NOT REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, WINDHOEK

REASONS

CASE NO: LC 116 / 2016

In the matter between:

ALWYN PETRUS VAN STRATEN N.O.	**1ST APPLICANT**
KOMSBERG FARMING (PTY) LTD (IN LIQUIDATION)	**2ND APPLICANT**

And

THE LABOUR COMMISSIONER	**1ST RESPONDENT**
THE NAMIBIA FARMWORKERS UNION	**2ND RESPONDENT**
ROCCO NGUVAUVA	**3RD RESPONDENT**
SHIMAKELENI ELIA S.	**4TH RESPONDENT**
IINDJI LEONARD	**5TH RESPONDENT**
DYAKOMBA ANTANASIUS	**6TH RESPONDENT**
VRIES CHRISTINA IDLA	**7TH RESPONDENT**

MUNJAHARAPEKE NANGOMBE	**8TH RESPONDENT**
NDARA PAULUS K.	**9TH RESPONDENT**
AMAS VEIKKO MBAMBI	**10TH RESPONDENT**
SALOM SALATIEL	**11TH RESPONDENT**
MBANDE OLAVI	**12TH RESPONDENT**
LYUMA LEONARD L.	**13TH RESPONDENT**
INDONGO ESTER	**14TH RESPONDENT**
FLAI PAULUS K.	**15TH RESPONDENT**
RUVIRO REINHOLD N.	**16TH RESPONDENT**
NUULE WILBARD	**17TH RESPONDENT**
AMALOVU MWATILE A.	**18TH RESPONDENT**
KAMBANGU ANDREAS M.	**19TH RESPONDENT**
THITUNDA KASIUS M.	**20TH RESPONDENT**
KUDUMO FAUSTINA N.	**21ST RESPONDENT**
FILLEMON SIMON	**22ND RESPONDENT**
IINDJI LEONARD	**23RD RESPONDENT**
MUNGOBA TRESIA	**24TH RESPONDENT**
KAKWENA RACHEL M.N.	**25TH RESPONDENT**
SEZESI RONNETY K.	**26TH RESPONDENT**
KOCK MAGDALENA	**27TH RESPONDENT**
ITANA SERIMA	**28TH RESPONDENT**
RUBEN LUKAS	**29TH RESPONDENT**
NDJUKUMA JULIA	**30TH RESPONDENT**
HENDJALA ELIAS	**31ST RESPONDENT**
NAKALE LINEA N.	**32ND RESPONDENT**
SHIKOYENI JASON	**33RD RESPONDENT**
MUSHE JONA C.	**34TH RESPONDENT**
NYUNDU MAIRE	**35TH RESPONDENT**
MESAH HILIMA N.	**36TH RESPONDENT**
SHEEHAMA HILMA	**37TH RESPONDENT**
SHIMUNINGENI GABRIEL	**38TH RESPONDENT**
SIMBILINGA PAULUS J.S.	**39TH RESPONDENT**
MAHEU PHILLIPUS M.	**40TH RESPONDENT**
TOBIAS AINA	**41ST RESPONDENT**

KWANDU SIMON M.	**42ND RESPONDENT**
SMIT HYACINTA	**43RD RESPONDENT**
ISAACKS BATHOLOMEAS	**44TH RESPONDENT**
SWARTBOOI DANIEL	**45TH RESPONDENT**
LIKUWA FAUSTINUS	**46TH RESPONDENT**
HAINGURA JOSEPH MPARO	**47TH RESPONDENT**
HAIHAMBO IMMANUEL	**48TH RESPONDENT**
NDARA FELISTAS K.	**49TH RESPONDENT**
HAUSIKU ELIZABETH N.	**50TH RESPONDENT**
HAIPAND HISKIA	**51ST RESPONDENT**
KAUSO JOSEPH T.	**52ND RESPONDENT**
HAMUKWAYA JOHANNES N.	**53RD RESPONDENT**
LUKAS THOMAS	**54TH RESPONDENT**
KANDERE PETRUS S.	**55TH RESPONDENT**
ISAKS KATRINA	**56TH RESPONDENT**
MUKUVE MAURUS	**57TH RESPONDENT**
MWESHIPOOLI REINHOLD T.	**58TH RESPONDENT**
ROOI ANNA C.	**59TH RESPONDENT**
MPASI TITUS KAVANGA	**60TH RESPONDENT**
SHITA IGINATIUS K.	**61ST RESPONDENT**
LUKAS MARIA	**62ND RESPONDENT**
FEKA SABINU	**63RD RESPONDENT**
SHIKONGO LAIMI N.	**64TH RESPONDENT**
SHAANIKA GETRUD K.	**65TH RESPONDENT**
KOCK KATRINA	**66TH RESPONDENT**
SHAANIKA BERGITTA N.	**67TH RESPONDENT**
MUKUVE FESTUS N.	**68TH RESPONDENT**
MAKAYI STEPHANUS	**69TH RESPONDENT**
NYOKA BENHARD	**70TH RESPONDENT**
TJANGANO JONAS K.	**71ST RESPONDENT**
NGONDO JOSEPH	**72ND RESPONDENT**
NDARA LAURENCE LIKUWA	**73RD RESPONDENT**
DANIEL JOHANNES	**74TH RESPONDENT**
THIPUNGO AMATUS H.	**75TH RESPONDENT**

