"SPECIAL INTEREST"

CASE NO.: (P) A 227/2005

SUMMARY

ERIC KNOUWDS N.O. versus **NICOLAAS CORNELIUS JOSEA & HEDWICHT JOSEA**

DAMASEB, JP

11/12/2007

PRACTICE:

- Counsel has the duty, when asking the Court to make a non-standard order, to specifically direct the attention of the presiding judge thereto and to explain the reason therefor;

- The requirement that a party proceeding *ex parte* must act *bona fide* includes the duty to act fairly towards the affected party: it is a breach of such duty to fail to serve the entire application on the strength of which a rule *nisi* was obtained *ex* prate: The right to a fair trial includes the right to know the case one is required to meet. Serving only the rule *nisi* and not the entire application is inherently unfair and unjust.

- When there has been no service of the process, it is not competent for the Court to condone the same, even if prejudice is not shown.

CASE NO.: (P) A 227/2005

IN THE HIGH COURT OF COURT OF NAMIBIA

In the matter between:

ERIC KNOUWDS N.O **APPLICANT**

(In his capacity as provisional liquidator
of Avid Investment Corporation (Pty) Limited)

and

NICOLAAS CORNELIUS JOSEA **1ST RESPONDENT**
HEDWICHT JOSEA **2ND RESPONDENT**

CORAM: DAMASEB, JP

Heard: 02 – 06/03/06; 19/05/06 & 22/05/06
Delivered: 11/12/2007

JUDGMENT

DAMASEB, JP: [1] On 27 July 2005 Gibson J granted an order in the following terms:

> "1. That non-compliance with the forms and service provided for by the rules of this Honourable Court is condoned and the application is heard on an urgent basis as envisaged in Rule 6(12) of the Rules of Court.
>
> 2. That leave is granted to the applicants in terms of section 386(5) of the Companies Act, No. 61 of 1973 ("the Act") to bring these proceedings and to engage the services of legal practitioners and counsel for such purpose.
>
> 3. That a rule nisi is hereby issued calling upon the respondent **and all interested parties** to show cause (if any) on Monday **29 August 2005** at 10h00 why:
>
> 3.1 the estate of **the respondent** should not be placed under a final order of sequestration into the hands of the Master of the above Honourable Court.

3.2 the costs of this application should not be costs in the sequestration of the estate of **the respondent**.

4. That service of such rule nisi be effected **upon the respondent** as follows:

4.1 By service of a copy thereof by the Deputy Sheriff for the district of Windhoek **on the respondent's registered address**:

4.2 By publishing same in one edition of each of the Government Gazette and the Namibian Newspaper."

[2] On 31 October 2005 Angula AJ granted an order joining the wife (i.e. second respondent) of Nicolaas Josea in the following terms:

"1. That the second respondent is hereby joined as a second respondent in the application instituted in the above Honourable Court under case number (P) A227/2005.

2. That third applicant is granted leave to file a supplementary affidavit to the first applicant's founding affidavit in this matter to reflect that, where appropriate, references to the respondent shall be reference to both the first and second respondents herein.

3. That the aforesaid respondent, in the event that she should wish to oppose the aforesaid application, shall be entitled to deliver a notice of intention to oppose which complies with Rule 6.

4. That both the third applicant and the first and second respondents shall have such further right to file further pleadings in respect of this application as provided for in the Rules of Court and within the time limits laid down by those Rules."

[3] The first and second applicants resigned their office as provisional liquidators and only the third applicant now remains a party to the application. He is the provisional trustee of **Avid Investment Corporation (Pty) Ltd** *(Avid)* which has since been placed under a final order of liquidation. The applicant seeks to recover debts owing to *Avid* from, amongst others, the two respondents on the basis that:

(i) the applicant has a claim against the respondents in excess of N$100.00;

(ii) the respondents have committed an act of insolvency in terms of the Insolvency Act, No. 24 of 1936;

(iii) there is reason to believe that the sequestration of the respondents' joint estate will be advantageous to creditors .

[4] The applicant now moves to confirm the *rule nisi* granted on 27 July 2005. The respondents oppose the confirmation of the *rule nisi*. They do so on various grounds, including one ground in *limine* that the applicant failed to serve the provisional order on the respondents.

[5] Although initially feverishly debated in the affidavits, the objection that the application should not have been brought *ex parte* and that it was not urgent, were in the end not pursued as is evident from the heads of argument and oral arguments; accordingly I do not deal with those issues in this judgment.

