

IN THE HIGH COURT OF NAMIBIA

Case Title: R B M v T I M (BORN NATANGA)	Case No: I 168/2016
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 14 FEBRUARY 2020
	Date of order: 6 MARCH 2020
	Reasons delivered on: 10 MARCH 2020
Neutral citation: <i>R B M v T I M (BORN NATANGA)</i> (I 168/2016) [2020] NAHCMD 86 (6 March 2020)	
Results on merits: Merits were not considered	
<p>The order:</p> <p>Having heard Mrs Delport, on behalf of the Applicant/Defendant and Mr Bangamwabo, on behalf of the Respondent/Defendant and having read the documents filed of record:</p> <p>IT IS HEREBY ORDERED THAT:</p> <ol style="list-style-type: none"> 1. The court order dated 12 September 2019 is hereby rescinded in terms of Rule 103 (1) (a) of the Rules of Court. 2. The <i>rule nisi</i> is reinstated. 3. The Plaintiff is issued with new dates for an order for restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before 17 April 2020, failing which, to show cause, if any, to this court on 15 May 2020 at 09h00, why: <ol style="list-style-type: none"> a. The bonds of marriage subsisting between the Plaintiff and Defendant should not be dissolved; b. The settlement agreement reached between the parties should not be made an order of court. 4. No order as to costs. 	
Reasons for orders:	
[1] This matter has a very long history and after a protracted and sometimes acrimonious judicial case	

management process the parties reached a settlement agreement on 10 April 2019. As a result the defendant withdrew her defence and counterclaim on 11 April 2020 and the matter proceeded on an unopposed basis.

[2] The RCR proceedings were scheduled for 11 April 2019 during which proceedings the plaintiff testified under oath as to the grounds upon which he is seeking a divorce and also consequently confirmed the settlement agreement, which recorded the terms of the settlement so concluded, reached between the parties.

[3] An order for restitution of conjugal rights was issued in favour of the plaintiff with a return date of 20 June 2019. Prior to the return date the plaintiff sought an extension of the date granted on 11 April 2019 as the court order could not be served on the defendant timeously. As a result the plaintiff was issued with new dates with a return date of 12 September 2019.

[4] On 12 September 2019 there was no appearance on behalf of the plaintiff and the plaintiff himself was also not in court. This court then proceeded to strike the matter from the roll and listed the following as reasons for its decision:

'(Reasons: The Non-appearance by the Plaintiff's legal practitioner and no documents were filed in respect of the final order to be granted and/or status report).'

[5] On 17 October 2019 the defendant¹ (applicant in this application) filed a notice of motion seeking the following relief:

1. 'Reinstating the Rule Nisi issued on 20 June 2019 with return date being the 13 September 2019.
2. A final order of divorce, incorporating the settlement being granted.
3. In the alternative, that the Applicant's defence to the action be reinstated.
4. A punitive cost order on the scale of an attorney/own client.
5. Such further and/or alternative relief as the above Honorable Court may deem fit to grant.'

[6] During argument the defendant's legal practitioner abandoned the application for reinstatement of the rule nisi and indicated that she will only be relying on the alternative relief prayed for, that is to reinstate her defence.

¹ Parties will be referred to as they are in the main action.

[7] Ms Delpont, on behalf of the defendant, argued that rule 88 (5)² of the Rules of Court finds application in the matter in casu as the matter was struck from the roll on 12 September 2019, which was patently the incorrect order under the circumstances.

[8] Counsel argued that although rule 88 (5) makes provision for those instances where counsel for the plaintiff withdrew, it became evident during the next appearance of this matter that it was indeed the case that counsel withdrew which then brings, in the Court's view, this matter within the ambit of rule 88 (5).

[9] Ms Delpont further submitted that the court can act in terms of rule 103 out of its own initiative and rescind or vary any order or judgment erroneously sought or granted in the absence of any party affected thereby. Ms Delpont submitted that should the court choose to rescind the order dated 12 September 2019 on the basis of rule 103 and allow the defendant to re-instate her defence then the matter can proceed and be finalized.

[10] The plaintiff opposed the application of the defendant and in his notes on argument Mr Diedericks raised a point *in limine* the issue of non-compliance with rule 32 (9) and (10) and argued that as the application before court is an interlocutory application the failure to comply with the said rule is fatal to the defendant's application.

[11] In addition to the point *in limine* raised counsel argued that the relief sought by the defendant is incompetent. Mr Diedericks argued that the effect of the order striking the matter off the roll on 12 September 2019 is that the matter is no longer alive before this court.

[12] Mr Diedericks further argued that the defendant's reliance on rule 88 (5) read with rule 103 is misplaced as rule 88 (5) only finds application in circumstances where the plaintiff's legal practitioner of record withdrew and submitted that that was not the case. Mr Diedericks further submitted that rule 103 does not find application either as the court sanctioned the plaintiff, and not the defendant, for non-appearance and the non-activity in the matter.