LINYANDO JUSTINUS	**76TH RESPONDENT**
NAMBAMBI SILAS	**77TH RESPONDENT**
SIREMO MARIA K.	**78TH RESPONDENT**
VRIES AGNES	**79TH RESPONDENT**
SHIMAKELENI ELIA S.	**80TH RESPONDENT**
PETRUS KAINO	**81ST RESPONDENT**
IITANA TILENI	**82ND RESPONDENT**
MWAMBU JOHANNES M.	**83RD RESPONDENT**
KAMUNOKO EIRA NEPEMBA	**84TH RESPONDENT**
KALYANGU GOTLIB	**85TH RESPONDENT**
DINDO CECILIA M.	**86TH RESPONDENT**
LINYANDO FIDELIUS L.	**87TH RESPONDENT**
MASHIYANGE ANNAMARIA M.	**88TH RESPONDENT**
KAROMBE FAUSTINUS D.	**89TH RESPONDENT**
MWAMBU JOHANNES IHEMBA	**90TH RESPONDENT**
MUSENGE ANDREAS M.	**91ST RESPONDENT**
ASSER NESTORY A.	**92ND RESPONDENT**
AMON MATHEUS S.	**93RD RESPONDENT**
MARUNGU MATEUS	**94TH RESPONDENT**
MUHUNGUKO PERGRINA R.	**95TH RESPONDENT**
SAPETAMA JOHANNES	**96TH RESPONDENT**
SHIMUNINGENI GERSON S.	**97TH RESPONDENT**
AMAKALI SELMA M.	**98TH RESPONDENT**
MBWALALA MARIA MARTHA	**99TH RESPONDENT**
SHIHEPO JOHANNES N.	**100TH RESPONDENT**
NANGOLO MARTA	**101ST RESPONDENT**
MOSES THERESIA	**102ND RESPONDENT**
UULE SELMA	**103RD RESPONDENT**
THIKERETE VILGINIA R.	**104TH RESPONDENT**
KASHANDJA FILLEMON	**105TH RESPONDENT**
THIYUNGE MARTIN M.	**106TH RESPONDENT**
SHINTANGO JOSEPH K.	**107TH RESPONDENT**
KAVETO ELIOTH D.	**108TH RESPONDENT**
MUKUVE PETRUS S.	**109TH RESPONDENT**

NKUVI LADISLAUS S.	**110TH RESPONDENT**
KANDONGA WILLEM N.	**111TH RESPONDENT**
MBUMBO MBAMBU	**112TH RESPONDENT**
SHAANIKA TOMAS S.	**113TH RESPONDENT**
MUNYINDEI NAMAKANDO WINNIE	**114TH RESPONDENT**
MATYAYI JOHANNES K.	**115TH RESPONDENT**
NAMULO PETRUS	**116TH RESPONDENT**
SIKERETE MATIAS M.	**117TH RESPONDENT**
KATHUMBI THIKANDEKO K.	**118TH RESPONDENT**
NDJAMBA BERTHA T.	**119TH RESPONDENT**
NGAMBI LUCIA K.	**120TH RESPONDENT**
IILONGA INAMUTILA I.	**121ST RESPONDENT**
MPANDE VALENTINUS K.	**122ND RESPONDENT**
MANGUNDU LAURENSIUS M.	**123RD RESPONDENT**
HAUSIKU MBANZE	**124TH RESPONDENT**
SIMBILINGWA VEIKKO K.	**125TH RESPONDENT**
JAMES ELIZABETH K.	**126TH RESPONDENT**
KALIMBO TEOPOLINA HINAMBEDHI	**127TH RESPONDENT**
SHITHIGONA NATALIA N.	**128TH RESPONDENT**
HAITA PAULINA N.	**129TH RESPONDENT**
MUKOSHO CHRISANTUS S.	**130TH RESPONDENT**
KASHERA HAMUTENYA L.	**131ST RESPONDENT**
SHISHWASHWA KAMPUNGU JONAS	**132ND RESPONDENT**
SIYENGO ERICKI	**133RD RESPONDENT**
FULAYI SELMA	**134TH RESPONDENT**
AKWANYENGA JOHANNES I.	**135TH RESPONDENT**
SHEKUZA FILLEMON	**136TH RESPONDENT**
JOHANNES FILLIPUS	**137TH RESPONDENT**
SHAMPAPI ALOYSIA N.	**138TH RESPONDENT**
KASHIMBA HELENA SELMA N.	**139TH RESPONDENT**
KAZUNGO KATANA SILLAS	**140TH RESPONDENT**
SHIKOYENI JONAS K.	**141ST RESPONDENT**
IHEMBA BONIFASIUS	**142ND RESPONDENT**
NDARA MARKUS INTJA	**143RD RESPONDENT**