[6] In his answering affidavit deposed to on 9 September 2005 first respondent alleges that the applicant *'failed to serve the provisional order in these proceedings upon me and Namangol, and it is only because of the media coverage that I came to know thereof. As such my and Namangol's*

attorney's of record through their own endeavors procured copies of the application and the provisional order'.

[7] In reply the applicant concedes that the provisional order was not served on the first respondent. He specifically avers in his replying affidavit that:

> "I confirm that the provisional order was obtained whilst the section 417 proceedings were in session and respondents' legal representatives were in attendance at such proceedings in this Court. Accordingly, a copy of the papers and the order was handed to such legal representatives and they have known of the import of such order since approximately 27th July 2005.
>
> In order to formally comply with the provisional order herein, I will instruct the Deputy Sheriff to formally serve the provisional order on respondent, even though this would have little practical effect since respondent's office is now vacated and its managing director, respondent, is presently incarcerated in the Windhoek Central Prison."

[8] By agreement between the parties the first respondent was allowed to file further affidavits to deal with the applicant's allegations in reply. In a further affidavit he deposed to as a result, first respondent says the following in respect of the applicant's allegations in paragraph 7 above. (He does so in paragraph 31 of the 'duplicating' affidavit):

> "Save as aforesaid, and save insofar as I have already dealt with the allegations contained in this paragraph in this or my answering affidavit, **I deny each and every remaining allegation contained in this paragraph** as if specifically traversed."

[9] It is not disputed that paragraph 4.2 of the order of 27th July had been complied with. In a supplementary affidavit filed of record on 1st November 2005 the legal practitioner of record for the applicant, Mr

Rodgers Kauta, confirms with proof that the order was published in the Government Gazette on 2nd September 2005, and advertised in *The Namibian* on 25th August 2005. He also confirms with proof that the Court order dated 27th July 2005 was served on second respondent on 1st August 2005 and on first respondent on 20th October 2005. It is clear that only the Court order was served on the respondents. The initial return date was 29th August 2005, later extended to 12th September 2005.

[10] Mr Van Rooyen, for the respondents, submitted that effecting service after the first respondent had raised a challenge to non-service does not assist he applicant because when proceedings are initiated without notice, the subsequent proceedings are null and void and 'may' be set aside at the instance of the party on whom service should have been effected.

[11] Mr Corbett, for the applicant, retorts that all the Court order of 27 July required was service of a copy of the order of court by the deputy sheriff on the *'respondent's registered address'* and that the order **does not** direct service of the papers (i.e. the notice of motion and supporting affidavits) on the respondent. In any event, the argument goes, the order was served on second respondent on 27 July 2005; in addition, a copy of

the order and the papers were handed to first respondent's legal representatives on or about 27th July 2005 and to that extent, Mr Corbett maintains, there was compliance with the Court order. Besides, he maintains, the first respondent suffered no prejudice and no such prejudice is alleged on the papers – a consideration which, the argument goes, justifies condonation in the event there was non-compliance with the rules of court.

[12] The parties to the present application are identified in the founding affidavit of Ian McLaren as follows:

> "2. The applicants are the provisional liquidators of Avid Investment Corporation (Pty) Ltd ("Avid"). Avid was placed in provisional liquidation in terms of a court order handed down by this Honourable Court on 12th July 2005... The applicants were then appointed as joint provisional liquidators by the Master of this Honourable Court.
>
> 3. The **respondent is Nicolaas Cornelius Josea**, the managing director of Namangol Investments (Pty) Ltd ("Namangol"), a company with limited liability duly incorporated in terms of the Companies Act, 1973, having its principal place of business situated at 3rd Floor Capital Centre, Levinson Arcade, Windhoek."

[13] Paragraph 4 then states:

> "The purpose of this application is to seek the sequestration of **the respondent** on the basis that:
>
> 4.1 the applicants have a claim against **the respondent** in excess of N$100.00;
>
> 4.2 **the respondent** has committed an act of insolvency and/or is insolvent as understood by section 10, read together with section 9(1) of the Insolvency Act, No. 24 of 1936 ("the Act");

4.3 There is reason to believe that such sequestration of the **respondent's** estate will be to the advantage of creditors of **respondent** …"

[14] The notice of motion, in relevant part, states as follows:

"3. That a *rule nisi* be issued calling upon **the respondent** and all interested parties to show cause (if any) on a date and time to be determined by the Registrar of the above Honourable Court, as to why:

3.1 **the estate of the respondent** should not be placed under a final order of sequestration into the hands of the Master of the above Honourable Court;

3.2 the costs of this application should not be the costs in the sequestration of **the estate of the respondent**.

