

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 198

MA231/2021

(Arising in DC116/2021)

In the matter between:

CATHERINE CILLIERS

(Absent / represented by Mrs. Alexia Amesbury)

Petitioner

AND

ADRIAAN DE LANGE

(Absent / Unrepresented)

Respondent

Neutral Citation: *Cilliers v. Delange* (MA231/2021 (arising in DC116/2021) [2022] SCSC 198

(07 March 2022)

Before: B. Adeline, Judge

Summary: Dispensation of service of divorce petition under Rule 7 (4) of the Matrimonial Causes Rules – Motion dismissed for want of service under Rule 7 (1) (a) read with Rule 8 (1) of the Matrimonial Causes Rules.

Heard: 5 November 2021

Delivered: 07 March 2022

FINAL ORDER

Service of divorce petition upon the Respondent in a Matrimonial Cause is mandatory – Under Rule 7 (1) (a) read with Rule 8 (1) of the Matrimonial Causes Rules – Rules 7 (2) and 7 (3) of the Matrimonial Causes Rules provide other options for service besides personal service – Dispensation of Service of divorce petition on the Respondent under Rule 7 (4) of the Matrimonial Causes Rules should be considered as a measure of last resort – Such a remedy impacts on the right to a fair hearing under Article 19 (7) of the Constitution and the principle of natural justice – Motion is therefore dismissed for want of service of the petition upon the Respondent.

RULING

B. Adeline, J

[1] By way of a divorce petition dated 09th September 2021 filed in Court, one Catherine Cilliers (“the Petitioner”) petitions this Court for an Order of divorce to dissolve the marriage between her and one Adrian De Lange, (“the Respondent”).

[2] The Petitioner now files this application by way of Notice of Motion supported by an affidavit sworn by her as MA231/2021. The application is filed pursuant to Rule 7(4) of the Matrimonial Causes Rules, by which application, an Order of this Court is being sought for leave to dispense with service of the petition on the Respondent. Rule 7(4) is couched in these terms:

“Service may be dispensed with altogether in any case in which it may appear necessary or expedient to do so. An application for leave to dispense with service on the Respondent spouse or in any other case shall be made to a Judge and shall be supported by an affidavit setting out the ground of the application”.

[3] To contextualise the issues that this application calls for consideration and need to be addressed in this ruling, it is appropriate, at this juncture, to remind ourselves, that the Matrimonial Causes Rules came into force on the 22nd March 1993, prior to the promulgation of the country’s Constitution on the 21st June 1993, incorporating therein, the Seychellois Charter of Fundamental Human Rights and Freedoms.

[4] An application for service of the petition upon the Respondent to be dispensed with under Rule 7(4) of the Matrimonial Causes Rules, effectively seeks to deny the Respondent’s right to a fair hearing afforded to him under Article 19(7) of the Constitution which reads as follows;

“19(7). Any Court or other authority required or empowered by law to determine the existence or extent of any Civil right or obligation, shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such Court or other authority the case shall be given a fair hearing within a reasonable time”. (Underlined emphasis is mine).

[5] In addition, in dispensing justice, the Court has to have regards to the principle of natural justice, when in given circumstances, there are calls for its consideration.

The principle of natural justice is derived from the Roman word “*jus-naturale*” and “*lex naturale*”. Natural justice is a sense of what is wrong and what is right. It has several purposes, not limited to the following;

- (i) to provide equal opportunity to be heard.
- (ii) It introduces the notion of fairness to fulfil the gaps and loopholes of the law.
- (iii) To protect fundamental rights, and
- (iv) to avoid miscarriages of justice.

[6] In essence, therefore, the principle of natural justice should be free from bias, and parties should be given fair opportunity to be heard, and all reasons and decisions taken by the Court should be informed by the Court to the respective parties.

[7] It follows to say, that parties who are affected by an application to a Court must be given a chance to make representations, and that “Courts are not permitted to lock litigants out of the Court process”. In *Falcon Enterprise v. David Ersack* [2001] SLR137, the Court said the following;

“Lack of opportunity to comment on the evidence is a breach of the right to a fair hearing”.

[8] The word shall use in Rule 7(1) (a) of the Matrimonial Causes Rules as regards to service of the petition upon the Respondent after the commencement of proceedings for divorce, as opposed to the word may in Rule 7(4) as regards to dispensation with service, is of great significance and vitally important if the Constitutional right to a fair hearing and the principle of natural justice is to be upheld. (Underlined emphasis mine).

[9] The significance of the mandatory provisions as to service, was the subject of discussion and analysis in *Government of Seychelles and The Attorney General v. Nelson Robert Poole and others* SCA CP2, CP3, CP4/2016 (Appeal from the Constitutional Court CP4/2012. Addressing a dispute over whether service of a plaint on a defendant had

been effected or not, the Court made particular reference to Section 30 of the Seychelles Code of Civil Procedure (“the SCCP”) that reads;

“When the plaint has been entered in the register of Civil and Commercial suits, the Registrar shall issue summons under the seal of the Court, and signed by him, to each defendant calling upon him to appear in the Supreme Court at a date and time therein stated, to answer the claim. A copy of the plaint shall be served with each summons”.

