

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2019/00496

In the matter between:

GLOBAL DIAMONDS VALUATORS NAMIBIA (PTY) LTD

APPLICANT

and

**CENTRAL PROCUREMENT BOARD OF NAMIBIA
REVIEW PANEL**

1st RESPONDENT

THE MINISTER OF MINES AND ENERGY

2nd RESPONDENT

THE MINISTER OF FINANCE

3rd RESPONDENT

GEM DIAMONDS NAMIBIA (PTY) LTD

4th RESPONDENT

KINGS DIAMOND VALUATION (PTY) LTD

5th RESPONDENT

WELWITCHIA DIAMOND VALUERS (PTY) LTD

6th RESPONDENT

ONDJERERA DIAMOND VALUATORS (PTY) LTD

7th RESPONDENT

METCOR DIAMONDS CC

8th RESPONDENT

HOMPA INVESTMENTS (PTY) LTD

9th RESPONDENT

TARGET DIAMOND SERVICES (PTY) LTD

10th RESPONDENT

UNITED DIAMOND TRADING COMPANY (PTY) LTD

11th RESPONDENT

SINCO INVESTMENT FIVE (PTY) LTD

12th RESPONDENT

PRESTIGE DIAMOND SERVICES NAMIBIA (PTY) LTD

13th RESPONDENT

14th RESPONDENT

Neutral citation: *Global Diamonds Valuators Namibia (Pty) Ltd v Central Procurement Board of Namibia* (HC-MD-CIV-MOT-REV-2019/00496) [2022] NAHCMD 631 (17 November 2022)

Coram: RAKOW, J

Heard: 24 August 2022

Delivered: 15 November 2022

Reasons delivered: 17 November 2022

Flynote: Effective service – Purpose is to bring the matter to the attention of a party, including having the benefit of an explanation to the meaning and the nature of the process – Fundamental principle of fairness in litigation.

Summary: This is a review application, however before dealing with the merits of the review application, it is necessary to deal with the issue of service of the application on the ninth, eleventh and the thirteenth respondent. The fifth respondent contends that some of its co-respondents has not been served.

Held – that, the Witvlei Meat case laid down the principles applicable to the service of process.

Held – that, it is a fundamental principle of fairness in litigation that litigants be given proper notice of legal proceedings against them.

Held further – that, the ninth, eleventh and thirteenth respondents were not served in terms of the rules applicable to the service of documents on businesses and, or closed corporations.

Held further – that, not all parties to the current review application was served.

Held further – that, it will be appropriate, to inform these parties of the pending proceedings and allow them, if they so wish to participate in the said proceedings.

ORDER

1. A rule nisi is issued calling upon any interested party to appear before this court at 10h00 on Tuesday 17 January 2023 and give reasons, if any, why they

should be allowed to participate in the review matter (the main matter) currently before court.

2. This order, together with the review application should be served by the applicant on the ninth and thirteenth respondents.

JUDGMENT

RAKOW, J

The parties to the review

[1] The applicant is Global Diamond Valuers Namibia (Pty) Ltd, a private company duly incorporated under the company laws of Namibia. The first respondent is the Central Procurement Board of Namibia which was established as a juristic person in terms of section 8 of the Public Procurement Act, 15 of 2015 (the Act) and which is responsible for the procurement of goods, works and services in respect of public entities. The second respondent is the Review Panel appointed by the Minister of Finance, who is the fourth respondent, in terms of section 58 of the Act. The third respondent is the minister of Mines and Energy, duly appointed in terms of article 32(3)(i)(bb) of the Namibian Constitution, and who is one of the responsible ministers concerning the matters relevant to this application. The fourth respondent is the minister of Finance, also appointed in terms of the Namibian Constitution and also a responsible minister concerning the matters relevant to this application.

[2] The fifth respondent is Gem Diamonds Namibia (Pty) Ltd, a private company incorporated under the company laws of Namibia and the company which was awarded the bid to perform diamond valuation services of diamonds received for the Namibian Diamond Trading Company on behalf of the Ministry of Mines and Energy. The remainder of the respondents from the sixth to the fourteenth are all companies who submitted tenders as part of the process of awarding the valuation services contract. The applicant in this review matter was one of the unsuccessful applicants for the valuation tender.

Point in limine

[3] Before dealing with the merit of the review application, it is necessary to deal with the point *in limine* raised by the fifth respondent. The issue raised is regarding the service of the application on the ninth, eleventh and thirteenth respondents. As such a review application must be served by the Deputy Sheriff and such service must comply with the provisions of rule 8(3) of the rules of court. On 16 June 2021 the applicant applied for an order allowing substitute service on the ninth, eleventh and thirteenth respondents. In an affidavit Mr Tjitemisa indicated that he traced the addresses for these respondents through BIPA as the only information on the bid documents are their telephone numbers. The deputy sheriff could not effect service on the addresses obtained from BIPA and filed returns of non-service. He therefore approached the court for an order for substitute service on these parties via the newspapers.

