

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-MAT-2016/03096

In the matter between:

DESIDERIUS RICHARD JOHN STRAUSS

APPLICANT/PLAINTIFF

and

PETRONELLA GERALDINE STRAUSS

APPLICANT/DEFENDANT

(born VAN WYK)

Neutral citation: *Strauss v Strauss (born Van Wyk)* (HC-MD-CIV-ACT-CON-2016/03096) [2018] NAHCMD 159 (07 June 2018)

Coram: USIKU, J

Heard on: 19 April 2018

Delivered: 07 June 2018

ORDER

1. The Applicants' application for rescission of the Final Order of Divorce granted by this court on the 06 September 2017, is hereby dismissed.
2. The court makes no order as to costs.
3. The matter is removed from the roll and regarded finalized.

REASONS IN TERMS OF PRACTICE DIRECTIONS 61 (9)

USIKU, J:

Introduction

[1] The present application appears before me in a form of an interlocutory application, and I am going to deal with it as such. I say this for reasons that would become apparent from reading para 7 hereof.

[2] The Applicants apply for rescission of a Final Order of Divorce granted by this court on the 06 September 2017. According to the Notice of Motion, the Applicants apply for the rescission of the aforesaid order, in terms of Rule 103(1)(c) and in terms of the common law.

Background

[3] The First Applicant was Plaintiff in an action for divorce, wherein he prayed for a final order of divorce together with certain ancillary relief. The Second Applicant was the Defendant in the said divorce-action, but later filed a counterclaim wherein she claimed for final order of divorce together with certain ancillary relief.

[4] The parties entered into a settlement agreement and prayed that same be made an order of court. Subsequently, it appears that the Plaintiff had change of heart and withdrew his action. The Defendant proceeded with her counterclaim and was granted the final order of divorce on the 06 September 2017, incorporating the aforesaid settlement agreement.

Application for rescission of the Final Order of Divorce

[5] The Applicants now pray for the rescission of the aforesaid order on the ground that the order was 'erroneously granted'. In the Notice of Motion, the Applicants refer to Rule 103(1)(c) and common law, as further grounds upon which they apply for the rescission.

Proceedings in court, on the 06 September 2017

[6] On the 06 September 2017, counsel for the Defendant submitted that the papers were in order and prayed for, inter alia, the final order of divorce incorporating the Settlement Agreement. The transcript of the relevant proceedings reflects that the court granted the order 'as prayed (for)'. The order as prayed for is fully recorded in the court order reflecting the date: 06 September 2017, as appearing under para 7 hereunder.

[7] Soon after the court granted the final order of divorce, the First Applicant rose and addressed the presiding judge and handed over to the court a document titled 'Reasons why the marriage should not be dissolved'. Counsel for the Second Applicant also addressed the presiding judge. Thereafter, the presiding judge, according to the record, postponed the matter to 18 October 2017 for a status hearing. It should be noted that the court did not reverse the final order already granted as prayed for. Furthermore there is nothing from the record of the proceedings indicating that the presiding judge was swayed by the content of the document handed over, to vary the

order already granted as prayed for. The presiding officer then issued an order in the following terms:

'1.The application for condonation of the plaintiff's late filing of the service of the restitution order on the defendant is hereby granted.

2. The bonds of marriage subsisting between the plaintiff and the defendant be and are hereby dissolved.

3. The settlement agreement signed by the parties dated 25 January 2017 be and is hereby made an order of this court.

4. The matter is removed from the roll and regarded as finalized.'

[8] The issue for determination by this court is whether the aforesaid order was erroneously granted, and should therefore be rescinded.

Whether Applicants have made out case for the order they now pray for

[9] As stated earlier, the Applicants cited Rule 103 (1)(c) and common law as basis for their application. Rule 103(1)(c) provides that the court may rescind or vary any order 'in which there is an ambiguity or patent error or omission' The Applicants have not pointed out any 'ambiguity', 'error' or 'omission' in the relevant order.

[10] Furthermore, the Applicants have not satisfied the requirements of common law, entitling them to the relief they seek.

[11] In addition, the Applicants have not established that the order in question was erroneously sought or erroneously granted. From the record of the relevant proceedings of 06 September 2017, the Final Order of Divorce was properly granted, as prayed for. In other words, the Applicants have not shown cause, why the order granted on the 06 September 2017 should be rescinded.

[12] For the foregoing reasons the application falls to be dismissed, and is hereby dismissed as per the order appearing above.

B Usiku, J

APPEARANCE:

APPLICANT/PLAINTIFF

A Delport
of Delport Legal Practitioners, Windhoek

APPLICANT/DEFENDANT

in person