

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I 2508/2012

In the matter between:

STANDIC BV

APPLICANT

and

PETROHOLLAND HOLDING (PTY) LTD

1ST RESPONDENT

PETROHOLLAND OIL REFINING (PTY) LTD

2ND RESPONDENT

**RENE JOHANNES CHRISTIAAN WILHEMUS
KESSELS**

3RD RESPONDENT

Neutral Citation: *Standic BV v Petroholland (Pty) Ltd* (I 2508/2012) [2019]
NAHCMD 274 (02 August 2019)

CORAM: MASUKU J

Heard: 09 August 2018

Delivered: 02 August 2019

Flynote: Civil Procedure – dispute of facts – test to be applied – Plascon-Evans Rule – service of process – return of service– rule in terms of which service effected to be cited – manner of service to be cited - purpose of service – irregular service may be condoned.

Summary: Having obtained judgment against the above-named respondents in the District Court of Rotterdam, in Holland, on 22 February 2012, the

applicant has approached this court seeking to declare that judgment executable and enforceable in Namibia. The applicant approached this court by way of notice of motion, which was opposed by the respondent.

The respondent alleges that: he has not been served with the notice of motion; that this court does not have jurisdiction over him, and that the District Court of Rotterdam did not have jurisdiction over him.

Held: The test to be applied in determining disputes of fact is trite. It is the test set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.

Held that: It is important for the Deputy Sheriff, in the return of service, to state the exact subrule in terms of which service was allegedly effected.

Held further that: Although it is clear that the service effected was not personal, it is unclear what the nature of the service was. It is not clear what the relationship between the respondent and Ms. Muller, who was served was, nor is it apparent, what the relationship is between the place where service was effected and the respondent.

Held: That the onus is on the person on whose behalf the papers are served, to show to the court that the process in issue was served on the intended recipient and in a manner authorised by the rules of court.

Held that: It is once service has been effected in a manner authorised by the rules or in some other manner authorised by the court in its discretion and upon application, that a person to be served may be called upon to answer the question of service.

Held further that: In the instant case the respondent was not served with the application in any of the manners of service authorised by the rules.

Court accordingly striking the application from the court's roll with costs.

ORDER

1. The application is struck from the roll.
2. The Applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed counsel.
3. There is no order as to costs for the abortive hearings on 7 February 2017 and 22 May 2018, save that the Third Respondent is entitled to costs necessarily incurred as a result of it having to rectify the documents because of the state of the record.
4. The determination of wasted costs for the hearing scheduled for 15 August 2017, is to be placed before Usiku J.

JUDGMENT

MASUKU J:Introduction

[1] Having obtained judgment against the above-named respondents in the District Court of Rotterdam, in Holland, on 22 February 2012, the applicant has approached this court seeking to declare that judgment executable and enforceable in Namibia. The applicant approaches this court by way of notice of motion.

The parties

[2] The applicant in this matter, is Standic BV. It is described in the founding affidavit as a company, duly incorporated under the laws of the

Netherlands and its place of business situate at Wieldrechtseweg, 48, 3316 BG Dordrecht, The Netherlands.

[3] The first and second respondents are private companies incorporated in terms of the laws of Namibia and have their address of service situate at 21 Heliodoor Street, Erosark, Windhoek. The third respondent, Mr. Rene Johannes Christiaan Wilhemus Kessels, is described as an adult male businessman, employed by the first and second respondents as the chief executive officer of both entities.

Background

[4] The present judgment relates to the applicant and third respondent only. The matter as between the applicant and the first and second respondent served before my Brother Justice Uietele. I will, accordingly say nothing of that matter.

[5] As intimated in the opening paragraph of this judgment, the main issue that this court is called upon to determine is the sustainability of an application for the recognition and enforcement of a judgment issued by the Rotterdam Court in Holland against the third respondent. I will, for purposes of this judgment, refer to the third respondent as the 'respondent'.

[6] A reading of the papers filed of record in this matter, shows that the respondent opposes the notice of motion on a number of grounds. He alleges that:

- (a) he has not been served with the notice of motion,
- (b) this court does not have jurisdiction over him, and
- (c) the District Court of Rotterdam did not have jurisdiction over him.

[7] I intend to deal with the legal issues raised by the respondent in the sequence that they have been raised, depending on whether it will be necessary to deal with them all. If appropriate, it may be necessary to only deal with such ground of opposition that may be dispositive of the application, even if *pro ha vice*. I will, in this regard, commence with the question of service, which has been pertinently raised by the respondent.

Service

[8] It is common cause that the notice of motion and founding affidavit, together with the annexures to the founding affidavit, were served at 24 Orban Street, Windhoek by the Deputy Sheriff. It is further common cause that service was effected on 21 November 2012 on a certain Karin Muller, who according to the Deputy Sheriff's return of service, was apparently over 16 years of age and further apparently, in charge of the given address where service was effected.

