

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

PRACTICE DIRECTION 61

Case Title: Fillipus Kavera Kavera and WAP Pharmacare T/A Kavmed Pharmacy Defendant Bianca Nawatises Defendant	Plaintiff 1 st 2 nd	Case No.: HC-MD-CIV-ACT-DEL-2022/05052 Division of Court: Main Division
Heard before: Honourable Mr. Justice Masuku,J	Heard on: 29 February 2024 Delivered on: 14 March 2024	
Neutral citation: <i>Kavera v WAP Pharmacare T/A Kavmed Pharmacy</i> [2023] (HC-MD-CIV-ACT-DEL-2022/05052) NAHCMD 112 (14 March 2024)		
The order: <ol style="list-style-type: none">1. The order issued on 25 January 2024 joining Dr. Lunghano Ndovie as the Third Defendant in the proceedings, is hereby set aside in terms of Rule 103(1)(a).2. The First and Second Defendant are ordered to serve the application for joinder on Dr. Ndovie in terms of the rules of this court.3. The First and Second Defendant are ordered to pay the costs necessitated by this proceeding subject to Rule 32(11).		

4. The matter is postponed to **04 April 2024** at **08:30** for a status hearing.

Reasons for the order:

MASUKU, J:

Introduction

[1] In this matter, the defendants filed an application for joinder, seeking an order for Mr Lunghano Ndovie to be joined to the proceedings as a third defendant. A draft order was filed by the defendants, to help the court make an appropriate order in the further conduct of the matter. An order was issued on 25 January 2024 which granted the joinder application and further gave directions on the further conduct of the matter. The plaintiff has not opposed the joinder application, however, the plaintiff gave a notice in terms of Rule 27(2) and filed a status report indicating that the plaintiff's application for joinder is defective and has not complied with Rule 32(9), 40 and 65(2). I believe the plaintiff meant Rule 32(4).

Background

[2] The matter was heard on 29 February 2024. The plaintiff submitted that the application for joinder is defective and that the court erred in granting it, as there was no proper service of the joinder application on the party to be joined. The defendants, on the other hand, submitted that the court order issued on 25 January 2024 was appropriate and service on the party to be joined was not necessary because the said party will get an opportunity to be heard upon the court order granting the joinder application being served on them.

The law

[3] It is unnecessary, for present purposes, to indulge in a thorough examination of the law applicable to joinder applications. It merely suffices to refer to the matter of *United Africa Group (Pty) Ltd v Uramin Incorporated*,¹ in which the court has stated the following:

'Non-service of the application for joinder on the proposed defendants

[31] Rule 65(2) provides the following:

'Where relief is sought against a person or where it is necessary or proper to give a person notice of such application, the notice of motion must be addressed to both the registrar and that person, otherwise, the notice must be addressed to the registrar only.'

[32] This subrule, in my view, reinforces a very fundamental tenet of justice, namely that a person who may have an interest in any order sought, should be afforded an opportunity to be heard in respect of that relief sought. The exception may be if the application is ex parte and the relief sought does not have any bearing or detrimental effect on any other person's rights or interests. There may well be cases, which are an exception, where although a party may be prejudicially affected by the order sought, the court may be convinced that it is proper to grant a rule nisi without hearing that party for stated reasons, which may include notice of the application serving to defeat the avoidance of harm sought to be forestalled.'

[4] The above excerpt states that a party, who may have an interest in proceedings and who is sought to be joined therein, must be afforded an opportunity to address the application for joinder. It may well be that at first blush, he or she may not appear to have any reason to object to the joinder but that should be left to the party to decide once the application for joinder has been served upon him or her.

[5] In the instant case, it would be precipitous and a violation of the above principle to order Dr Ndovi to be a party to the proceedings without affording him an opportunity to consider the application and take legal advice. He may well be able to persuade the court that the application seeking to join him as a party to the proceedings is, on one or other basis improper. He should accordingly be served with the application for joinder.

[6] I now turn to deal with variation or rescission of court orders and judgments. These are governed by rule 103, which reads as follows:

'103. (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time rescind or vary any order or judgment –

¹ *United Africa Group (Pty) Ltd v Uramin Incorporated* 2017 (4) NR 1145 (HC) at p 1152.

(a) erroneously sought or erroneously granted in the absence of any party affected thereby; . . . ‘

[7] In terms of Rule 103, the court has inherent powers to vary or rescind any order or judgment and which affects a party, within a reasonable time. This the court may do on its own initiative or upon application by the parties. I am of the considered view that the court order to join Dr Ndovi without him having been served with the application for joinder, was done in error. For that reason, this constitutes a proper case in which to invoke rule 103, cited above.

[8] I wish to address one issue raised on behalf of the plaintiff by Ms Von Bach. She argued that the third defendant has no mandate to argue the case of non-joinder of Dr Ndovi. I agree that this submission is correct. What it however does not do, is to consider that parties, and especially their representatives, are officers of the court. They have a duty to ensure that the provisions of the rules, where applicable, are followed to the letter. It would be a dereliction of duty on their part, to see a necessary step or misstep being taken and to watch and fold their arms. They may be liable for some censure therefor.

[9] In view of the discussion above and the findings made, I am of the considered view that the principle applied in *United Africa Group* applies to this matter. The failure to serve Dr Ndovi, is not consistent with the legal principles applicable. This necessitates that the order issued on 25 January 2024 must be set aside as it was clearly granted in error.

Order

[9] In the circumstances, I am of the considered view that the appropriate order to issue is the following:

1. The order issued on 25 January 2024 joining Dr. Lunghano Ndovie as the Third Defendant in the proceedings is hereby varied and set aside in terms of Rule 103(1)(a).
2. The First and Second Defendant are ordered to serve the application for joinder on Dr. Ndovie in terms of the rules of this court.
3. The First and Second Defendant are ordered to pay the costs necessitated by this proceeding subject to Rule 32(11).
4. The matter is postponed to **04 April 2024** for a status hearing.

Judge	Comments:
Masuku, J	NONE
Plaintiff: E Shifotoka Instructed by Dr Weder, Kauta & Hoveka Inc. Windhoek	Defendant: L Von Bach Of Leezhel Mouton & Associates Incorporate Windhoek