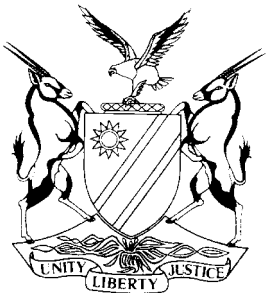

CASE NO.: A 386/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

EVELINE MARIA KOBER	**APPLICANT**
and	
I.R. McLAREN N.O.	**1ST RESPONDENT**
MASTER OF THE HIGH COURT N.O	**2ND RESPONDENT**
LEOPOLD KLAUS KOBER JNR.	**3RD RESPONDENT**
MATHILDE KOBER	**4TH RESPONDENT**

CORAM: **MULLER J**

Heard on: 27 June 2011

Delivered on: 15 July 2011

JUDGMENT

MULLER, J.: [1] The applicant launched an application on urgent basis on 17 December 2010 in which the following relief was sought:

"1. Condoning the applicant's non-compliance with the Rules of this Honourable Court and the time periods prescribed therein in so far as these have not been complied with and directing that this matter be heard as one of urgency.

2. That rule nisi calling upon the first respondent to show cause why he should not be ordered to:

2.1 Pay maintenance in the amount of N$20 000.00 (Twenty Thousand Namibian Dollars) per month, with effect from 20 December 2010, to the applicant pending the finalization of the liquidation of the Estate of the late Leopold Kober who died on 1 November 2000;

2.2 Pay the monthly expenses relating to the administration and running of the Farm Bag-Bag No. 180, Okahandja District, Otjozondjupa Region, with effect from 20 December 2010, to the applicant pending the finalization of the liquidation of the Estate of the late Leopold Kober who died on 1 November 2000.

3. That the relief sought in paragraph 2 operate as an interim interdict with immediate effect.

4. That the cost occasioned by any opposition to this application be paid by the Respondent who oppose it.

5. That such other relief as seems appropriate to this Honourable Court be granted pursuant tot he determination of this application."

On 17 December 2010 a *Rule Nisi* was issued in respect of paragraphs 1 to 3 of the notice of motion with a return date on 28 January 2011. The *Rule Nisi* was twice extended and finally until 27 June 2011.

[2] When the matter was heard on the extended return day, Mr Ueitele appeared on behalf of the applicant and the third and fourth respondents were represented by Adv Barnard. Both counsel filed heads of argument in advance. During the proceedings on the extended return day both counsel amplified the written heads of argument with oral submissions. At the end of the arguments presented, the court reserved judgment and extended the *Rule Nisi* to 29 July 2011.

[3] At the hearing counsel agreed to argue the preliminary point as well as the merits of the application together. The applicant commenced with its submissions, whereafter Mr Barnard argued and the applicant briefly replied. Despite this procedure, I shall deal with preliminary point first and thereafter with the merits of the application, if necessary.

Background

[4] The purpose of the application is to obtain an order by this court for maintenance in the amount of N$20 000.00 per month from 20 December 2010

until the finalization of the estate of the late Leopold Kober, as well as payment of the monthly expenses with regard to the administration and running of the farm Bag-Bag for the same period. As mentioned, a *Rule Nisi* was obtained in that regard.

[5] The application was brought and the *Rule Nisi* obtained against the following background set out in the applicant's founding affidavit:

"● *The applicant and the late Leopold Kober was married on 27 January 2000 in community of property;*

● *On 1 November 2000 the late Leopold Kober died intestate;*

● *Originally the applicant was appointed as executor of the said estate by the Master of the High Court, with a certain Mr Peter AH Schmidt-Dumont as her agent;*

● *A first liquidation and distribution account was filed with the Master on 8 October 2001;*

● *According to that liquidation and distribution account the applicant, as well as the third and fourth respondents are the heirs in the estate of the late Leopold Kober;*

● *As a result of a dispute, apparently in respect of whether the marriage between the applicant and the late Leopold Kober was in or out of community of property, a summons was issued, but a settlement was eventually entered into, which settlement was made an order of this court on 31 May 2007;*