[9] There is no dispute from the affidavits exchanged by the parties to the present matter that 24 Orban Street, Windhoek is the registered address for the first and second respondent. There is however, a dispute between the parties as to whether 24 Orban Street, Windhoek was an address at which the respondent could be properly served. The respondent holds the view that such address is not his address, as he is only a director of the first and second respondent.

[10] The applicant, for its part, on the other hand, holds a totally divergent view. It inclines to the view that the third respondent is the Chief Executive Officer of the first and second respondent and as a result, he may be properly served at the said address, allegedly being his place of employment, considering that it is the registered address of the first and second respondents as stated earlier.

[11] The court is therefore called upon to determine, in the first instance, whether the respondent is the Chief Executive Officer (the CEO) of the first and second respondent. If he is not, then it may well be that there has been no service on him of the notice of motion. If, on the other hand, he is the CEO as alleged, then the next question, to be determined, is whether there has been proper service of the notice of motion, in terms of the rules of this court on the respondent.

The dispute of fact

[12] In the founding affidavit the applicant deposes that the respondent is 'an adult businessman employed as chief executive officer of both first and second respondent'. The respondent in response thereto, denies that he is 'employed by the first and second respondent companies or that I was employed at the give addresses or any address in the Republic of Namibia'. Third respondent further deposes that he is 'only appointed as a director and of both first and second respondents'.

[13] The applicant, in its replying affidavit, responds to the denial by making reference to various correspondence authored by the respondent and directed to the applicant wherein he describes himself as 'Group Chairman, CEO' of the first and second respondent. The applicant, as a result holds the view that the denial by the third respondent is contrived and disingenuous. There is, as a result, a dispute of fact between the parties which is in need of resolution.

[14] The test for applied in determining disputes of fact is trite. It is the test set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹. This test has been applied generously in Namibia and is generally known as the Plascon- Evans rule. This Court in *Kauesa*² explained the said rule as follows;

¹ 1984(3) SA 623; applied in Namibia in *Bahlsen v Nederloff and Another* 2006(2) NR 416 (HC); *Grobbelaar and Another v Council of the Municipality of Walvis Bay* 1997 NR 259 (HC).

² *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC) at 108 G-J.

'The Plascon-Evans Rule postulates that in deciding disputes of fact in application proceedings, those disputes should be adjudicated on the basis of the facts averred in the founding affidavits which have been admitted by the respondent together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant unless a denial by the respondent is not such as to raise a real genuine *bona fide* dispute of fact or a statement in the respondent's affidavit is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers. This approach remains the same irrespective of the question which party bears the onus of proof in any particular case.'

[15] This test has recently received comment by Harms JA in the Court of Appeal of Botswana in *Kgori Capital (Pty) Ltd v The Director of Public Prosecutions and Another*³. The learned Judge of Appeal commented on the applicable test as follows:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. Where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be difficult if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[16] In applying the rule to the facts, the approach, I must adopt in determining the conflict of fact in the affidavits, is in relation to whether the respondent is employed by the first and second respondents and especially where there has been no resort to oral evidence by the parties, is that such conflict of fact should be resolved on the admitted facts and the facts deposed to by or on behalf of the third respondent. The facts set out in the respondent's papers are to be accepted unless I consider them to be so far-

³ CA Crim App No. CLCGB-033-19 (delivered on 26 July 2019), para 16.

fetched, uncreditworthy or palpably implausible or clearly untenable such that I can safely reject them out of hand on the papers.

[17] In determining whether I should accept the facts advanced by the respondent, I shall have regard to the annexures attached to the applicant's founding affidavit. From those annexures, I find that on 13 July 2011, a certain Mr. Hiskia Auchab, who described himself as the Executive Director of the first respondent, sent an email to the applicant⁴. In that email he communicated that the third respondent was the 'CEO & Chairman of the Petroholland Group of Companies'.

[18] On 18 August 2011, the respondent sent an email to the applicant. He signed off the email by describing himself as the Chairman and CEO of the second respondent⁵. On 12 September 2011 the respondent sent an email to the legal representatives of the applicant and he signed off the email as 'CEO of the second respondent', which company he described as a subsidiary of the first respondent⁶.

[19] In view of the foregoing, I am entitled and hereby reject the denial by the respondent that he is the CEO of the first and second respondent as clearly untenable. I therefor find on the papers that the respondent is the CEO of the first and second respondents. I move on to consider whether the respondent was properly served with the present application in terms of the rules of this court.

Was there proper service on the third respondent?

