REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REASONS

Case No A223/2006

In the matter between:

ERF NUMBER FIVE LANGSTRAND NUMBER ONE CC **1ST APPLICANT**

ERF NUMBER FIVE LANGSTRAND NUMBER TWO CC **2ND APPLICANT**

and

THE MINISTER OF REGIONAL AND LOCAL GOVERNMENT,

HOUSING AND RURAL DEVELOPMENT **1ST RESPONDENT**

THE MUNICIPAL COUNCIL OF WALVIS BAY **2ND RESPONDENT**

THE CHIEF EXECUTIVE OFFICER OF

THE MUNICIPAL COUNCIL OF WALVIS BAY **3 RD**
RESPONDENT

THE MANAGEMENT COMMITTEE OF THE

MUNICIPAL COUNCIL OF WALVIS BAY **4 TH**
RESPONDENT

DEDEKIND ESTATES CC **5 TH**
RESPONDENT

Neutral citation: *Erf No 5 Langstrand No 1 CC v Minister of Regional and Local Government, Housing and Rural Development* (A223-2006) [2017] NAHCMD 357 (8 December 2017)

Coram: VAN NIEKERK J

Heard: 29 March 2010

Delivered: 1 February 2016

Reasons: 8 December 2017

ORDER

---

1. The main review application is struck with costs.

2. The second respondent's counter-application is struck with costs.

REASONS

VAN NIEKERK J:

[1] On 1 February 2016 I made the above order. The reasons therefore now follow.

[2] The applicants are joint owners in undivided shares of Erf 5, Langstrand, in the municipal area of Walvis Bay. The erf was developed into two sectional title units with the intention that each should be sold. The fifth respondent is the owner of the adjacent property situated at Erf 6, Langstrand. The fifth respondent also had two sectional title units developed on Erf 6. During the development of Erf 5 a dispute arose regarding the relaxation of building lines in favour of the applicants with regard to the boundaries between Erf 5 and Erf 6. Certain unapproved additions were made to the property erected on Erf 5. On the fifth respondent's behalf its sole member, Mrs van Rhyn, complained to the applicants and certain of the respondents about the additions and alleged that these additions obstructed the view from the property on Erf 6.

[3] The third respondent, who is the chief executive officer of the municipal council of Walvis Bay, refused to give consent to the applicants to relax the side building line along the boundary between Erf 5 and Erf 6 and also refused to approve the applicants' amended building plans. On appeal the second respondent (the municipal council of Walvis Bay) upheld the third respondent's decision and took certain other decisions unfavourable to the applicants.

[4] During 2004 the applicants launched an urgent application for interdictory relief pending the outcome of an application for review of a decision allegedly made

by the chairperson of the municipal council of Walvis Bay. The fifth respondent was cited as the second respondent in that matter and opposed the relief sought. The application was dismissed (see *Erf No 5 Langstrand No 1 CC and Another v Chairperson of The Municipal Council for Walvis Bay and Another* 2005 NR 72 (HC)).

[5] Thereafter the first respondent likewise dismissed the applicants' appeal against the decisions of the second and third respondents. During September 2005 the second respondent also directed the applicants to demolish the unauthorised addition to the structure erected on Erf 5.

[6] During 2006 the applicants launched this application in which they seek review and setting aside of the decisions of the first, second and third respondents, alternatively that the various decisions be declared unconstitutional and set aside. Further relief is claimed directing the one or the other of the first to fourth respondents to approve the amended building plans and the relaxation of any building lines which may be necessary for that purpose. No relief is claimed against the fifth respondent, except for costs in the event that it opposes the application. The fifth respondent has not opposed the matter.

[7] The application is opposed by the second, third and fourth respondents, who filed answering affidavits. The first respondent abides the decision of the Court. The second respondent also lodged a counter-application in which it seeks an order directing the applicants to comply with the second respondent's demolition notice dated 1 September 2005.

[8] According to the papers before the Court the applicants at no stage attempted to set the matter down for hearing. It was the second, third and fourth respondents who first attempted to arrange for a date for hearing of the application. However there was non-compliance with Practice Directive 3 of 2006 and the application for a date for hearing was rejected. Since then the second, third and fourth respondents on three occasions called on the applicants to meeting for purpose of obtaining a date for hearing in respect of the counter-application. After the first meeting a date was allocated, but the matter was later removed from the roll by agreement between the parties. Thereafter a further two meetings were arranged in respect of a hearing

date for the counter-application. After the second of these meetings, the second, third and fourth respondents filed a notice of set down for 'the matter' to be heard on Monday, 29 March 2010.