SIWOGEDI PAULUS KALIMBWE	**144TH RESPONDENT**
KAPINDURA KAMBINDO K.	**145TH RESPONDENT**
MUYENGA LUDWIG M.	**146TH RESPONDENT**
NAMUNDJEMBO ANANIAS	**147TH RESPONDENT**
LIKUWA CHRISTOPH M.	**148TH RESPONDENT**
DIYEVE KANYINGA	**149TH RESPONDENT**
KAVETO FREDRICH K.	**150TH RESPONDENT**
SWARTBOOI BENJAMEN	**151ST RESPONDENT**
HAUFIKU FESTUS T.	**152ND RESPONDENT**
THIKONDHI PONTIANUS M.	**153RD RESPONDENT**
MUKONDA KORNELIUS	**154TH RESPONDENT**

Neutral citation: *Van Straten NO v The Labour Commissioner (LC 116-2016) [2016] NALCMD 34 (25 August 2016)*

Coram: VAN WYK AJ

Heard: **17 August 2016**

Delivered: **19 August 2016**

Reasons Released: **25 August 2016**

Flynote: Labour Law – section 129 of the Labour Act, 11 of 2007 (the Act) - the Act establishes two regimes of service – one in relation to service of Labour Court process - another for service of other documents in terms of the Act – a section 79 (1) notice is Labour Court process – service to be effected in terms of rule 5 of the Rules of the Labour Court (the Rules) – union not inherently or tacitly authorized to accept service on behalf of its members.

Summary: In this matter an urgent application was filed on 18 July 2016. Second and 3rd respondent opposed the application and reserved their right to anticipate the rule *nisi*. The 4th- 154th respondents did not oppose the matter. A rule *nisi* was accordingly issued on 21 July 2016 granting interim interdictory relief against 2-154th respondents, asking the parties to show cause why the relief should not be made final.

Held, the recognition agreement read with s 59 (1) (a) and s 67 (4) (a) (i) of the Act, did not support a case of proper service of the notice of motion effected on the 4th-154th respondents.

Held, the representative nature of the relationship between a union and its members does not inherently or tacitly authorise the union to accept service of process on behalf of its members.

Held, an enquiry into service of court process upon an effected party, is a fundamental enquiry into the compliance with the rules of natural justice and the court's assessment of whether a fair trial has been given. In this case, in the absence of proper service on the 4-154th respondents, the court is not satisfied to confirm the rule *nisi* for interdictory relief against them.

ORDER

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1. The rule *nisi* in respect of the relief sought in paragraph 2.1 of the Notice of Motion is not confirmed.

2. The relief sought in paragraph 2.2 of the Notice of Motion has been withdrawn.

3. Both parties reserved their rights in respect of costs; the rule *nisi* in respect of the relief sought in paragraph 2.3 of the Notice of Motion is extended to **31 August 2016 at 09h00**.