[20] The return of service, filed by the Deputy Sheriff indicates that service on the respondent was effected as follows:

⁴ Record page 106

⁵ Record page 121

⁶ Record page 137 see also similar sign off of emails at pages 149,153 and 177 amongst other similar references.

'I, the undersigned, G B ESSOP, do certify that I have on the 21st day of November 2012 at 14h33, duly served a NOTICE OF MOTION, AFFIDAVIT, ANNEXURES 'FB1 UP TO FB10' AND A SUPPLEMENTARY AFFIDAVIT, on KARIN MULLER, apparently in charge at the given address, the same time handing to her a copy thereof, after exhibiting the original documents and explaining the nature and exigency of the process'.

[21] It will be assumed that the service was effected in terms the previous rules, which were in operation at the time. I say so for the reason that on the face of the return of service, it is not indicated the subrule in terms of which service on the said respondent was allegedly effected. I must state that it is important for the Deputy Sheriff, in the return of service, to state the exact subrule in terms of which service was allegedly effected. Once that information is provided, an independent person, including the court, is then able to gauge whether or not the return was as touted in the return of service, and more importantly, whether it was good in the circumstances.

[22] The previous rule 4 had different subrules, in terms of which service could be effected on persons. These included personal service (rule 4(1)(a)(i); leaving a copy at the place of residence or business of the person served, guardian, curator or such like person (rule 4(1)(a)(ii); delivering the copy at the place of employment of the person served on guardian, tutor, curator or some like person, apparently not less than 16 years and apparently in authority over the person served (rule 4(1)(a)(iii) and if the person has chosen a *domicilium citandi*, by delivering or leaving the process at the chosen *domicilium*.

[23] It is clear that the return of service is clearly defective as it does not state the manner of service as required by the rules. Although it is clear that the service effected was not personal, it is unclear what the nature of the service was. It is not clear what the relationship between the respondent and Ms. Muller, who was served was, nor is it apparent, what the relationship is between the place where service was effected and the respondent.

[24] In such matters, the onus is on the person on whose behalf the papers are served, to show to the court that the process in issue was served on the intended recipient and in a manner authorised by the rules of court. It is once service has been effected in a manner authorised by the rules or in some other manner authorised by the court in its discretion and upon application, that a person to be served may be called upon to answer the question of service. In the instant case, I come to the inexorable conclusion that the respondent was not served with the application in any of the manners of service authorised by the rules

[25] It is necessary, in this regard, to consider the approach of the courts to defective service. In *Knouwds NO v Josea and Another*⁷, Damaseb JP had to consider the adequacy of service of a *rule nisi* in sequestration proceedings. The learned JP found that on the record before him, the respondent the sequestration of whose estate was sought (Mr Josea) had not been served with a copy of the *rule nisi* and the founding papers and he held that the proceedings were accordingly null and void.

[26] In pronouncing the applicable law, the court held that:

‘Where there is 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 that has taken place without service is a nullity and it is not competent for a court to **condone it.**’ (Emphasis added).

[27] The Supreme Court in *Standard Bank Namibia Ltd and Others v Maletzky and Others*⁸, considered the issue of defective service and complete failure of service and made the following findings:

‘What is the purpose of service?’

⁷ 2007 (2) NR 792 (HC).

⁸ 2015 (3) NR 753 (SC)

[21] The purpose of service is to notify the person to be served of the nature and contents of the process of court and to provide proof to the court that there has been such notice. The substantive principle upon which the rules of service are based is that a person is entitled to know the case being brought against him or her and the rules governing service of process have been carefully formulated to achieve this purpose and litigants should observe them. In construing the rules governing service, and questions whether there has been compliance with them, this fundamental purpose of service should be borne in mind'

[28] The Supreme Court went on to hold as follows:

'[23] Acknowledging the possibility that irregular service may be condoned where there has not been a 'complete failure of service' will avoid an over-formalistic approach to the rules, for an approach that precludes condonation whenever there has been non-compliance with the rules regulating service may prejudice the expeditious, cost-effective and fair administration of justice. The possibility of condonation of irregular service that falls short of a nullity, would also accord with the approach to civil procedure evident in the new Rules of the Namibian High Court that came into force in April 2014, and with the recently introduced practice of judicial case management that seeks to ensure expedition, fairness and cost-effectiveness in the administration of justice.' (Emphasis added).

[29] The court found that in circumstances where there has not been a complete failure of service condonation may be granted. The Supreme Court went further and held that;

'No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible inexpensive decision of cases on their real merits.

[25] In many cases, the issue of prejudice will traverse similar considerations to those that will be relevant to the question of condonation of irregular service. Accordingly, if prejudice is not established, and the service of a summons is not 'patently bad' but

condonable, it is likely that condonation of the irregular service will be granted, and the rule 30 application will not succeed.’