[9] After the matter was allocated to me I regularly inspected the file in order to prepare for the hearing. The papers were incomplete and in fact did not contain the notice of motion and the supporting affidavits. There was simply no activity on the file. At a certain stage I formed the impression from the notices on the file that it was only the counter-application that was before me. Close to the date of hearing I instructed my secretary to enquire from the legal practitioners of the second, third and fourth respondents whether the matter was proceeding as there was no activity on the file. These practitioners then kindly provided copies of the missing papers and also bound, paginated and indexed a full set of the papers. The second, third and fourth respondents filed their heads of argument late, namely on Thursday, 25 March 2010, followed the next day by an application for condonation for the late filing. The heads of argument countered my earlier impression that only the counter-application had been set down, as the argument focused on what was submitted to have been an unreasonable delay in launching the review application and calling for the application to be dismissed. No argument was made on the counter-application.

[10] The applicants did not file heads of argument, but on 25 March 2010 they gave written notice that they intended applying on Friday, 9 April 2010, for an order granting them leave to file an additional/supplementary affidavit outside the permissible time limits and sequence provided for the filing of affidavits in terms of rule 6(5).

[11] On Monday, 29 March 2010, when the review application was called, Mr *Mouton* appeared for the applicants and Mr *Barnard* for the second, third and fourth respondents. I was then informed that the applicants earlier that morning had filed a notice of opposition to the second, third and fourth respondents' condonation application, as well as an application to postpone the hearing of the main application for review. The application for postponement was partly based on the fact that the applicants intended supplementing their papers should leave be given on 9 April

2010 (or any later date) as foreshadowed by the application referred to in the previous paragraph above.

[12] Mr *Barnard* opposed the application for postponement on behalf of his clients. Amongst his submissions there was the following: it would serve no purpose to grant

the postponement because the main application had been lodged after an unreasonable delay for which there was no explanation on the founding papers. He therefore moved for dismissal of the review application and indicated that no order was requested in respect of the counter-application. Argument was also presented on behalf of the applicants.

[13] While judgment on the matter was being prepared I realized that the papers did not include a return of service of the review application on the fifth respondent. It was not at all clear from the papers that the fifth respondent had received notice of the application. This issue was not traversed during the hearing on 29 March. The Court accepted that the fifth respondent had been served without specifically searching the papers for a return of service and without raising the matter with counsel. Counsel also did not place on record that the fifth respondent had been served, but did not oppose the review application. However, during the course of this argument on 29 March 2010, Mr *Mouton* referred the Court to the contents of the application for leave to file a further affidavit set down on 9 April 2010. I understood from the second, third and fourth respondents' counsel that this application would be opposed, but he voiced no objection to the references made by counsel for the applicants. The said respondents did indeed file a notice of opposition on 30 March 2010, later followed by opposing affidavits filed on 8 April 2010. On 9 April 2010 the parties by agreement obtained an order to postpone the said application pending the outcome of the proceedings regarding the review application heard on 29 March.

[14] From the opposing affidavits in the application to introduce further affidavits it is apparent that the current member of the fifth respondent at the time was no longer Mrs van Rhyn, but Mr van Rhyn, and that he alleges that neither the review application nor the application to introduce further affidavits was served on the fifth respondent, and further, that he had first heard of the review application on 7 April 2008 when he telephonically spoke to counsel for the other respondents.

[15] In light of the fact that there was no return of service with respect to the fifth respondent in the court file and the fact of the fifth respondent's allegation, the Court gave the following written direction:

> "1. The legal practitioners for the applicants in the main application for review are directed to file an affidavit by 2 September 2014, stating whether or not the said application was served on the fifth respondent, Dedekind Estates CC. If so, proper proof of service should be attached to the affidavit. Should the second, third and fourth respondents wish to file any affidavit in this regard, they may do so within seven days of delivery of the applicants' affidavit.
>
> 2. In the event that there is no proof of service on the fifth respondent, the parties are directed to file written argument on the following questions:
>
> 2.1 In view thereof that the main application was not served on the fifth respondent, is the following order not the appropriate order which the court should make: 'The main review application is struck from the roll with costs, such costs to include the costs of one instructing and one instructed counsel'?
>
> 2.2 What should the court's order be with respect to the second ……. [respondent's] counter-application?" [the omission and insertion are mine]

