REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 483/2014

In the matter between:

PATRICK HANSTEIN **PLAINTIFF**

And

SUSANNA HILDE HANSTEIN **DEFENDANT**
(born Steyn, previously Coetzee)

Neutral citation: *Hanstein v Hanstein* (I 483/2014) [2014] NAHCMD 340 (07November 2014)

Coram: UEITELE, J

Heard: 07 November 2014

Delivered: 07 November 2014

Flynote: *Practice - Judgments and orders* - Rescission of order- Can only be granted in terms of rule 103 of Rules of High Court or under common law where judgment erroneously sought or granted in absence of party - The failure by the defendant to provide an address where the documents would be served does not render the notice of intention to defend void - plaintiff therefore not entitled to proceed with the action as if there had been no notice to defend at all.

Summary: On 12 February 2014 the plaintiff caused summons to be issued against the defendant. In the summons the plaintiff claimed for the restitution of conjugal rights, and, failing compliance therewith a decree of divorce. The plaintiff furthermore claimed other ancillary relief.

The summons were, on 04 March 2014, served on the defendant personally. On 07 March 2014, the defendant acting in person served a notice of intention to defend on the plaintiff's legal practitioners of record and also on the Registrar of this court.

Despite the fact that, the defendant gave notice that she intends to defend the plaintiff's claim, the plaintiff's legal practitioners, without notice to the defendant, on 19 March 2014 gave notice to the Registrar for the latter to set down the matter for hearing on 24 March 2014. The matter was accordingly set down for hearing on the undefended matrimonial matters court roll of 24 March 2014. On that day when the matter was called the plaintiff's legal practitioner informed the Court that the defendant entered notice of intention to defend the action but the notice is defective because it (the notice) did not provide an address within 08 Kilometers radius at which the court process would be served. After that submission by the plaintiff's legal practitioner the court granted a restitution of conjugal rights order in favour of the plaintiff.

On 12 May 2014 the legal practitioners acting on behalf of the defendant filed a notice of representation and of intention to defend. The defendant, on 08 August 2014 filed an application for the rescission of the order granted on 24 March 2014, the application is brought under Rule 103 of this Court and an application for the condonation of the late filling of the application for the rescission application.

The plaintiff opposes both the application for the rescission and the application for the condonation of the late filling of the application for the rescission. The plaintiff opposes the condonation application on the basis that, the defendant allegedly unreasonably delayed in the bringing of the rescission application.

The plaintiff opposes the rescission application on the ground that the order of 24 March 2014 is not a final order and can therefore not be rescinded, that when the Court granted the order on 24 March 2014, the court was alerted that a 'defective notice of intention to defend' was filed the court thus granted the order full knowing that there is a defective notice to defend and the order was thus not erroneously granted.

Held that in a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment; whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata*.

Held further that failure to give an address for service in a notice of intention to defend does not render the notice void but makes it irregular and liable to be set aside. In such an event the plaintiff should not disregard the notice and apply for default judgment but may in a proper case apply to the court on notice to the defendant to set the notice aside as an irregular proceedings in terms of the rules of Court.

Held further, that the plaintiff erroneously sought the restitution of conjugal right order together with the ancillary relief. This court can therefore not allow that order to stand and it is accordingly set aside.

ORDER

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1. The restitution for conjugal rights order granted on 24 March 2014 is hereby set aside.

2. That the defendant is hereby granted leave to defend the matter.

3. That the plaintiff must pay the defendant's costs for the application to rescind the order of 24 March 2014 such costs to include the costs of one instructing and one instructed counsel.

4. That the matter is hereby postponed to 26 November 2014 at 8h30 for a case planning conference.

5. That the parties must file a case plan by no later than 21 November 2014.

JUDGMENT

UEITELE, J

A INTRODUCTION

[1] On 12 February 2014 the plaintiff caused summons to be issued against the defendant. In the summons the plaintiff claimed for the restitution of conjugal rights, and, failing compliance therewith a decree of divorce. The plaintiff furthermore claimed other ancillary relief, namely that:

'(a) The defendant forfeits the benefits arising out of the marriage in community of property specifically the forfeiture of an immovable property situated at Erf 576, Block G, Rehoboth, Republic of Namibia.