4. That service of such *rule nisi* **be effected upon the respondent** as follows:

4.1 By service of a copy thereof by the Deputy Sheriff for the District of Windhoek **on the respondent's registered address**; and

4.2 by publishing same in one edition of each of the Government Gazette and the Namibian Newspaper."

[15] In the event, the Court granted the order as set out in paragraph 1 of this judgment which is in identical terms as the order sought in the notice of motion.

[16] It must be clear from all that I have quoted above that a natural person, Nicolaas Josea, and, since being joined, his wife, were the objects of the relief sought. Namangol is <u>not</u> a party to this application. A **'registered address'** – in relation to a natural person – is a concept alien to our law. The part of the order which required service **on the registered address** of Nicolaas Josea is, therefore, a legal impossibility.

[17] It is also apparent that the applicant(s) wished to give notice of the proceedings to 'all interested parties' (i.e. creditors) who may have an interest in the sequestration of Nicolaas Josea. It could have been the only reason why the applicant sought, and was granted, an order to publish the *rule nisi* in the Government Gazette and in the newspaper.

[18] This application was brought *ex parte*, i.e. without notice to the respondent(s). It is trite that a party who comes to court without notice to a person effected by the relief it seeks must act *bona fide* and must disclose all relevant facts to the court. As to the requirement of good faith in *ex parte* applications see: Erasmus, 'Superior Court Practice B1-42 and the authorities there collected. Acting *bona fide,* in my view, includes the duty to act fairly towards the affected person. Thus considered, Mr Corbett's argument that *all* the applicant(s) was required to do was to serve the *rule nisi* only without the founding papers whose fruit the order is, presents fundamental problems. To require only service of a Court order on a respondent against whom relief was obtained *ex parte* is in my view inherently unfair and unjust. It is the founding papers, not the Court order, which contain the case the respondent(s) were required to meet. Article 12(1)(a) of the Namibian Constitution states:

> "In the determination of their civil rights and obligations … all persons shall be entitled to a fair hearing …"

A fair hearing, it can hardly be disputed, includes the right to know what case you are required to meet.

[19] It was incumbent upon the applicant, and the Court, to ensure that the respondent(s) had proper notice of the case he (they) had to meet and the only reasonable interpretation that can be placed on the Court order of 27 July is that not only the order, but the entire application, had to be served on the respondent(s). Rule 6(5)(a) of the Rules of this Court requires that true copies of the notice of motion and all annexures to it must be served on the affected party. 'Service' normally includes an explanation of the nature and meaning of the process (*Botha NO v Botha* 1965(3) SA 128 (E) at 130 F-G; Herbstein & Van Winsen 'Civil Practice of the Supreme Court of South Africa (4th ed)' p 279).

[20] What counsel obtained *in casu* by way of service is a deviation from the standard form of order to the effect that the entire application must be served. Where counsel moves the Court to grant an order which is a deviation from accepted practice, he/she must direct the court's attention thereto and explain the reason therefor. In *Ex Parte Satbel (Edms) Bpk:* In re *Meyer v Satbel (Edms) Bpk* 1984(4) SA 347 (W) at 362G the Court said:

> "Dit is die advokaat se plig om die voorsittende Regter se aandag te vestig op enige afwykings van die gebruiklike vorm en 'n verklaring daarvoor aan te bied. Hierdie standaardbevele is versigtig ontwerp om die regsbedeling te laat vlot. Dit

> is albei dele van die regsberoep se plig om nougeset hierin saam te werk. Ek is oortuig dat my Kollega wat die aanvanklike bevel uitgevaardig het, dit nooit in hierdie vorm sou gedoen het as sy aandag op hierdie afwykings gevestig was nie."

(Free translation:

> "It is the duty of the advocate to draw (direct) the attention of the presiding Judge to any deviations from the usual form and to offer an explanation for it. These standard orders have been carefully designed for the smooth administration of justice. It is the duty of both parts of the legal profession to cooperate meticulously in this regard. I am convinced that my colleague, who issued the initial order, would never have done it if his attention was drawn (directed) to these deviations.")

I find myself in a similar situation here. I have not the slightest doubt that if it was brought to the Court's attention that all that is sought is service of the Court's order only and not the entire application, the Court's attitude would have been different; if regard were had also to the fact that what was being sought is service 'on a registered address' (sic) of a natural person.