[16] In response to the directive a member of the applicants' firm of legal practitioners filed an affidavit in which he states, *inter alia*, that "the application appears to have been served by the Deputy Sheriff by way of an attachment process, on the address, Erf No, 6, Langstrand of the Fifth Respondent." He attached a copy of the return of service of the Deputy Sheriff, Walvis Bay, dated 21 June 2006, in which the latter states that he served the notice of motion and attached affidavits and annexures personally on Mr Katiti (the third respondent) and also on the latter as the representative of the second and fourth respondents and that he "attached proses (*sic*) of Fifth Respondent at Erf No. 6, Langstrand, because Respondent is at his farm Mariental District." Curiously, service on all the mentioned

respondents occurred at the same time at 15h30. The second, third and fourth respondents did not file any affidavits.

[17] Thereafter the Court invited the parties to present written argument on the following questions:

> "(i) Is the service of the main supplication effected on the fifth respondent according to the deputy sheriff's return dated 21 June 2006 (Annexure "R1" to Mr Mueller's affidavit filed on 3 September 2014) proper service?
>
> (ii) May the Court take notice of the fact that the current member of the fifth respondent alleges in his affidavit dated 8 April 2010 that the main application was never served on the fifth respondent?"

[18] Prompted by this invitation and, it seems, by the question posed in paragraph 2.2 of the first directive, the applicants' legal practitioner filed a further affidavit in which he amplifies his first affidavit. He states, *inter alia*, that the main application was clearly served at the principal place of business of the fifth respondent, being Erf No. 6, Langstrand. He also states that he considers it necessary to inform the Court that the second respondent's counter-application delivered on 1 August 2006 appears not to have been served on the fifth respondent. Also in respect of this affidavit the second, third and fourth respondents did not file any affidavits.

[19] In due course written argument was presented on the questions posed. In this regard the Court expresses its gratitude to counsel and the parties.

May the Court take notice of the fact that the current member of the fifth respondent alleges in his affidavit dated 8 April 2010 that the main application was never served on the fifth respondent?

[20] It is convenient to first consider the second question posed. In framing the question my concern was directed at the fact that the allegation is contained in an affidavit which was filed after the hearing on 29 March 2010 had been concluded.

[21] Counsel for the second, third and fourth respondents expresses the view that there is no reason why the Court should not have regard to the contents of the affidavit of Mr van Rhyn, as it was duly placed before the Court.

[22] Counsel for the applicants also expresses no objection to the affidavit on the ground that it was filed after the hearing.

[23] Having reflected upon the matter, it seems to me that regard may be had to the contents of Mr van Rhyn's affidavit about the alleged lack of service and related allegations. These allegations deal with a fundamental procedural issue concerned with the right to a fair trial of civil disputes. Generally speaking a court should always make sure that all parties who have not opposed an application have been served in terms of the relevant rules (*Cf Van Niekerk v Barket* 1922 OPD 164). In this matter the deplorable state of the Court file until shortly before the hearing, as well as the flurry of interlocutory papers filed, some at the last moment, unfortunately distracted attention from this vital issue. In addition, counsel did not draw attention to the issue of service, whether proper or not, on the fifth respondent, nor did they draw attention to the fact that no return of service was filed in respect of the fifth respondent.

[24] It was only when the opposing affidavit in the postponed interlocutory application to file further affidavits was perused when the papers in the Court file were studied that it came to attention that the fifth respondent had allegedly never been served. All parties are in agreement that the fifth respondent is a material party to the proceedings and that its rights be could be materially prejudiced by the outcome of the review application. I do not think that the fact that the allegation of non-service came to the attention of the Court by way of an affidavit filed in an interlocutory application in connection with the main application after argument was heard on an application for its postponement and argument that the main application should in fact be dismissed is a reason not to take notice of the allegation about non-service.

Was there proper service on the fifth respondent?

[25] Rule 4(1)(a)(v) of the Rules of the High Court applicable at the relevant time (published by GN. No. 59 in Government Gazette No. 90 of 10 October 1990) reads as follows:

> "Service of any …… document initiating application proceedings shall be effected by the sheriff ……. in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered address or

> its principal place of business within Namibia, or if there be no such employee willing to accept
>
> service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law".

