HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: BRAND PLAN ADVERTISING CC V NRUPESH VALMIK SONI	**Case No:** HC-MD-CIV-ACT-CON-2021/00289
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	**Date of hearing:** 21 OCTOBER 2021
	Date of order: 04 NOVEMBER 2021
Neutral citation: *Brand Plan Advertising CC v Soni* (HC-MD-CIV-ACT-CON-2021/00289) [2021] NAHCMD 515 (05 November 2021)	
Results on merits: Merits not considered.	
The order:	

Having heard **MR NOELLE**, on behalf of the Plaintiff(s) and **MR NAUDE**, on behalf of the First and Second Defendant(s) and having read the pleadings for **HC-MD-CIV-ACT-CON-2021/00289** and other documents filed of record:

Ruling:

1. The defective service of the summons on the third defendant is condoned.
2. No order as to costs.
3. The matter is postponed to 18 November 2021 at 15h00 for a status hearing.
4. The parties must file a joint status report on or before 15 November 2021 regarding the further conduct of the matter, with specific reference to third defendant.

Reasons for orders:

The parties

[1] The parties are Brand Plan Advertising CC, a close corporation duly registered in Namibia. The first defendant is Nrupesh Valmik Soni, an Indian citizen having permanent residency in Namibia. The second defendant is Jaysiel Consulting & Solution CC a close corporation registered in Namibia and the third defendant is Benevolent International Limited, a private company limited by shares, registered in Hong Kong, with its principal place of business at FLT C 9/F Carlton Building, 2-3 Knutsford Terrace, Tsim Sha Tsui KLN, Hong Kong.

[2] The first defendant is the sole member of the second defendant and the sole shareholder and director of the third defendant.

The issue to be determined

[3] The proceedings before me are limited to the narrow issue of service on the third defendant and whether the service was properly effected on the third defendant.

Chronology of events

[4] The chronology of the events from the time of issuing of the summons to date of service, can be summarized as follows[1]:

4.1 The summons was issued on 2 February 2021;

4.2 On 3 February 2021, a copy of the summons was served on the first defendant and second defendant in terms of rule 8(4) (b) of the Rules of Court.

4.4 On 4 March 2021, all three of the defendants, respectively, filed notices of intention to defend;

4.5 On the same date, 4 March 2021, Dr Weder Kauta Hoveka Inc., being on record for the third defendant (as well as for the first and second defendants) provided the particulars of the third defendant in terms of rule 6, by filing a notice to this effect;

4.6 On 16 April 2021, a plea was filed on behalf of all the defendants. In terms of the aforesaid plea, the third defendant raised three points in law *in limine*, two of which are interrelated. The points of law raised are in actual fact special pleas, being:

4.6.1 that service of the summons was not affected, alternatively not properly affected;

4.6.2 the jurisdiction of the court over the third defendant is disputed;

4.6.3 the defendants also raised the special plea of lack of *locus standi*, although this plea is not related to the aforesaid two pleas.

4.7 On 26 April 2021, the plaintiff filed a status report in which it indicated that it deems it necessary to bring an application in terms of either rule 12 (for edictal citation) or rule 13 (for substituted services), and seeking further directions from the court with regards to timelines and procedures.

4.8 On 5 May 2021, the plaintiff caused a copy of the summons to be served by the Deputy Sheriff at the legal practitioners of the third defendant (Dr Weder Kauta Hoveka Inc.) in terms of rule 8(4) (b), by leaving a copy of the document at the main entrance of the property, as no responsible employee was willing to accept service of the process.

[1] Plaintiff's heads of argument para 2.

[5] On the same day, after service the summons the legal practitioners of the third defendant, Dr Weder Kauta and Hoveka Inc., withdrew as legal practitioners of record.

[6] In terms of the case management report filed on behalf of the first and second defendants on 4 August 2021, Mr Naude indicated that neither he nor his secretary could accept service of the summons on behalf of the third defendant during an attempt on 27 April 2021, as he did not hold a power of attorney to accept or receive service of the combined summons on behalf of the third defendant, and accordingly service could not be effected on the third defendant by virtue of service on their offices.

Arguments on behalf of the plaintiff

[7] I only had the benefit of the plaintiff's argument in this matter as the third defendant is currently unrepresented, although it is debatable whether the service of the notice of withdrawal on the third defendant is rule compliant.

[8] Mr Naude, who is now apparently only representing the first and second defendants, chose not to file any heads of argument or make any oral submissions although he had the benefit of reading plaintiff's heads of argument and listen to the submissions of Mr van Zyl.