(b) The defendant must sign all the documents necessary to effect transfer of Erf 576, Block G, Rehoboth, Republic of Namibia into the name of the plaintiff within seven days after having been called upon to do so by defendant's attorneys, failing which the Deputy Sheriff for the District of Rehoboth is authorized to sign the necessary documents.

(c) Forfeiture of the benefits of the marriage in community of property in favour of the Defendant in respect of various pots and pans, cutlery, dishes and crockery and a gazebo currently in the possession of the Defendant.

(e) Costs of suit (only in the event of the Defendant defending this matter).'

[2] The summons were, on 04 March 2014, served on the defendant personally. On 07 March 2014, the defendant acting in person served a notice of intention to defend on the plaintiff's legal practitioners of record and also on the Registrar of this court. The notice to defend amongst others reads as follows (I quote verbatim):

> '**BE PLEASED TO TAKE NOTICE** that I, Susanna Hilde Hanstein, hereby enter an Appearance to Defend in the above matter.
>
> I received the complaint this Tuesday, 4 March 2014. I have requested legal aid at the Legal Aid Board, Kisting House, Mungunda Street today, 07 March 2014. By next Wednesday, 12 March 2014, the Legal Aid Board will inform me whether it will assign me to a lawyer. I therefore kindly ask your extend the period until when I have to file with the Registrar a Plea.'

[3] Despite the fact that the defendant gave notice that she intends to defend the plaintiff's claim, the plaintiff's legal practitioners, without notice to the defendant, on 19 March 2014 gave notice to the Registrar for the latter to set down the matter for hearing on 24 March 2014. The matter was accordingly set down for hearing on the undefended matrimonial matters court roll of 24 March 2014. On that day when the matter was called plaintiff's legal practitioner informed the Court that the defendant entered notice of intention to defend the action, but the notice is defective because it (the notice) did not provide an address within 08 Kilometers radius at which the court process would be served. The plaintiff's legal practitioner furthermore informed the court that, she could not bring an application in terms of Rule 30 because the defendant did not provide a physical address where she could serve the court process. After that submission by the plaintiff's legal practitioner the court entered judgment for the plaintiff and ordered the defendant to:

'…return to or receive the plaintiff on or before the 12th day of May 2014, failing which the show cause, if any, to this court on the 09th of June 2014 why :

1 The bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved.

2 The defendant should not forfeit the benefits of the marriage in community of property in favour of the Plaintiff in respect of the immovable property situated at Erf 576, Block G, Rehoboth, Republic of Namibia.

3 The defendant should not sign all the documents necessary to effect transfer of Erf 576, Block G, Rehoboth, Republic of Namibia into the name of the plaintiff within seven days after having been called upon to do so by defendant's attorneys, failing which the Deputy Sheriff for the District of Rehoboth is authorized to sign the necessary documents.

4 The defendant should not forfeiture of the benefits of the marriage in community of property in favour of the Defendant in respect of various pots and pans, cutlery, dishes and crockery and a gazebo currently in the possession of the Defendant.'

[4] The Court order of 24 March 2014 was served on the defendant at her place of employment on 03 April 2014. The board for legal aid instructed the defendant's current legal practitioners of record on 09 May 2014 to assist her. On 12 May 2014 the legal practitioners acting on behalf of the defendant filed a notice of representation and of intention to defend. On 14 May 2014 the defendant filed an affidavit with the Registrar in which affidavit the defendant indicates that she will oppose the granting of the final order of divorce. When the matter was called on the return date, the 09 June 2014, the rule was extended to 30 June 2014. The purpose of the extension of the rule was to allow the parties to negotiate an amicable solution. On the extended return day, 30 June 2014, the matter was again called, this time before me. The parties indicated that they could not settle the matter and I directed that the matter be removed from the undefended matrimonial court roll and be returned to the Registrar for the Registrar to

docket allocate it for purposes of case management. I accordingly extended the *rule nisi* to 30 July 2014 for that purpose.