[26] Paragraph 8 of the applicants' founding affidavit deals with the citation of the fifth respondent and states that it is "….. a close corporation with limited liability, duly incorporated and registered in accordance with the Close Corporations Act, 1988, and with its principal place (*sic*) situate at Erf No 6, Langstrand, Walvis Bay." Clearly the words as used do not make sense. Mr *Mouton* submitted that the words "principal place" could only refer to "principal place of business". Opposing counsel for submitted that "Namibian law does not recognise the term of "*principal place*" of any entity as being of any judicial significance." This is indeed correct. It appears that the paragraph contains an error in that the words "of business" were omitted, probably inadvertently.

[27] Both counsel refer in different ways to the requirement that a return of service must be intelligible, failing which it is defective (*Fuller v Phillips* (1828 – 1849) 1 Menz 137; *Agricultural and Industrial Mechanisation (Vereeniging) (Edms) Bpk v Lombard* 1974 (1) SA 291 (O) at 296E-F).

[28] Mr *Barnard* submits that the passage cannot be viewed as evidence of proper service as it is gibberish. The submission continues that the deputy sheriff's statement that he "attached proses (*sic*) of the fifth respondent" at Erf No. 6 is so vague that the applicants' legal practitioner was prompted thereby to state in his affidavit that it "appeared" that service had been effected "by way of an attachment process" at the said address. Counsel further submits that the service of court proceedings is effected by service thereof and not by way of "attachment processes", which are intended to be used for purposes of execution.

[29] Mr *Mouton*, on the other hand, submits that the word “attached” can only refer to an attachment of the process at Erf No. 6, Langstrand as provided for in the relevant rule.

[30] The rule in question does not contain the word “attach” or “attachment”, but uses the word “affixing”. It is so that the word “attach” is often used in the sense “seize property in execution according to law” and “attachment” is used to indicate such a “seizure”. However, the expression “attach” is also defined, *inter alia*, as “to join, fasten, or connect” and the word “attachment” is defined, *inter alia*, as “a fastening”. (*Collins Concise English Dictionary* (3rd ed.) Similarly, the expression “affix” bears the meaning, *inter alia*, of “to attach, fasten, join or stick”. (*op.cit.*)

[31] Reading the deputy sheriff’s return as a whole and in context I am satisfied that what he actually meant is that he affixed the process intended for the fifth respondent at Erf No. 6, Langstrand.

[32] The return states that the process was served at Erf No.6, Langstrand “because Respondent is at his farm Mariental District.” This is clearly nonsense, because the fifth respondent is a close corporation and could not “be at his farm.”

[33] If the deputy sheriff was referring to the member of the close corporation being at his farm, the problem is compounded. Not only was the fifth respondent’s member female at the time of service, as I understand the founding papers, but the relevant rule does not provide that process may be affixed at an address because the member, in case of a close corporation is not at that address. The rule clearly states that service by affixing may be done if there is no responsible employee of the close corporation at the registered address of its principal place of business willing to accept service. The return is completely silent about this requirement. In my view the deputy sheriff should have stated the circumstances which rendered permissible the manner of service he chose to employ (the use of the word “may” instead of “shall” in the rule indicating a directory provision).

[34] Mr *Mouton* further submits in the applicants’ heads of argument that the word “attached” (i.e. “affixed”) mentioned in the return can only refer to an “attachment”

(i.e. an “affixing”) to the front door of the property at Erf No. 6, Langstrand as provided for in rule 4(1)(a)(v) “as it is incomprehensible and illogical to imagine another form of attachment such as to a wall, etc…”.

[35] I do not agree with counsel’s submission. Firstly, the rule does not use the expression “front” door, but rather “main” door. Secondly, in my view the deputy sheriff should state where he affixed the process and not leave it to conjecture. This is important in order to determine whether there was compliance with the applicable rule. It becomes of greater importance when the party allegedly served disputes that service took place, which evidence is supported to some extent by the fact that it did not file a notice of opposition in the present application, whereas it did oppose the first application, and is clearly materially interested in the matter.

[36] Section 32(2) of the High Court Act, 1990 (Act 16 of 1990), provides that the deputy sheriff’s return shall be *prima facie* evidence of the matters stated therein. In regard to the equivalent provision namely, section 36(2) of the Supreme Court Act, 1959 (Act 59 of 1959) (previously applicable in South Africa) the authors Herbstein and Van Winsen of the work The Civil practice of the Supreme Court of South Africa (4th ed), state at p. 303:

> “….. [I]t is clear that, the return not being conclusive but merely *prima facie* evidence of service, proof that there has been no or insufficient service will be allowed, although the maxim *omnia praesumuntur rite esse acta* applies to a return of service, and the clearest and most satisfactory evidence will be required to rebut this presumption and to impeach the return”.