[21] It is common cause that the Court order was not served on the first respondent. He has also denied the allegation by the applicant that the order and the papers were handed to his legal representatives. He says that the papers were obtained through 'own endeavours'. I will treat such denial as a bare denial only. It is also worth noting that the legal practitioners of first respondent have opted not to confirm under oath the bare denial that they received copies on or about 27 July 2005. On the other hand, Eric Knouwds does not say who handed the papers to the legal representatives of the first respondent and what the source of that

information is. If, as seems to be implied, the applicant's legal representatives handed the papers to their counterparts, there is no confirmatory affidavit to state that. It is common cause that first respondent is presented in this matter by a local firm, André Louw & Company, by a South African based firm Orchard Greyling, and by Advocate Van Rooyen who is leading the team. Knouwds does not say to whom the papers were given. The matter not having been referred to oral evidence, I must accept that the order and the founding papers were never handed to the first respondent's legal representatives. The applicant bore the *onus* to prove that service took place in the way he alleged it did. At best for him, the probabilities are evenly balanced and the issue must therefore be decided against the applicant.

[22] 'Service' of process is the all-important first step which sets a legal proceeding in train. Without service, can there really be any argument that proceedings are extant against a party? Speaking of 'short service', the learned authors Herbstein & Van Winsen *"The Civil Practice of the Supreme Court of South Africa"* (4th ed.) comment at p283:

> "If the Defendant or respondent has not been allowed sufficient time, the service will be bad and fresh service will have to be made. In two cases, *Brussels & Co v Barnard & another* and *Cole & others v Wilmot,* the courts condoned short service but no reasons are given in the reports. If these cases lay down the principle that it is in the discretion of the court to condone short service, they are, with respect, wrongly decided. It has been suggested that the test of the court apply is whether the defendant has suffered any prejudice through the short service. In later cases, however, the courts have not accepted that it is necessary for the defendant to show either that he has been prejudiced or that he has a good defence to the action, and in *Salkinder v Magistrate of De Aar & another* short service was held to be a fatal irregularity. In another case the court granted provisional sentence but reserved leave to the Defendant to move

> the court to set aside the order on the ground of short service." (footnotes omitted)

[23] If short service is fatal, *a fortiori*, *non-service* cannot be otherwise. 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 which has taken place without service is a nullity and it is not competent for a Court to condone it.

[24] Even if I am wrong in this view, condonation for non-compliance with the rules of Court is sought in the present case on the basis that first respondent's legal representatives had been handed the papers on or about 27th July 2005. Hence Mr Corbett's reliance on *Dreyer v Naidoo* 1958(2) SA 628 (N) at 629 G-H and *Federated Insurance Co. Ltd v Malawana* 1986(1) SA 751 (A) at 763 A-C. In *Dreyer 'the defendant did receive the summons and understand the nature and exigency thereof'*. In *Federated Insurance Company* there was service albeit irregular. Service was effected upon the company's branch manager at his private residence who was authorized to accept service of process on behalf of the company – although not at his private residence. The company had also been furnished with full details of the claim some three months before service of summons. In that case there was service although irregular. In the present case there was no service at all on first respondent. In my respectful view, this case, too, is distinguishable from

the present. I found that the first respondent's legal representatives were not handed the papers as alleged and it is common ground that as at the time the first respondent filed his answering affidavit he had not been served with the court order.

[25] The applicant sought and obtained an order to serve the Court order 'on the registered address' of the first respondent. Such a thing is unknown to our law. This is the root of the problem which has arisen in this case. Also, the legal representatives of the applicant(s) had a duty since they proceeded *ex parte* to assist the Court to do justice in the case and to act fairly towards the first respondent by asking for service of the order and the whole application. That they failed to do and it resulted in the proceedings being challenged and the present point *in limine* being pursued.

[26] I have come to the conclusion that the point *in limine* must succeed. The failure of justice brought about by the conduct of the legal representatives of the applicant(s) is gross and I will, in the exercise of my discretion, mark my disapproval of that conduct with a special costs order.

[27] Accordingly, the *rule nisi* granted by the Court on 27 July 2005 is

discharged with costs, including the costs of instructed counsel, on the scale as between attorney and own client.

_____

DAMASEB, JP

ON BEHALF OF THE APPLICANT: **Mr A Corbett**

Instructed By: Dr Weder, Kauta & Hoveka Inc.

ON BEHALF OF THE RESPONDENTS: **Mr Van Rooyen**

Instructed By: André Louw & Company