[5] On 30 July 2014 it became apparent that the defendant was desirous of the order granted on 24 March 2014 to be set aside and that the plaintiff was opposing such a course. I accordingly gave directions as to the filling of pleadings for the purpose of resolving the impasse between the parties. The defendant accordingly filed an application for the rescission of the order of 24 March 2014. The plaintiff opposes both the rescission and condonation application. It is to the condonation and rescission applications that I now turn.

B *THE CONDONATION APPLICATION AND THE RESCISSION APPLICATION*

[6] As I have indicated above the defendant, on 08 August 2014, filed an application for the rescission of the order granted on 24 March 2014, the application is brought under Rule 103 of this Court's rules which provides as follows:

> **'Variation and rescission of order or judgment generally**
>
> **103.** (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought *<u>within a reasonable time</u>*, rescind or vary any order or judgment -
>
> (a) erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> (b) in respect of interest or costs granted without being argued;
>
> (c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or
>
> (d) an order granted as a result of a mistake common to the parties.

(2) A party who intends to apply for relief under this rule may make application therefor on notice to all parties whose interests may be affected by the rescission or variation sought and rule 65 does, with necessary modifications required by the context, apply to an application brought under this rule.

(3) The court may not make an order rescinding or varying an order or judgment unless it is satisfied that all parties whose interests may be affected have notice of the proposed order.'

[7] As I have indicated above the plaintiff opposes both the application for the rescission of the order of 24 March 2014 and the application for the condonation of the late filling of the application for the rescission application. The plaintiff opposes the condonation application on the basis that the defendant allegedly unreasonably delayed in the bringing of the rescission application. If one has regard to the background of this matter which I have set out above, I am not convinced that, the defendant unreasonably delayed in filling the rescission application. I am therefore of the view that in so far as it is necessary to apply for condonation, I condone the delay in filing the rescission application.

[8] The plaintiff opposes the rescission application on the ground that the order of 24 March 2014 is not a final order and can therefore not be rescinded, that when the Court granted the order on 24 March 2014 the court was alerted that a 'defective notice of intention to defend' was filed, the court thus granted the order full knowing that there is a defective notice to defend and the order was thus not erroneously granted.

[9] Herbstein and Van Winsen[1] argue that the word 'judgment' when used in the general sense comprise the reasons for the decision reached by the court , the decision itself and the order made pursuant thereto. They further argue that 'orders' have traditionally included final orders and 'interlocutory orders.' In the case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[2] Corbett, JA said:

[1]Cilliers, Loots and Nel: *Herbstein & Van Winsen: The Civil Practice of the High Courts and the Supreme Court of South Africa* 6th ed (Juta 2009) at 913.

[2] 1977 (3) SA 534 (A) at 550-551.

‘(a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which G do not. (See generally *Bell v Bell,* 1908 T.S. 887 at pp. 890 - 1; *Steytler, N.O. v Fitzgerald, supra* at pp. 303, 311. 325 - 6, 342; *Globe and Phoenix Gold Mining Co. Ltd. v Rhodesian Corporation Ltd.*, 1932 AD 146 at pp. 153, 157 - 8, 162 - 3; *Pretoria Garrison Institutes v Danish Variety Products, supra* at pp. 850, 867.

(c)…

(e) At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment; whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata*.’ (*Bell v Bell*, *supra* at pp. 891 - 3*).’*

[10] Ms Williams’ argument that, an order for the restitution of conjugal is not a final order and therefore not rescindable is thus without merit and rejected. Her further argument that, the order was not erroneously granted because the court was informed of the defective notice to defend overlooks the fact that, what the rule permit is the rescission of an order which was ***erroneously sought*** or erroneously granted in the absence of a party affected by that order. Van Winsen and Herbstein[3] suggest that a notice of intention to defend which does not set out an address for service is irregular. They continue and say:

‘Failure to give an address for service does not render the notice void but makes it irregular and liable to be set aside. In such an event the plaintiff should not disregard the notice and apply for default judgment but may in a proper case apply to the court on notice to the defendant to set the notice aside as an irregular proceedings in terms of the rules of Court.’