[37] The question arises whether there is *prima facie* evidence of service. In my view the defects outline above leave this issue in doubt. In regard to this aspect, the applicants’ counsel submits that the affidavit of Mr van Rhyn carries no weight because it merely alleges that the main application had never been served on the fifth respondent at all, instead of attacking the return of service and/or raising the issue of defective service. It is hardly surprising that Mr van Rhyn did not do so, because the return of service was not available to him, as the history of this matter set out above clearly shows. In my view Mr van Rhyn could do no more than what

he sought to establish in his affidavit. In this regard I accept Mr *Barnard's* submission that the deputy sheriff's reference to the "respondent" being at "his" farm in the Mariental district demonstrates that he had clear knowledge that whatever he did at the address of No. 6,

Langstrand was an exercise in futility as the purported service would not come to the attention of the "respondent" who was at his farm several hundreds of kilometres away.

[38] Mr *Barnard* submits that the applicants cannot rely on any subsequent attempt to clarify the deputy sheriff's defective return of service, should they be inclined to do so, and relies on *Sabre Motors (Pty) Ltd v Morophane* 1961 (1) SA 759 (W) at 762H, where the Court stated:

> "Mr Bosman asked for leave to amplify the messenger's return, but in my view he is not entitled to do so. He must stand or fall by the return upon which he has relied."

[39] The applicants did not seek to do as contemplated, but the Court considered doing so. In this regard I am of the view that the authority relied upon is distinguishable from the present matter on the facts, the *Sabre* case being concerned with an application for sequestration where the main jurisdictional fact relied upon by the applicant was the messenger's return as affording the sole evidence of an act of insolvency by the respondent. In such circumstances I agree, with respect, that the Court in that case was correct to refuse the application for leave to amplify. In the present matter it is merely a question of establishing whether proper service had taken place or not. In any event, the option of requiring an improved or amplified return was not open to the Court, as the deputy sheriff in the present matter had regrettably passed away in the meantime.

[40] To sum up, I am inclined to find that the evidence surrounding the purported service is such that I not prepared to find that there is sufficient evidence to conclude that service on the fifth respondent has taken place. Should I be wrong, I am of the view that the service was so defective, that the defects should not be condoned.

[41] As such it is clear that the main application should be struck. (See *Glawe v Klotzsch and three others; Klotzsch v Glawe and another; Glawe v Klotzsch and two others* (Case no. A79/2001; 320/2000; 344/2002) delivered 31/10/2008 at p12).

[42] A last issue should be mentioned. The applicants in their heads of argument repeatedly state that the fifth respondent was "before the Court" and did not make use of this opportunity to deal with all the allegations in the review application and that it would be a travesty to strike the application. The fifth respondent was not "before Court" in the sense they contend for and certainly not to deal with the whole review application. Mr van Rhyn made an affidavit at the request of the second, third and fourth respondents for the first time as part of their opposition to the applicants' application dated 25 March 2010 for leave to file a further affidavit out of time.

The second respondent's counter-application

[43] The applicants' instructing legal practitioner brought it to the Court's attention that the counter-application was not served on the fifth respondent. This is not disputed. The applicants submitted that an appropriate order would grant their application to postpone the main review application which would include the counter-application and would afford the parties to effect proper service on all concerned.

[44] The second, third and fourth respondents submitted that the counter-application should not be struck as the relief sought therein is not prejudicial to the fifth respondent. In this regard reliance was placed on authority dealing with joinder.

[45] On the facts of this matter it is clear that the fifth respondent has been joined and is a party to the proceedings, although it has not been served and therefore did not oppose the review application. The fifth respondent has not condoned or accepted the lack of non-service of the counter-application. While it may be so that the relief sought in the counter-application appears to be in line with the fifth respondent's interests, the fact of non-service impinges upon such a basic right of a party to court proceedings, namely the right to be informed of such proceedings, the right to be heard and the right to conduct their case as they deem appropriate

according to law. In the circumstances the only appropriate order would be to strike the counter-application with costs.

_____

K van Niekerk

Judge

APPEARANCE

For the applicants: Adv C J Mouton

Instr. by Koep & Partners

For the 1st – 4th respondents: Adv T A Barnard

Instr. by Diekmann Associates