[4] This did not happen but the ninth respondent was eventually served together with the eleventh and thirteenth respondents. The ninth respondent was served at Heinutsburg Street 31 on a certain Amon Metarwee, a representative of the ninth respondent. The eleventh respondent was served at the deputy sheriff's offices on George Kamati and the thirteenth respondent was served no 915 Schuster street Klein Windhoek on a responsible employee, Fransina Nghipuilepo. Except that the name George Kamati the same name is that was used on the documentation of the eleventh respondent, whose phone number the applicant's legal practitioner obtained.

[5] Although the applicant applied for permission for substitute service to the court, it seems that this was never published in any newspaper but that they proceeded and tried to trace the places of business of these respondents. There is however no explanation as to who Amon Metarwee is or why the place of business of the ninth respondent now moved to Heinutsburg Street 31, similarly that the business of the thirteenth respondent now moved to no 915 Schuster street Klein Windhoek.

[6] The fifth respondent contends that some of its co-respondents has not been served. In *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal*

*Practitioners and Others*¹, where Smuts J as he then was said the following regarding service:

‘The fundamental purpose of service is after all 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 their import.)’

[7] Using the *Witvlei Meat* case, the principles applicable to service of process can be summarized as follows:

- a. 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.
- b. Where there has been a complete failure of service this cannot be condoned. However, a less serious form of noncompliance in relation to service may be condoned.
- c. The complaint in regard to defective service must however take the facts of the matter into consideration.

[8] Counsel referred the court to the matter of *Standard Bank Namibia Ltd v Maletzky and others*² in which the following was said:

‘It is a fundamental principle of fairness in litigation that litigants be given proper notice of legal proceedings against them. Defective service can be raised in different ways during the litigation process. In two recent decisions, somewhat different outcomes were reached by the Namibian High Court in determining the effect of defective service in the initiation of proceedings. In *Knouwds NO v Josea and Another*³, Damaseb JP had to consider the adequacy of service of a rule nisi in sequestration proceedings. Damaseb JP found that on the record before him that 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. The High Court held that –

¹ *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others* (1) (APPEAL 212 of 2011) [2012] NAHC 32 (20 February 2012).

² *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC).

³ *Knouwds NO v Josea and Another* 2013 (1) NR 245 (HC).

“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.”

[18] An apparently different outcome was reached in *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others*⁴. The case concerned the question whether the Disciplinary Committee for Legal Practitioners had been properly served with the application. The Disciplinary Committee had originally entered an appearance to defend but then withdrew its opposition to the application. Counsel for another respondent argued as a point *in limine* that service on the Disciplinary Committee had been defective because it had been effected on the Office of the Government Attorney, when service should have been on the Chairperson of the Committee. Smuts J held that the rule in the Knouws matter should be confined to the facts of that case which had concerned an application that affected status. He held that –

“The present circumstances are different and distinguishable. 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 is after all 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, the fundamental purpose has been met, particularly where the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate their import)”.

[19] The two cases turned on different facts and neither of them involved an application to set aside a pleading or notice of motion as an irregular step in terms of rule 30 of the High Court Rules on the basis of defective service and accordingly neither can provide firm guidance as to the manner in which defective service should be addressed in this appeal.

[20] In addressing the appellants’ arguments in this regard, it will be helpful to address four issues briefly:

(a) what is the purpose of service?

(b) does defective service always constitute a nullity, or may irregular forms of service, short of a nullity, be condoned?

⁴ Supra.

(c) is it necessary for an applicant to show prejudice in addition to defective service in a rule 30 application and

(d) what is the effect of a decision in a rule 30 application that there has been defective service – is the irregular service set aside, or is the pleading or process that has been served set aside?

What is the purpose of service?

[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.⁵ 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 her⁶ 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.

Does defective service always constitute a nullity, or may irregular forms of service, short of a nullity, be condoned?

[22] Appellants argued that improper service constitutes a nullity relying, amongst other authorities, on the dictum in *Knouwds* cited above at para 17. Yet the court in *Knouwds* clearly considered there to have been ‘a complete failure of service’ in that case that could not be condoned, which suggests a distinction between a nullity and a less serious form of non-compliance in relation to service, which may be condoned. This is a distinction that has been drawn by the South African Courts, which have held that irregular service may be condoned, where the service is not so irregular as to constitute a nullity.⁷ The line between ‘a complete failure of service’ and ‘irregular service’ is not always easy to draw but will be a ‘question of degree’.⁸

[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

⁵ In this regard, see the reasoning in *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions* 2012 (5) SA 267 (GSJ) para 21.

⁶ *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at 892B-C.

⁷ See, for example, *Scott and Another v Ninza* 1999 (4) SA 820 (E) at 828F-G; *Federated Insurance Co Ltd v Malawana* 1984 (3) SA 489 (E) at 495I, and, on appeal, *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A) at 762G-I; *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions*, cited above in 9 para 23. For a recent case where service was found to constitute a nullity, see *Concrete 2000 (Pty) Ltd v Lorenzo Builders CC t/a Creative Designs and Others* 2014 (2) All SA 81 (KZD) paras 29 – 30.