[9] Mr van Zyl argued that it is evident from the notice of intention to defend filed on behalf of the third defendant that Dr Weder Kauta Hoveka Inc. purport to act as an agent in the matter on behalf of the said defendant and that the legal practitioners presented themselves to be duly authorized to accept service of all process in these proceedings.

[10] Counsel further submitted that the aim of service, i.e. to inform the defendant of the case against it was met because by its participation in the proceedings in terms of the filing of a notice of intention to defend as well as a case plan and subsequently a plea, it is clear that the third defendant was aware of the case it had to meet.

[11] Mr van Zyl submitted that the wording of the notice of intention to defend appear to be at

variance with the submission that the legal practitioner did not have written authority from the third defendant to accept service.

[12] Mr van Zyl submitted that if the argument is that Dr Weder Kauta and Hoveka Inc. do not have authorisation in writing as required in terms of the provisions of rule 8(2) (e) to accept service on behalf of the third defendant, then the question follows, what is to be made of the notice of intention to defend which state and hold out to the plaintiff that they are appointed to accept service of all process in this matter on behalf of the third defendant. The wording of the notice of intention to defend appear to be at variance with the submission that they do not have written authority from the third defendant to accept service.

[13] Mr van Zyl argued that service was properly affected in terms of rule 8(2) (e), alternatively that defective service should be condoned. In support of his argument counsel relied on *Kapuire v Minster of Safety and Security*[2] and the cases referred therein.

Discussion

[14] 'It is a corner-stone of our legal system that a person is entitled to notice of legal proceedings instituted against him.'[3]

[15] This position was confirmed in as many words by our Apex Court when it said that "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"[4].

[16] *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd and Others and First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and Another*[5] the court per Horn AJ, reaffirmed the principle that it is the cornerstone of our legal system, that an affected party is entitled to notice

[2] (HC-MD-CIV-ACT-OTH-2017-01508) [2017] NAHCMD 297 (18 October 2017).

[3] *Steinberg v Cosmopolitan National bank of Chicago* 1973 (3) SA 885 (RA) at 892B-C.

[4] *Standard Bank of Namibia Ltd v Maletzky & Others* at para 21.

of legal proceedings against him or her, in the following terms:

'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*. The methods of service are prescribed in the Rules. Mere "knowledge" of the issue of a summons is not service and a plaintiff is not relieved of his obligation to follow the prescribed Rules.'

[17] In the current matter the scenario is similar to the *Ganyesa* matter as there was no service on the third defendant in spite of it entering a notice of intention to defend. The moment that the third defendant entered its intention to defend the non-service was cured to a certain extent. When the issue of non-service was brought to the attention of the plaintiff during the third defendant's plea, the plaintiff attempted to serve the process on the 'erstwhile' legal practitioner of record. The third defendant was an active participant to the proceedings before this court, up to the point where the notice of withdrawal was filed in terms of rule 44(6).

[18] When the Personal Assistant to Mr Naude refused to accept service the process was served in terms of rule 8(4)(b)[6] and the return of service read as follows:

'I, the undersigned, G.B. ESSOP, do hereby certify that I have on 5th day of May 2021 at 14:56, in terms of rule 8(4)(b) of the High Court of Namibia, duly affixed a copy of the COMBINED SUMMONS TOGETHER WITH PARTICULARS OF CLAIM AND PARTICULARS OF LITIGANTS IN TERMS OF RULE 6, ANNEXURE "A" – "J" at C/O DR WEDER KAUTA & HOVEKA, being ATTORNEYS OF THE 3RD DEFENDANT, of BENOVOLENT INTERNATIONAL LIMITED, by LEAVING the abovementioned documentation at the MAIN ENTRANCE of the property, as no responsible employee is willing to accept service of the process."

[19] On the very same day, hours after the service of the summons by the Deputy Sherriff, Mr Naude, the legal practitioner at the time, filed a notice of withdrawal as legal practitioner of record in

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

[6] (4) Where at any premises contemplated in subrule (2) or (3), no person is willing to accept service, service may be effected by affixing a copy of the process to - (a) …; or (b) if this is not accessible, any other place to which the public has access.

terms of rule 44(6) and attached to its notice of withdrawal Mr Naude's email, which was directed to the third defendant which read as follows:

'The Manager,

The above matter refers.

Kindly be informed that we have withdrawn as Legal Practitioners of Record for the Third Defendant in this matter with immediate effect, as per the Notice of Withdrawal attached hereto.