3 *Supra* footnote 1 at 512.

[11] In the matter of *Schewe v Schewe*[4] the husband (as plaintiff) issued summons against his wife (as defendant) for an order for judicial separation and the custody of the children. The wife acting in person entered a notice to defendant the action but omitted to give an address where the court processes were to be served. Without giving notice to the defendant the plaintiff set the matter down for trial and obtained a default judgment against her. When she learned about the default judgment she applied to have the default judgment rescinded. The court rescinded the default judgment Bristowe, J said:

> 'Can it be said that that omission [i.e. the omission to enter an address of service] renders the appearance void? If that had been the intention of the rule it would have been so framed as to make the giving of the address an integral part of entering appearance. But it does not do that. The giving of the address is prescribed by a subsequent rule and is directed to be done by a defendant "having entered appearance personally," that is, after the appearance has been entered. So that it appears to me that appearance is completed by a defendant entering his name in the registrar's books. Therefore the most that can be said is that the appearance was irregular. In that case it falls under Rule 37, and the proper course for the plaintiff to have taken was not to have treated the appearance as nugatory, but to have applied to cancel the appearance under Rule 37. That course, however, was not taken, the plaintiff preferring to take it upon himself to proceed with the action as if there had been no appearance at all. I am of the opinion that that course was irregular, and therefore the orders of the 21st and 26th May must be set aside with costs'

[12] In the present matter the summons were issued on the 12 February 2014 that is before the present rules came into operation. The entering of notice of intention to defend was governed by rule 19 which amongst others reads as follows:

> '**Notice of Intention to Defend**
>
> 19. (1) The defendant in every civil action shall be allowed 10 days after service of summons on him or her within which to deliver a notice of intention to defend, either personally or through his or her attorney: Provided that the days between 16 December

[4] 1909 TH 149.

and 15 January, both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend.

(2) …

(3) When a defendant delivers notice of intention to defend, he or she shall therein give his or her full residential or business address, and shall also appoint an address, not being a post office box or poste restante, within 8 kilometres of the office of the registrar for the service on him or her thereat of all documents in such action, and service thereof at the address so given shall be valid and effectual, except where by any order or practice of the court personal service is required.'

[13] I am of the view that reasoning of Bristowe, J is also applicable to this matter. The failure by the defendant to provide an address where the documents would be served does therefore not render the notice of intention to defend void. In this matter what is even striking is the fact that when the defendant gave her notice to defend she informed the plaintiff's legal practitioner's that she has approached the Board for Legal Aid and sought legal assistance and she requested that the period, within which she is required to file a plea, be extended. I am of the view that in the present matter the proper course for the plaintiff to have taken was not to have treated the appearance as nugatory, but to have applied to set aside 'notice to defendant' as irregular under the former Rule 30. That course, however, was not taken, the plaintiff preferring to take it upon himself to proceed with the action as if there had been no notice to defend at all. In my view the plaintiff erroneously sought the 'restitution of conjugal right together with the ancillary relief' order. This court can therefore not allow that order to stand and I accordingly set it aside.

[14] In this matter I have not been referred to any facts or circumstances which will persuade me to depart from the general rule that costs must follow the cause. In the result I make the following order:

1. The restitution for conjugal rights order granted on 24 March 2014 is hereby set aside.

2. That the defendant is hereby granted leave to defend the matter.

3. That the plaintiff must pay the defendant's costs for the application to rescind the order of 24 March 2014 such costs to include the costs of one instructing and one instructed counsel.

4. That the matter is hereby postponed to 26 November 2014 at 8h30 for a case planning conference.

5. That the parties must file a case plan by no later than 21 November 2014.

SFI Ueitele

Judge

APPEARANCES:

PLAINTIFF:	C WILLIAMS Of Andreas Vaatz & Partners
DEFENDANT:	A. W BOESAK Instructed by JR Kaumbi Inc