REASONS

VAN WYK AJ:

[1] An urgent application was filed in this matter on 18 July 2016. It was opposed by the 2nd and 3rd respondent, at the first appearance on 21 July 2016 when the court was asked to grant a *rule nisi*. The 2nd and 3rd respondent opposed the application and reserved their right to anticipate the rule *nisi*. The 4th- 154th respondents did not oppose the matter. A rule *nisi* was accordingly issued on 21st of July in the following terms:

'2. A rule *nisi* herewith issues calling upon the respondents to show cause, if any, on **4 August 2016 at 11h00**, why the following order should not be made final:

2.1 Pending the resolution of the dispute lodged with the Labour Commissioner on 18 July 2016, the 4th to 154th respondents are interdicted and restrained from continuing or re-commencing with the illegal strike at Farm Komsberg, when Mr. Johannes Hendrik (Jannie) Thiart enters into any of the various vineyard blocks on the farm or upon any other portion of the Farm Komsberg, or for any other reason.

2.2 Pending the resolution of the dispute lodged with the Labour Commissioner on 18 July 2016, the 2nd, 3rd, 4th, 5th and 6th respondents are interdicted and restrained from permitting or assisting the 7th to 154th

respondents in continuing or re-commencing with the illegal strike at Farm Komsberg, when Mr. Johannes Hendrik (Jannie) Thiart enters into the various vineyard blocks on the farm or upon any other portion of the Farm Komsberg, or for any other reason.

2.3 The respondents shall pay the applicants' costs of one instructing and two instructed counsel, jointly and severally, the one paying the others to be resolved.

3. The orders in paragraphs 2.1 and 2.2 hereof shall operate with immediate effect pending the return date of the rule nisi.

4. The applicants shall serve this order on the 4th, 5th and 6th respondents on behalf of the 4th to 154th respondents.'

Allowing Counsel for 2nd and 3rd Respondent to make a legal point

[2] Mr. Heathcote S.C., appeared for the applicants and Ms. Nambinga appeared for the 2nd and 3rd respondents. The return date of the rule nisi was extended to 16 August 2016. In his opening address, counsel for the applicants indicated that the relief sought against 2nd-3rd respondents in the rule *nisi*, is withdrawn. He urged the court that the rule *nisi* be confirmed against 4th - 154th respondents.

[3] Notwithstanding the fact that the interdictory relief sought against 2nd-3rd, in paragraph 2.2 of the rule *nisi* above was withdrawn, Ms. Nambinga, acting for 2nd -3rd respondents, maintained that she is on record and has the right to address the court regarding a legal point pertaining to service of the *s 79 (1)* notice and the notice of

motion. She argued that, even though raising the point is no longer directly in furtherance of the case of her clients, but rather in furtherance of the case against the 4th to the 154th respondents, for whom she categorically stated she does not act, it is a legal point concerning the case before the court and she has a right and a duty to raise it accordingly.

[4] Her contention was that the applicants' case pertaining to compliance with service of the application rests firmly on submissions which concern her clients, and therefore they have an interest in the arguments placed before this court for consideration and therefor they should be heard before an order is made. More fundamentally she argued, she must be heard on the basis that her submissions may impact the court's conclusions on whether or not sufficient proof of service exists in this matter. Service, being a fundamental consideration when granting urgent interdictory relief, and forming the basis of adherence to the rules of natural justice and the right to a fair trial. A legal point so raised on whether the court process was properly served, so she contended, cannot be lightly discarded.

[5] Having considered the above stated arguments, the court ruled to allow her to argue the point raised. Her arguments regarding the service of process, were placed before court and were accordingly considered.

Service of Section 79 (1) Notice

[6] Ms. Nambinga raised a point in relation to *section 129 of the Labour Act,* in which she contended that for purposes of the Act, a document is served on a person

if it is delivered personally or sent by registered mail or left with an individual apparently residing or occupying at the person's last known address. She contended that the *s 79 (1)* notice is such a document and was not served in accordance with *s 129*, and therefore the application lacks compliance with *s 79 (1)*, and the interdictory relief sought, should on that basis alone be refused.

[7] *S 129 (1)* reads as follows:

'(1) For the purpose of this Act -

(a) a document includes any notice, referral or application required to be served in terms of this Act, except documents served in relation to a Labour Court case; and

(b) an address includes a person's residential or office address, post office box number, or private box of that employee's employer.

(2) A document is served on a person if it is –

(a) delivered personally;
(b) sent by registered post to the person's last known address;
(c) left with an adult individual apparently residing at or occupying or employed at the person's last known address; or

(d) in the case of a company -
(i) delivered to the public officer of the company;
(ii) left with some adult individual apparently residing at or occupying

or employed at its registered address;

(iii) sent by registered post addressed to the company or its public officer at their last known addresses; or

(iv) transmitted by means of a facsimile transmission to the person concerned at the registered office of the company.