- *After a certain event ensued arising from the settlement agreement, the third respondent was appointed as co-executor together with the applicant and the third respondent appointed Mr CJ Hinrichsen, formerly of the legal firm Lorenz Angula Incorporated, as his agent. Upon Mr Hinrichsen's retirement Mr A Potgieter from the same firm was appointed as agent of the third respondent;*
- *When the applicant's agent Mr Schmidt-Dumont became incapacitated the applicant was not able to furnish a full account regarding the financial part of the administration of the estate for the period 2000 to 2007;*
- *A further liquidation and distribution account, prepared by a financial tax consultant, a certain Dirk Van Zyl on behalf of the applicant, was submitted on 28 February 2010 to the Master of the High Court;*
- *During May 2010 the Master of the High Court informed the applicant that she was removed as co-executor in the estate of the late Leopold Kober and the first respondent was appointed as an independent executor."*
- *According to her, she received no assistance from the Master and had to maintain the farm and relevant expenses for the running of the farm.*

- *During June 2010 she received an amount of N$400 000.00 from her portion of the inheritance from the estate of the late Leopold Kober ,which she used to maintain herself and to pay some of the expenses in respect of the running of the farm Bag-Bag. This advance was depleted during October 2010.*
- *Thereafter she called her legal practitioner to write to the Master and enquire about her entitlement to maintenance. She did not receive any reply, but Mr Potgieter objected thereto, while the first respondent's attitude was that he had already advanced an amount of N$400 000.00 to her.*

[6] Against his background applicant approached the court on urgent basis to be provided with maintenance and money for the running of the farm.

Preliminary issue – Service of the application

[7] It is not disputed that the application was served by hand on Lorentz Angula Incorporated in respect of the third and fourth respondents on 16 December 2010 just after 11h00 in respect of the hearing the next day and that there was no service on anyone of them. The third and fourth respondents' counsel submitted that such service did not comply with the provisions of section 24 of High Court Act no. 16 of 1990, which reads as follows:

"24. The time allowed for entering an appearance to a civil summons served outside Namibia shall not be less than 21 days."

It is common cause that the third and fourth respondents are foreigners and live outside Namibia. It is further common cause that despite the applicant knowing that third and fourth respondents are *incolae* of this court, service was effected as mentioned without first obtaining an order for edictal citation. There was also no attachment of any property belonging to third and fourth respondents *ad fundandam or confirmandam jurisdictionem.* On behalf of the third and fourth respondents, who are german speaking, a complaint was also raised that the documents were not translated into the german language to enable them to understand it. It is further common cause that the *Rule Nisi* has also not been served on the third and fourth respondents.

[8] Mr Barnard submitted that the said manner of service, in contradiction with the provisions of Rule 4 and the said section 24 of the High Court Act, without first obtaining an order for edictal citation caused the institution of the litigation proceedings to be a nullity. In this regard he relied on the judgments of this court in the cases of *Knouwds N.O. v Josea and Another* 2007 (2) NR 792 (HC) at 798 [22]; and *China State Construction Engineering Corp v Pro Joinery CC* 2007 (2) NR 675 (HC) at 681 [21]. Mr Barnard further submitted that the service is also a nullity because it was affected on an unauthorized person or entity, namely Lorenz Angula Incorporated, and relied in this regard on the case of *Beauhomes Real Estates (Pty) Ltd v Namibia Estate Agents Board* 2008 (2) NR 427 (HC) at

43 [15]. A final submission by Mr Barnard in this regard is that the granting of the provisional order (the *Rule Nisi)* after such non-service also constitutes a nullity and if a final order should than be granted by this court, it would also constitute a nullity. In this regard he referred to the case of *HAW Retailers CC t/a ARC Trading and Another v T Nicanor t/a Natutungeni Pamwe Construction CC*, an unreported judgment by Damaseb JP, delivered on 4 October 2010, case no. A 151/2008, page 11 [14]. With regard to the alleged contravention of Section 24 of the High Court Act, Mr Barnard submitted that a civil summons referred to in that section also includes any Notice of Motion in terms of the definition section of that Act, namely section 1, and that when a summons or application is served outside Namibia the defendant or respondent has to be allowed a period of not less than 21 days to enter appearance to defend or oppose, which did not happen here.

[9] In respect of the nullity-submission by Mr Barnard as a result of non-service, Mr Ueitele submitted that the submissions of third and fourth respondents are based on technical grounds. In the first instance, he submitted that the application was brought as an urgent one and the court hearing that application on that day granted a *Rule Nisi* by condoning the applicant's non-compliance with the rules. Mr Ueitele submitted that also included non-compliance with the rules relating to the service of proceedings. The applicant also denied that the submission by Mr Barnard based on the affidavit of Ms Hoffman of Lorenz Angula Incorporated that her firm was never appointed as an

agent for third and fourth respondents does not hold water. According to him it is clear that during 2004 to 2010 the firm Lorenz Angula Incorporated was the agent of, and acted for, the third and fourth respondents even after the third respondent had been removed as an executor. He submitted that the third and fourth respondents are only nominal respondents and that the action is brought against the first respondent for maintenance until the estate has been finalised.