[10] The Court also made particular reference to Rule 8 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules that reads;

“8. After the Petitioner has complied with the Rules, the Registrar shall issue a notice on the Respondent fixing a date and time for appearance”.

[11] Interestingly, in addressing the issue of service (which was about service of summons on the Respondent). The Court put great emphasis on the mandatory nature of Section 30 of the SCCP and Rule 8 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules emphasizing on the word “shall”. The Court had this to say;

“All these provisions uphold the Constitutional right to a fair hearing and compliance with the Rules of natural justice. In this suit, the observance of Rights and rules is even more required given the potential expropriation of the person affected by a decision of the Court”.

[12] Clearly, therefore, based on the same reasoning, the failure to adhere to such a clear and elaborate procedural requirements of Rule 7 (1) (a) read with Rule 8 (1) of the Matrimonial Causes Rules, and to opt for the simplistic option of seeking for dispensation of service of the petition upon the Respondent cannot be entertained at this early stage of these proceedings.

[13] It is not sufficient for a Plaintiff to issue a suit (or a Petitioner to issue a petition) against a party and not to take steps to effect service of summons (or service of notice). Besides what have been discussed in the preceding paragraphs, basic fairness and due process of the law requires, that before a Plaintiff or a Petitioner may obtain the relief being sought, all other parties must be formally notified that a case has been commenced.

[14] In fact, in *Rashida Abdul Karim Hanali and Or v Suleiman Adrisi* (Miscellaneous Civil and Application 11 of 2017), the Court said, that “a Court has no jurisdiction to deal with a filed plaint until a summons to file a defence has been served and a return of service filed, which steps alone activate further proceedings”. The Court proceeded to add, that “until summons have been issued and served, the suit is redundant”.

[15] The Court also said, that “non-compliance with the requirement of service is a fundamental defect rather than, a mere technicality”. It emphasised, “that Court procedures cannot be allowed to go awry”.

[16] The correct approach was successfully endorsed by Carolus J in *Marc Edward Davison V. Ganokwan Phansuwan Davison* when she granted the Applicant the relief sought. At paragraph 7 and 8 her Ladyship had this to say;

“7. Section 52 however also allowed substitution for service of notice by advertisement or otherwise, as may seem just”. In the circumstances, I consider it just to substitute service by advertisement”.

“8. Consequently, in terms of Section 52 of the SCCP, I Order that Notice of the present proceedings is advertised in three consecutive issues of two widely circulated daily newspapers in Thailand by the Petitioner”.

[17] At paragraph [1] of her Order, Carolus J summarises the facts that led to her making the Order for substitution for service of Notice by Advertisement as follows;

“[1] The Petitioner has filed a petition before this Court, and sought for leave for service of the said petition on the Respondent out of the jurisdiction, in

Thailand, by way of motion in MA47/2020 under Section 47 of the Seychelles Code of Civil Procedure “SCCP”. The motion was granted on the 01st July 2020 but service was unable to be effected on the given address. The Petitioner now seeks substitution for advertisement pursuant to Section 52 of the SCCP”.

[18] I am reminded, that there is a similar provision to Section 47 of the SCCP under Rule 9 of the Matrimonial Causes Rules that reads as follows;

“A petition, summons, notice or other document in matrimonial cause or matter may be served out of the jurisdiction with leave”.

[19] I am further reminded, that there are provisions under the Matrimonial Causes Rules equivalent to Section 52 of the SCCP, notably, Rules 7 (2) and 7 (3). Rule 7 (2) reads as follows;

“An application for leave to substitute for personal service some other mode of service or to substitute for service notice of the proceedings by advertisement or otherwise shall be made ex parte and shall be accompanied by an affidavit in support setting out the grounds on which the application is made”.

[20] Rule 7 (3) reads;

“Where leave is given to substitute for service, notice of the proceedings by advertisement, the form of advertisement shall be settled by the Registrar and copies of the newspapers containing the advertisement shall be filed together with any notice to appear”.

[21] In conclusion, therefore, the lesson to be learned, is that although under Rule 7 (4) of the Matrimonial Causes Rules, the Court may entertain an application to dispense with service of the petition upon the Respondent altogether, for the reasons discussed in the preceding paragraphs, the Court would only grant this remedy as a measure of last resort, more so in the instant case, given that it is record, that the Petitioner and the

Respondent do have personal contact with each other to facilitate the access arrangement regarding their minor child.

[22] For these reasons, therefore, the motion is dismissed for want of service.

Signed, dated and delivered at Ile du Port on 07th March 2022

B. Adeline

Judge of the Supreme Court