(3) Unless the contrary is proved, a document delivered in the manner contemplated in subsection (2)(b) or (d)(iii), must be considered to have been received by the person to whom it was addressed at the time when it would, in the ordinary course of post, have arrived at the place to which it was addressed'

[7] Considering the ordinary grammatical meaning of *s 129* of the Act, I conclude that it very explicitly excludes 'documents served in relation to a Labour Court case', from the definition of documents to be served in terms of *s 129*. The provision in my view clearly creates two regimes for service. One regime for documents in terms of *s 129*, and another regime for 'documents served in relation to a Labour Court case'. In terms of my understanding of the Act, in relation to the function of the Rules of the Labour Court, the purpose of the rules is 'to regulate the conduct of proceedings in the Labour Court'[1].

[8] *Rule 5* of the Rules of the Labour Court contains the rules of service of process in the Labour Court. Process is defined as:[2]

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1 *S 119 (3*) of the Act

2 Rule 1 of the Act

'any notice of motion, notice of appeal or cross appeal, affidavit or other notice, or document required to be served or delivered under these Rules;

[9] A *s 79 (1)* notice is undisputedly a 'document served in relation to a Labour Court case'[3] and falls under the definition of court process so defined in the Rules of the Labour Court. In this premises, I hold that it must be served in terms of *Rule 5*. I do not agree with Ms. Nambinga's contention that a s 79 (1) notice is a document referred to in s 129 (2). I therefore reject her contention that there was on that ground non-compliance with s 79(1).

[10] The *s 79 (1)* notice was served on 1st - 6th respondents as proved in the affidavits of service. The Act, in *s 79 (1) (a)* requires the applicant to give the respondent written notice of the upcoming application. In *s 79 (1) (b)* the Act requires, service of the notice and the application on the Labour Commissioner and in *s 79 (1) (c)*, that the respondents had 'been given a reasonable opportunity to be heard before a decision is made'.

[11] In this matter the *s 79 (1)* notice was served on the 1st-6th respondents. The question to be answered is – is this compliant with *Rule 5*? In terms of *Rule 5 (8)* 'the court can accept proof of service in a manner, other than prescribed in this rule, as sufficient'. I hold that the *s 79 (1)* notification served on the union, its representative and three employees in the leadership of the workforce, the 4th - 6th respondents is sufficient proof of service. The 4th-6th respondents are workplace union representatives, hereinafter called shop stewards. This court accepts that in the

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3 S129 (1)(a)

circumstances of this application, the said three shop stewards, were in a position to share the written notice of the application with the rest of the affected employees. It is not an unreasonable assumption; they were in a position to have shared the written notice of *s 79(1)* amongst the remaining respondents and those with an interest would have had reasonable access to read the notice. On this basis I am satisfied that the service done on the 2nd–6th respondents, and their reach amongst the employees[4], is sufficient proof of service of the *s 79(1)* notice.

Service of the Notice of Motion effected as alleged in Replying Affidavit

[12] I will now deal with the submissions of the applicant in their replying affidavit regarding service. Applicants' contention in their replying affidavit[5] was that in terms of certain clauses of the recognition agreement[6] read with the provisions of the Act in *s 59 (1) and s 67 (4) (a) (i)*, the union is an authorized representative of its members in respect of service and the service in this case was thus effected.[7] Reference was made to Rules 5(5) and 5(8), suggesting that service in terms of such provisions could have been done.[8] Below is the reference in the replying affidavit:

'Mr. Nguvauva refers to Rule (5)2 and says the court cannot condone non-compliance therewith. I refer him to Rule 5(5) and 5(8)'[9]

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4 S 67 (1) stipulating the ratio of shop stewards in relation to numbers of union members

5 Page 151 of the amended indexed bundle

6 Clause 20.4; Clause 70(1)(d); Clause 3.1; Clause 7.1.2; Clause 8.3.7

7 Page 152 of the amended indexed bundle paragraph 7.9

8 Page 152, of the amended indexed bundle paragraph 7.6

9 Page 8, paragraph 7.6 of the Replying Affidavit

[13] I have considered the relevant clauses, so mentioned in the recognition agreement and I accept the contentions of counsel for the 2nd and 3rd respondent, that the provisions so mentioned does not give any specific authority to the union to accept service of process on behalf of its members. These provisions, read within the context of clause 14 of the recognition agreement dealing with unlawful industrial action, where the role of the union is limited to act as mediator and communication channel for intended actions by the company, convinced me that the recognition agreement is steering away from the subject of the union accepting service on behalf of its members in the event of matters moving in the direction of an unlawful strike. The recognition agreement is clearly assisting the employer in this regard.