[10] Affidavits were filed by the first and third respondents as well as affidavits on behalf of Lorentz Angula Incorporated. The applicant filed a replying affidavit. I shall only deal with those affidavits at this point in respect of the ‘service- issue.”

[11] According to a letter by the Master (second respondent) both co-executors were removed as executors on 11 May 2010, seven months before this application was brought by the applicant. A director of Lorentz Angula Incorporated, Ms Hoffman’s affidavit was confirmed by Mr Potgieter, the agent of the third respondent, as well as a director of that firm. She stated that as a result of the removal of these co-executors, the agents’ mandates were also terminated and that since that date any legal representation of the third respondent by Lorentz Angula Incorporated ceased with the effect that the firm was no longer mandated to receive service of any legal process whatsoever on behalf of the third respondent. Despite being aware hereof, the applicant still caused service of this application to be effected directly on Lorentz Angula Incorporated. She informed the third respondent’s current legal practitioners about this situation.

[12] In his affidavit (in german, but with a translation in English) the third respondent also confirmed being discharged as executor together with the applicant. He further stated that the appointment of Mr Potgieter as his agent also lapsed and that he did not have any further dealings with Lorentz Angula Incorporated.

[13] All that the applicant replied to in this regard, is that the third respondent did not file a notice with her or her legal practitioners that because he was removed as executor, he was no longer represented by Lorentz Angula Incorporated and that she cannot be blamed for Mr Potgieter acting without a mandate. She however admits that the notice of motion was not personally served on the third and fourth respondents, but remained adamant that they were still represented by Lorentz Angula Incorporated at that time. She stated that in any event such service did find its way to the third respondent.

[14] It is not in dispute that there was no application for edictal citation in respect of the third and fourth respondents. There was also no attachment to found or confirm jurisdiction. It is further common cause that there was no compliance with the provisions of S 24 of the High Court Act and that both third and fourth respondents are foreigners to this court; the third respondent residing in Austria and the fourth respondent in Canada. The only “service” that was

effected, was by hand to Lorentz Angula Incorporated. I have earlier herein referred to the submissions made by counsel in this regard.

[15] I shall first deal with the situation of the fourth respondent. Although there is no affidavit by the fourth respondent before me, it cannot be disputed that she has a substantial interest in the estate of her late father and consequently in the assets of that estate. She can never be regarded as a “nominal respondent” as contended by Mr Ueitele. Had she not been joined in the application, it would certainly have been considered to be a mus-joinder, which would cause the application to fail. However, the fact is that she had been joined and the application had to be served on her in compliance with of the rules of court and the High Court Act. In respect of the fourth respondent there was no service and no such compliance with the rules and the Act.

[16] In respect of the third respondent it is also evident that he should have been joined for the same reason as referred to above in respect of the fourth respondent. Consequently, service of the application and compliance with the Rules and the Act was also peremptory. The only difference between the situation of the third and fourth respondents is that the third respondent was once the co-executor of the estate and that he had an agent, who was also a director of Lorentz Angula Incorporated. It is clear from the allegations by Ms Hoffman, confirmed by Mr Potgieter and the third respondent, that since 11 May 2010, long before the application was launched, the third respondent was removed by the

Master as co-executor and consequently the appointment of his agent was also terminated. Both Ms Hoffman and the third respondent stated that since that event Lorentz Angula Incorporated did not legally represent the third respondent anymore.

[17] Mr Ueitele relied on a letter dated 13 October 2010 written by Mr Potgieter on a letterhead of Lorentz Angula Incorporated and addressed to the Master to show that Lorentz Angula Incorporated still represented the third respondent at that time and that Mr Potgieter still acted as the agent of the third respondent. The background of the previous negotiations and meetings are set out in that letter and in the last sentence Mr Potgieter stated that "*we most strenuously object*" to any advance to the applicant. He also reserved "*our client's rights*". From this it seems that Mr Potgieter was acting in his capacity as agent of the third respondent and as a director of Lorentz Angula Incorporated. Except for these statements it seems that the remainder of the letter was to explain and clarify the situation to the Master. However, it is undisputed that already on 11 May 2010 the executors had been removed from their positions by the Master and consequently their previous agents' positions were also automatically terminated. Mr Potgieter had therefore no mandate to address the letter of 13 October 2010 to the Master. Even if he acted without any mandate, Ms Hoffman's affidavit, as well as that of the third respondent, made it clear that Lorentz Angula Incorporated had no mandate to represent the third respondent anymore. Even if

service of legal documents have been effected on that firm, it was not service in compliance with the rules at the time when this application was brought.