Kindly appoint new attorneys of record, as soon as possible.'

[20] There can be no doubt that Mr Naude acted on behalf of the third defendant as his legal representative, but what I understand from para 5.3 of the case management conference report[7] is that neither he nor his personal assistant had the power of attorney to receive or accept the combined summons in terms of rule 8(2) (e) of the Rules of Court. This objection therefore relates specifically to the receiving of process initiating action. The notice filed in terms of rule 14 confirms that Dr Weder Kauta and Hoveka Inc would 'accept notice and service of all process in these proceedings' this does not automatically include process initiating proceedings.

[21] I accept that the authority to a legal practitioner to accept service of proceedings initiating application or action cannot be presumed because the legal practitioner acted for the defendant in earlier proceedings[8], however I am not convinced that Mr Naude did not act as the agent of the third defendant throughout these proceedings until after service on 5 May 2021. This would thus also include that he acted as an agent on the strength of his power of attorney to receive the process initiating action on behalf the third defendant. Only after service of the summons did he withdraw as legal practitioner of record.

[22] In *Prism Payment Technologies v Altech information Technologies*[9], Lamont J said the

[7] '5.3 In any event, the Plaintiff irregularly attempted already on 27 April 2021 to serve said Combined Summons on the Secretary of Mr Naude, which service was rejected and not accepted, as neither Mr Naude nor his Secretay held any Power of Attorney from the Third Defendant to accept or receive service of the Combined Summons in term of Rule 8(2)(e), which should have taken place in Hong Kong, China, in accordance with Rule 11 and no application or leave to sue by Edictal Citation was granted or obtained against the Third Defendant, as pleaded.'

[8] Pole v Gundlefinger 1909 TS 734.

[9] *Prism Payment Technologies v Altech information Technologies* 2012 (5) SA 267 (GSJ) at 271H-272A.

following about the purpose of rule 4 (Our rule 8):

'The purpose of rule 4 is to provide for a mechanism by which relative certainty can be obtained that service has been effected upon a defendant. If certain minimum standards have been complied with as set out in the rule, then the assumption is made that the service was sufficient to reach the defendant's attention and his failure to take steps is not due to the fact that he does not have knowledge of the summons. The converse is not true – namely that if service is not effected as required by the rule, the service is not effective – in that the purpose for which service is required was fulfilled, namely the defendant came to know of the summons. The rules, as was pointed out by Roux J in *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W), set out procedural steps. They do not create substantive law. Insofar as the substantive law is concerned, the requirement is that a person who is being sued should receive notice of the fact that he is being sued by way of delivery to him of the relevant document initiating legal proceedings. If this purpose is achieved, then, albeit not in terms of the rules, there has been proper service.'

[23] It appears to me that once the third defendant noted his intention to defend and actively partook in the case management process any issues regarding the subsequent service of the summons became academic, but had to be done in order to comply with the Rules of Court (see *Ganyesa Bottle Store* matter para 16*).*

[24] In my view the purpose of service was satisfied and service which was effected in terms of rule 8(2)(e) read with 4(2)(b), instead of rules 11 and 12 can be condoned as there appears to be no prejudice to the third defendant, who had a legal practitioner protecting its interest all along. In LTC Harms *Civil Procedure in the Superior Courts* Students' Edition Third Edition para B4.1 it is stated:

'When proceedings have begun without any notice, the subsequent proceedings are null and void and may be disregarded or set aside at the option of the other party. However, if the initiating document such as the summons was served incorrectly, the subsequent proceedings are not void, but may be voided: the summons may be set aside as an irregular step although the court may condone the irregularity.'

[25] This is however not the end of the plaintiff's potential problems in respect of the third defendant, as is evident from the points *in limine* raised but the plaintiff cleared the first hurdle in its effort to move the matter forward with the overriding objective of the rules in mind.

[26] Although the matter before me is quite distinguishable from the case law I was referred to, i.e. the *Kapuire* and the matter of *Witvlei Meat (Pty) Ltd & Others v Disciplinary Committee for Legal*

Practitioners & Others[10], I however associate myself with the view that one should guard against sterile formalism.

[27] My order is as set out above.

Judge's signature	**Note to the parties:**
	Not applicable.
Counsel:	
Plaintiffs	**Defendants**
Adv Van Zyl Instructed by Engling Stritter and Partners	

[10] *Kapuire* and the matter of *Witvlei Meat (Pty) Ltd & Others v Disciplinary Committee for Legal Practitioners & Others* Case No. A 212/2011 (HC).