[30] This court in *Beauhomes Real Estate (Pty) Ltd t/a Remax Real Estate Centre and Another vs Namibian Estate Agents Board*⁹ stated as follows;

‘[14] It has been held that the issue of a summons is the initiation process of an action and has certain specific consequences, one of which is that it must be served in terms of the methods of service prescribed by the Rules and that mere “knowledge” of the issue of a summons is not service which could relieve a plaintiff of his or her obligation to follow the prescribed Rules.

(See *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd and Others First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and Another 1998 (4) SA 565 NCD at 568 B- C*).

[15] Where proper service had not been effected, such service may be regarded as a nullity.

In *SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd 1977 (3) SA 703 NPD at 706 E – F* it was held that where there was no service on the defendant company in terms of the provisions of Rule 4 (1)(a)(v) that such a service was a nullity and that the Court could under the particular circumstances of that case not condone the improper service.

In the present instance there was no service at all on the applicants in terms of the provisions of Rule 4 (1)(a)(v) in respect of the first respondent or in terms of Rule 4 (1)(a)(i), 4 (1)(a)(ii) or 4 (1)(a)(iii) in respect of second and third applicants and similarly in my view such services amount to nullities.’

[31] In the circumstances, I am inclined to the view that there was no service of the process on the applicant in this matter. For that reason, it would seem to me that the situation considered by the learned JP in *Knouwds* applies in this case as there was no service on the respondent shown to have been properly effected in terms of the rules. There was accordingly a failure of

⁹ 2008 (2) NR 427 (HC)

service. As a result, the issue of condonation does not, in my view arise for consideration, given the factual matrix of this matter.

Conclusion

[32] In the premises, the court has no option but to accordingly strike the application from the roll with costs for non-service of the application on the respondent. It is not necessary, in the circumstances, to proceed to consider the other bases for opposition raised by the respondent, as the application does not leave the starting blocks in the absence of proper service.

Costs

[33] The approach to costs is trite, namely, that costs generally follow the result. I have not been provided with nor do I find any countervailing reasons or considerations why the general rule should not apply in this matter. As a result, I accordingly order the applicant to pay the third respondent's costs of one instructing and one instructed counsel.

Costs for earlier proceedings

[34] There is one outstanding issue that the called is called upon to determine and it relates to costs of earlier proceedings. The difficulty with this aspect is that the costs sought are not of proceedings that served before me and it is normally Herculean task to determine costs in such matters, particularly where, as in here, there is a dispute about what happened. I have to do my best which I will.

[35] The first date in relation to wasted costs appears to be in respect of proceedings for a hearing before Ueitele J on 7 February 2017. On that day, the matter was postponed for the reason that the learned Judge, it would seem, recused himself. No costs can properly be apportioned in such circumstances.

[36] The next date is 15 August 2017. The matter had apparently been placed before Usiku J for hearing. The events of that day appear to the subject of contestation between the parties. It is alleged by the one party, and denied by the other, that the learned Judge was under the impression that he was to hear the entire application as he was unaware that part of the application had been disposed of.

[37] There is accordingly no unanimity regarding the facts leading to this postponement. I am of the view that the parties should approach the learned Judge for him to make an appropriate order for costs in relation to the costs of that date as he would be best placed to deal with the dispute having been seized with the matter.

[38] It would appear that the last date over which an order for costs is required is the hearing of 22 May 2018 before me, which was postponed at the instance of the court. The respondent argues that it was put to the vexation of having to deliver amended heads of argument as a result of the applicant's record which contained errors and omissions. Furthermore, other documents were allegedly listed out of sequence. The respondent had to file a new bundle marked 'E', which contained the documents omitted from the index.

[39] I am of the considered view that since the matter was postponed on 22 May 2018 at the court's instance, it would be unfair to mulct any of the parties with the wasted costs for that day. I however, incline to the view that the respondent is entitled, nonetheless, to the costs he incurred in rectifying the problems occasioned by the state of the record.

Order

[40] In view of the foregoing reasons, it is accordingly condign to grant the following order:

5. The application is struck from the roll.

6. The Applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed counsel.
7. There is no order as to costs for the abortive hearings on 7 February 2017 and 22 May 2018, save that the Third Respondent is entitled to costs necessarily incurred as a result of it having to rectify the documents because of the state of the record.
8. The determination of wasted costs for the hearing scheduled for 15 August 2017, is to be placed before Usiku J.

T.S Masuku
Judge

APPEARANCES:

APPLICANT: Mr. T. A. Barnard
Instructed by ENSAfrica Namibia, Legal
Practitioners, Windhoek.

THIRD RESPONDENT: Mrs B de Jager
Instructed by Behrens & Pfeiffer Legal
Practitioners, Windhoek.