[14] Applicant placed a further reliance on *s 59 (1) (a)*, where the Legislator has given a registered trade union the right to represent its members in any proceedings brought in terms of the Act. *Section 59 (1)(a)* provides as follows:

> ‘(1) Subject to any provision of this Act to the contrary, a registered trade union has the right -
>
> (a) to bring a case on behalf of its members and to represent its members in any proceedings brought in terms of this Act;

[15] As I understand the provision, it does not authorise service on behalf of any union member on the union; it merely confirms that the union is allowed to represent its members in any proceedings. The union has the right to accept service on behalf of its members, but must still be so authorized by the members, to accept service on their behalf. *Section 59 (1) (a)*, is thus also not taking the applicant’s argument for effective service any further.

[16] The applicant also cited *s 67 (4) (a) (i)* as supportive of a construction that the union is an authorized representative in respect of service on behalf of its members. The replying affidavit in reliance thereon paraphrased s 67(4) (a) (i) as follows:[10]

> 'In terms of section 67 (4) (a) (i) of the Labour Act the workplace representatives represent all employees on any matter relating to terms and conditions of employment which includes industrial action – strikes.[11]

[17] My reading of *S 67 (4)(a)(i)* is this:

> 'The functions of a workplace union representative are –
>
> (a) to make representations to the employer of the employees who elected the representative concerning -
>
> (i) any matter relating to terms and conditions of those employees' employment; and...'

[17] The provision empowers the shop stewards to represent the employees in matters pertaining to their conditions of employment. It does not mention service of process in court proceedings which is clearly a different matter, to representation of members in relation to the negotiating better conditions of employment.

[18] The replying affidavit places reliance on *rules 5(5)* and 5(8), in respect of service. However, in court during argument Mr. Heathcote argued that the union is

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10 Paragraph 7.8.6 of the replying affidavit, page 152

11 Paragraph 7.8.6 of the replying affidavit, page 152

inherently or tacitly authorized to receive service on behalf of its members, as a result of its representative role in the employment context, and hence it does not need a specific authorization to accept service. This argument also seemed to have resonated in the replying affidavit, where reliance was placed on the broader terms of representation in the recognition agreement clauses mentioned previously. None of the clauses cited referred to service specifically:

'The collective agreement read with the relevant provisions of the Labour Act, disposes of Mr. Nguavauva's allegations that service has not been effected on the Komsberg workers (7th to 145th Respondents)'[12]

In court the argument was broadly done in the following terms - as an outflow of the general representative nature of the relationship between union and its members, service of court process on the union in a situation of industrial action, inherently also constitutes service on the members. I call this the inherent authorization of service argument for ease of reference. I will deal with this argument before I consider the argument of service in terms of *Rule 5 (5)* and or *Rule 5 (8).*

The Inherent Authorization of Service - Argument

[19] All the provisions of the recognition agreement so cited by the applicant, appears to emphases the representative role vis-à-vis its members, in one aspect or the other of their employment situation. None of the provisions specifically related to service, let alone giving the union a mandate to accept service on behalf of its

12 Paragraph 7.9 of the replying affidavit

members. My assessment of the above stated submissions in the replying affidavit, which were intended to convince the court to make an inference of effective service, is that a case has not been made out that the union *per se* is the authorized representative of the members when it comes to service of process in the Labour Court. The union still requires authorization from its members to accept service on their behalf in terms of Rule 5(2). I respectfully found support for this view in *Shoprite Namibia (Pty) Ltd v Hamutele:*[13]

[20] In this matter, the court considered this point of whether service on the union by law also constitutes service on its members, Angula AJ stated:

'[11] It is necessary to point out why service of the process on the correct party is important to the commencement of legal proceedings. It has been held that effective service of process initiating legal proceedings upon a correct party to the proceedings is fundamental to the commencement of such legal proceedings, failing which it will lead to the nullification of such proceedings.'