[18] In *China State Construction Engineering Corp v Pro Joinery CC, supra* Silungwe AJ considered several South African cases in respect of the validity of the distinction between an irregular proceeding (which is capable of being condoned) and one that is a nullity or void (which cannot be condoned). (*Mynhardt v Mynhardt* 1986(1) SA 456 (T) at 457A, 462, 463E-G; *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329D-I; *General Accident Insurance CC of South Africa v Zampelli* 1988 (4) SA 407 (C) at 410B and *Minister of Prisons and Another v Jongilanga* 1983(3) SA 47 (E)). Silungwe AJ came to the conclusion that where an irregular proceeding is a clear nullity, it is unnecessary for a defendant to enter a notice to defend, because there is nothing to defend. In a subsequent decision of this court the Judge-President, Damaseb JP, stated in *Knowds NO v Josea, supra*, at 798A [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?"*

The Judge-President then referred to what the authors *Herbstein and Van Winsen* have to say in their work *The Civil Practice of the Supreme Court of South Africa, 4 edition* at 283 in respect of "short service" and continued as follows in [23]:

> *"If short service is fatal a fotiori, 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 of defence 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."*

[19] In the case of *Beauhomes Real Estate (Pty) Ltd v Namibia Estate Agent's Board, supra*, Hoff J dealt with service of a notice of motion on a secretary of a legal firm and said the following in respect of such service by hand in [12] at 430 G-H:

> *"The service of the notice of motion in respect of all three applicants had been affected on a secretary employed by the legal firm then acting on behalf of the first applicant. The submission that the legal firm had been an agent of the applicants does not hold water since there is no proof that such a firm was duly authorised in writing to accept service on behalf of all the applicants."*

Later in [15] at 431 C-D and [16] D-F and G he stated:

> *"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 the*

second and third applicants and similarly in my view such services amount to nullities.

[16] The fact that the legal representatives of the respective parties had been involved in the exchange of correspondence at some stage prior to the initiation of the application proceedings by respondent did not imply tht the legal representative acting for the applicants was an attorney of record in terms of the provisions of rule 4(1)(b) which makes provision for service on an attorney of record.

It cannot be assumed that, in circumstances where a legal firm has acted for a party prior to the institution of court proceedings, such legal firm would also act for such party during the court proceedings."

[20] Finally, it has also been stated by this court in the case of *HAW Retailers, supra*, at p11 [14] that where a provisional order is a nullity, a final order confirming such an order, would also be a nullity. The learned Judge-President approved what was said in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) where Hefer JA dealt with this issue in the following words at 9I – 10A:

"Since a final order can accordingly not be granted unless a provisional order and a rule have first be obtained (Provincial Building Society of South Africa v Du Bois 1966 (3) SA 76 (W) at 81 E-G), the logical

implication of the nullity of the proceedings and the orders granted at the first stage is that the final order must suffer the same fate."

[21] From the facts and the law is it abundantly clear that the so-called service of the application on the third and fourth respondents was a nullity and that the *Rule Nisi* could not have been granted. Furthermore would confirmation of the *Rule Nisi* also constitute a nullity. In the light hereof is this court unable to confirm the *Rule Nisi* and it must be discharged.

[21] In the light of my aforesaid decision on the preliminary point, it is unnecessary to deal with the merits of the matter.

[22] Although the *Rule Nisi* had been further extended to 29 July 2011, the judgment has been finalised earlier and judgment is consequently given today.

[22] In the result, the following orders are made:

1. The *Rule Nisi* granted on 17 December 2010 and extended thereafter is discharged;
2. The applicant has to pay the wasted costs occasioned by her application, which costs include the costs of one instructing and one instructed counsel.

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MULLER, J

FOR THE APPLICANT:	**MR UEITELE**
Instructed by:	**UEITELE & HANS LEGAL PRACTITIONERS**
FOR THE RESPONDENTS:	**MR BARNARD**
Instructed by:	**KOEP & PARTNERS**