⁸ See the remarks of *Nestadt J in Krugel v Minister of Police* 1981 (1) SA 765 (T) at 768D-E (which concerned the question whether a summons was a nullity, not the issue of service). See also, *Concrete 2000 (Pty) Ltd*, cited above in 11 para 29.

the rules regulating service may prejudice the expeditious, cost-effective and fair administration of justice.⁹ 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.

Is it necessary for an applicant to show prejudice in addition to defective service in a rule 30 application?

[24] Applications to set aside process that has been served irregularly in terms of rule 30 will ordinarily only succeed if the defendant can show he or she has suffered prejudice in relation to the proceedings as a result of the defective service.¹⁰ The requirement of showing prejudice accords with the well-known dictum of Schreiner JA in *Trans-Africa Insurance Co Ltd v Maluleka*¹¹ –

“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.¹² Accordingly, if prejudice is not established, and the service of a summons is not ‘patently bad’¹³ but condonable, it is likely that condonation of the irregular service will be granted, and the rule 30 application will not succeed.

What is the effect of a decision in a rule 30 application that there has been defective service?

[26] The effect of a finding in a rule 30 application that service has been irregular, is that the irregular service will ordinarily be set aside, and leave will ordinarily be given to the relevant party to cause proper service to be effected within the terms of the rules.¹⁴ In this case, the relief initially sought by appellants in their rule 30 application was an order that the service on them had been ‘irregular and improper . . . and consequently, the application is set aside,

⁹ See also *Prism Payment Technologies*, cited above n 9, para 23.

¹⁰ For South African authority on the requirement of prejudice, see, for example, *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A) at 763B–C; *Scott and Another v Ninza*, cited above n 20, at 828G; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T) at 824G–J and 825G–H.

¹¹ *Trans-Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278.

¹² See, for example, *Federated Insurance Co Ltd v Malawana*, cited above n 14 at 762H–763C.

¹³ This was the formulation adopted in *Concrete 2000 (Pty) Ltd*, cited above n 11, para 29. See also *Greathead v Slabbert* 1964 (2) SA 771 (T) at 772E.

¹⁴ In this regard, see the order made in *Concrete 2000 (Pty) Ltd*, cited above n 11, para 39.

alternatively struck out'. However, in their written and oral submissions, counsel for the appellants appeared to accept that an order setting aside the application would not follow from a finding that the service was irregular or void.

[27] What is clear is that the relief sought by the three appellants when they launched their rule 30 application was the setting aside of the notice of motion and founding affidavit. However, that is not relief that will ordinarily follow from a conclusion that service has been irregular, or even void.¹⁵

[9] Looking at the above discussion and the circumstances currently before me regarding the service on the ninth, eleventh and thirteenth respondents it is clear that they were not served in terms of the rules applicable to the service of documents on businesses and in this case, closed corporations. There is no indication why the eleventh respondent could not have been served at his place of business but the court might be inclined to condone that as the purpose of service was achieved in that the respondent received notice of the impending proceedings to which it is joined as a party, if one assumes that it is indeed the same representative that was provided as a contact initially when the bids were submitted. The same can however not be said regarding the service on the ninth and thirteenth respondents. There is no indication as to where the applicant got hold of these addresses, after stating that it is not aware of the business addresses of these respondents or what role, if any the parties who eventually were served played in the said closed corporations, and if they were indeed employees or members of the said close corporations.

[10] In light of the above I came to a conclusion that not all parties to the current review application was served and the application is therefore not properly before this court and set down prematurely, without all the parties being properly informed of the pending proceedings. It will therefore be appropriate before dealing with the review application, to inform these parties of the pending proceedings and allow them, if they so wish to participate in the said proceedings. As such I am inclined to loosely follow the proceedings in *Alderbaran (Pty) Ltd and Another v Bouwer and Others*¹⁶ where parties who had an interest in the matter before court, and who were not served properly, was granted the opportunity to be served and to participate in the proceedings if they so wished.

[11] In the result, I make the following order:

¹⁵ See *Concrete 2000 (Pty) Ltd*, cited above n 11, para 39.

¹⁶ *Alderbaran (Pty) Ltd and Another v Bouwer and Others* 2018 (5) SA 215 (WCC).

1. A rule nisi is issued calling upon any interested party to appear before this court at 10h00 on Tuesday 17 January 2023 and give reasons, if any, why they should be allowed to participate in the review matter (the main matter) currently before court.
2. This order, together with the review application should be served by the applicant on the ninth and thirteenth respondents.

E RAKOW
Judge

APPEARANCES

APPLICANT: AW Corbett (with him J Tjitemisa)
Instructed by Tjitemisa & Associates, Windhoek

FIRST RESPONDENT: E Nekwaya (with him R Avila)
Metcalf Beukes Attorneys, Windhoek

FIFTH RESPONDENT: T Chibwana
Uanivi Gaes Inc., Windhoek