[21] Angula AJ continued:

'[16] Counsel for the applicant argues that in terms of s 86(12) (*a*) read with s 59(1) (*a*) of the Act, a registered trade union is entitled to represent its member at the arbitration proceedings. Counsel further points out that at the proceedings which form the subject matter of these review proceedings, the second respondent was represented by the General Secretary of the trade union of which the second respondent was a member. Accordingly, so

13 (LC 172/2013) [2014] NALCMD 43 (20 October 2014) at p8-9, 11-12

the argument goes, the applicant was entitled to serve the application at the offices of the trade union. Counsel for the second respondent points out that he has no qualms with the fact that the second respondent was represented by the General Secretary at the arbitration proceedings however his qualms is that the General Secretary's mandate came to an end once the arbitration proceedings were finalised; that when the applicant commenced with these review proceedings, it constitutes new or fresh proceedings. I agree with the submissions by counsel for the second respondent. The review proceedings are not a continuation of the arbitration proceedings nor are they interlocutory proceedings within the arbitration proceedings. They are new proceedings instituted afresh in a different forum, namely the Labour Court. It therefore follows that the service of the application has to take place in compliance with of rule 5 of the Labour Court. Proper service could only have taken place if the second respondent had authorized the trade union to accept service of the application on the trade union on his behalf.

[17] According to the second respondent, he had not authorized the trade union to accept the service of the application on his behalf. This contention by the second respondent is not disputed by the applicant. I have considered the provisions of rule 5(3) against rule 5(2) and find myself in agreement with the submissions by counsel for the second respondent, firstly, that rule 5(3) (*c*) is meant for service where the trade union is a party to the proceedings, as a respondent, in which case the process have to be served on the '*main office of the Union or its office in the place where the dispute arose'.* It is to be noted that the whole sub-rule (3) (except sub-rule (3)(*b*)) where any of those entities is a party to the proceedings, in each case, the person to be served with the process is identified eg a 'responsible employee', or 'official' of that entity.

[18] The trade union is not a party to this review proceedings; the trade union cannot represent a member in review proceedings; the trade union was not authorised by the

second respondent to accept service of the process on its behalf. Proper service upon the second respondent should have taken place in terms of rule 5(2).

[19] In the result, I have arrived at the conclusion that there has not been proper or service at all, of the application on the second respondent as required by rule 5(2) of this court. The application thus stands to be dismissed on that ground alone.'

[22] In addition, I also refer to the judgment of Parker AJ in the matter of *Meat Board of Namibia v Nitscke*[14]. In this matter service of a notice to appeal was not effected on the respondent, but on the Public Service Union, 'because a Public Service Union official has represented the respondent at the arbitration'[15].

[23] Parker AJ held in the flynote of the above stated judgment:

> 'Service must comply with the relevant provisions of these rules – Court held that it is a fundamental principle of fairness in litigation that litigants should be given proper notice of legal proceedings that are instituted against them – This principle lies at the root of the *audi alteram partem* rule of natural justice – Where there has been a failure of proper service of process on a party there is surely unfairness in the proceedings and, furthermore, the non-compliance with the rules is so material and pervading that it cannot be overlooked because the overlooking of such material non-compliance renders the proceedings unfair and, accordingly, offensive of art 12(1) of the Namibian Constitution – The notice of appeal served is not in compliance with the rules and is therefore a nullity.'

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14 (LCA 12-2015) [2015] NALCMD 18 (30 July 2015)

15 Paragraph 3 supra

[24] I respectfully associate myself with the dicta in both decisions. Bringing this principle home to the instant case, I do not have to look far for compelling reasons why personal service, and all attempts thereto, is the departure point of service of court process. In a situation of possible unlawful industrial action, members of the union may face personal consequences if they do not adhere to any court orders so issued to curtail any unlawful actions. Contempt of court charges may follow, as has happened in this matter in the interlocutory application that was filed on 2 August 2016. The penalties sought in contempt proceedings are not for the union. It is for the member personally. There is thus a very real and personal consequence for the employee and that clearly demonstrates the fundamental value of proper service of process on members and not only on the union. I respectfully associate myself in this regard with the *dicta* of Parker AJ in the *Meat Board* case when he said:

> 'It is a fundamental principle of fairness in litigation that litigants should be given proper notice of legal proceedings that are instituted against them'. I should say that this principle lies at the root of the *audi alteram partem* rule of natural justice. In my opinion, where there has been a failure of proper service of process on a party, there is surely unfairness in the proceedings.'

Service in terms of Rule 5(5)

[25] I will now consider the point whether service in this matter was affected in terms of Rules 5 (5). In that respect a judge in chambers must have given directions in respect of service, prior to service of the application, no such directions are alleged in this matter.

The Courts Discretion in terms of Rule 5 (8)

[26] In this regard the court was requested, during argument by counsel for the applicants, with reference to their replying affidavit, to consider the service of the union compliant with *Rule 5 (8)*, on the members. In the premises I have done so.

