane gesture on his part, appreciating as he did, the calamitous effect that a costs order may have had on the plaintiffs' right to continue prosecuting their claims as they, from present indications, are unable to pay the costs attendant to the defendants succeeding in their special plea. This may have resulted in the proceedings being stayed pending payment of the costs, to the detriment of the plaintiffs.

[33] By the same token, I am of the view that in view of the plaintiffs' non-compliance with the rules, which evoked the defendants' special plea, it would not be fair to mulct the defendants with an adverse order as to costs in the

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<sup>9</sup> *Ibid* at para 23.

peculiar circumstances of this case. I am accordingly of the considered view that it is fair not to make any order as to costs and I so order.

Order

[34] I accordingly issue the following order:

1. The defendants' special plea of improper service of the combined summons on the defendants is dismissed.
2. The plaintiffs' defective service of the combined summons on the defendants is hereby condoned.
3. There is no order as to costs.
4. The matter is postponed to **15 November 2017** at **15:15** hours for a case management conference hearing.

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TS MASUKU  
Judge

APPEARANCES:

PLAINTIFFS:

In Person

Of Windhoek Correctional Facility,  
Windhoek.

RESPONDENTS:

J Ncube  
Of Government Attorneys, Windhoek.