[27] I have had regard for the fact that these were urgent proceedings. The applicant has in my view made out a case for urgency and a *prima facie* case in terms of the principles of *Setlogelo v Setlogelo*[16].

[28] However, applicant's case in respect of proper service, based on his replying affidavit is now in the balance. I held that there is no basis to find that the service on the union, constituted service, relying on the clauses so mentioned in the recognition agreement, read *s 59 (1) and 67 (4) (a) (i).* I dismissed the argument that there is inherent or tacit authority for the union to accept service on behalf of its members, simply because it is their union. I associated myself with decisions placing a very high premium on personal service of court process on members of the union itself.

[29] Be that as it may, the question arrives - is it really in the interest of the due administration of justice to require personal service on 147 employees before an urgent application can be brought for interdictory relief in circumstances of impending unlawful industrial action? It seems that if an employer missed the opportunity to negotiate a clause in the recognition agreement that service on the

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16 *(Setlogelo v Setlogelo 1914 AD 221 and L F Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267A-F.)*

union constitutes service on the members, he missed the boat and have to bring an application in terms of *Rule 5(5)* before the hearing[17]*, or* face the onus in court to prove service in terms *Rule 5(8)*.

[30] Having considered the circumstances of this case, the court is not oblivious to the realities faced by the applicant in the current matter, in the midst of an impending unlawful industrial action. However, should service on the union and its representatives be the only effort made to constitute proper service, if considered from the court's perspective in *Rule 5 (8)*? In my view yes, that can suffice, if that is truly the only reasonable effort that could have been taken under the circumstances.

[31] I considered the circumstances of this matter. 'This application will be served on all respondents as indicated at the end of the Notice of Motion.'[18] That was the stated intention in the founding affidavit, but service of the notice of motion was not effected accordingly. It was only effected on the 2nd and 3rd respondents, the union and the union representatives. The very broader reach of the shop stewards among the 7th - 154th respondents was not set into motion in serving the notice of motion in this application. It was done for the *s 79 (1)* notice but not for the notice of motion.

[32] I am inclined to consider service on the union and its representative as one of the factors that would point to sufficient proof of service, in terms of *rule 5(8)*. Service on shop stewards connecting with the employees on a lower level in the vineyard, could have been another factor to tip the scale in favour of proper service. *Section 67 (1)* of the Act, demonstrates the reach of shop stewards - they have a broader

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17 Meat Board of Namibia v Nitscke supra, paragraph 4.

18 Paragraph 15.5 of the founding affidavit, page 31 of the amended indexed bundle

reach than the union representative on the ground level of employees in terms of numbers, and therefore have a better chance to bring the application to the attention of each and every employee affected. Affixing the application to a gate or fence where employees normally passes could have been another method of service. And all of these on a cumulative basis, could have tipped the scale toward sufficient service in terms of *rule 5 (8)*. Based on the above, I am not convinced that there is sufficient proof of service to tip the scale in favour of the applicant in terms of *Rule 5(8)*.

[33] In taking a decision in this instance, I cannot get away from the reality that serving the notice of motion only on the 2nd and 3rd respondent, left the 4th - 154th respondents without service of the notice of motion and for whom this application have infringed the rules of natural justice and have not been a fair trial. It is for this reason that I cannot confirm the rule *nisi* in respect of paragraph 2.1. An enquiry into service of court process upon an effected party, is a fundamental enquiry into the compliance with the rules of natural justice and the court's assessment of whether a fair trial has been given.

[34] It follows then that in this case, in the absence of proper service of the notice of motion on the 4-154th respondents, the court is not satisfied to confirm the rule *nisi* for interdictory relief against them.

[35] The following order is made:

1. The rule *nisi* in respect of the relief sought in paragraph 2.1 of the Notice of Motion is not confirmed.

2. The relief sought in paragraph 2.2 of the Notice of Motion has been withdrawn.

3. Both parties reserve their rights in respect of costs; the rule *nisi* in respect of the relief sought in paragraph 2.3 of the Notice of Motion is extended to **31 August 2016 at 09h00**.

L VAN WYK

ACTING JUDGE

APPEARANCES

APPELLANT: **R Heathcote (together with Jacobs)**

Instructed by Van der Merwe-Greeff Andimba Inc.

2nd–3rd RESPONDENTS: **S Nambinga**

AngulaCo. Inc.

131st RESPONDENT: **E Angula**

AngulaCo. Inc