[13] Mr Diedericks also raised an issue regarding the settlement agreement reached between the parties which is apparently now disputed. The issue raised was that the plaintiff was apparently not a willing

² (5) If the plaintiff's legal practitioner has withdrawn and there is no appearance by the plaintiff or his or her new legal practitioner on the return date or extended return date of a restitution order -

(a) the court must of its own initiative extend the return date; and

(b) the registrar must address a letter to the plaintiff, to be sent by registered post or any other convenient means, at an address contained in the parties' particulars filed in terms of rule 6.

participant to the settlement agreement.

Discussion

[14] The matter before me is a matrimonial matter where an RCR order was sought by and granted to the plaintiff. The matter was struck from the roll due to the non-appearance of the plaintiff's legal practitioner.

[15] At this point I must interpose and remark that I am utterly perplexed by the position of the plaintiff in this matter. The plaintiff is the party who instituted the divorce proceedings yet he is not the one bringing the application for reinstatement of the rule nisi alternatively for rescission of the order dated 12 September 2020. What is even more inexplicable is that the plaintiff now opposes the defendant's application which was brought in an attempt to bring this matter to finality and obtain a final order of divorce.

[16] The question as to why the plaintiff fails and/or failed to bring an application to reinstate the rule nisi or rescind the order of 12 September 2019 was raised with the plaintiff's counsel but no clear answer was forthcoming. The plaintiff raised an issue regarding the settlement agreement in his answering papers which might explain the plaintiff's reluctance to follow through with the final order of divorce but I am of the view that nothing before me merits a consideration of the settlement agreement or any argument pertaining to the settlement agreement. The settlement agreement was confirmed under oath by the plaintiff and it was rightfully incorporated into the restitution of conjugal rights order.

Compliance with Rule 32 (9) and (10)

[17] The plaintiff raised the issue of non-compliance with rule 32 (9) and (10). The defendant's counsel argued that the current reinstatement proceedings should not be regarded as interlocutory proceedings but one which should be equated with an application for rescission, which is a substantive application. The court was referred to *Kambanda v First National Bank of Namibia*³ in which matter Oosthuizen J found that a rescission application is a substantive application and not an interlocutory application. I take no issue with the finding of Oosthuizen J but I cannot find support of Ms Delpport's argument with regards to a reinstatement application.

[18] Be that as it may, even though rule 32 (9) and (10) was to apply this matter has been dragging on since 2016 and now that the matter is in its final stages of finalization I am of the opinion that this is one of the rare instances where the non-compliances with rule 32 (9) and (10) should be condoned. It is not in the

³ (I 4050-2014) [2016] NAHCMD 192 (6 July 2016) para 28.

interest of either party to derail the proceedings before me by virtue of a technicality raised by the plaintiff. However, it is important to note that the condonation is granted due to the peculiar circumstances of this case and should not be regarded as a precedent.

The order striking the matter off the roll

[19] It is common cause that the plaintiff is not obliged to be at court on the return date as his legal practitioner would make an appearance on his behalf to seek the final order of divorce.

[20] The striking of a matter that is in judicial case management does not dispose of the matter. In fact, within the judicial case management regime that we are today, striking of a matter from the roll has nothing to do with the merits of the case. It happens on a daily basis in our courts that a matter would be struck from the roll due to a party's non-compliance with the Rules of Court or the Practice Directions or for failure to appear in court, as is the case in the matter at hand. A matter struck from the roll under these circumstances may be re-enrolled upon delivery of an affidavit explaining the non-compliance or failure to appear when the matter was called. It is thus clear that contrary to the argument advanced by plaintiff's counsel, the striking of the plaintiff's matter from the roll did not terminate the proceedings but rather suspended the proceedings pending the hearing of the application for re-instatement⁴. In the event that the party concerned does not apply for re-instatement the matter will remain alive until such time that E-Justice recognises it as an inactive matter in terms of rule 132. When the matter is then struck off the roll in terms of rule 132 (10) it would dispose of the matter in terms of rule 132 (11).

Applicability of rule 88 (5)

[21] Mr Diedericks argued that rule 88 (5) does not apply to the facts at hand as the legal practitioner of the plaintiff at the time did not withdraw yet. To some extent I do agree with Mr Diedericks because at the time the erstwhile legal practitioner was still appearing on behalf of the plaintiff and she only filed a notice of withdrawal as counsel of record on 16 October 2019 and placed on record in open court on 17 October 2019 that her mandate was terminated.

[22] What is important from reading rule 88 (5) is that it is clear that the plaintiff should be notified of the absence of his or her legal practitioner and the court must on own initiative extend the rule and direct the Registrar to notify the plaintiff in writing. Only if the plaintiff or his/her legal practitioner does not make an appearance on the extended return date would the court discharge the rule nisi, and not before. To some

⁴ *Goldman v Stern* 1931 TPD 261 at 264.

extent the same should apply in a matter like the one in casu where the legal practitioner failed to appear in court on the return date. As indicated earlier, the court accepts that a plaintiff who is represented by a legal practitioner is not required to attend court on the return date in a divorce matter. However, having considered the submissions made by both parties and in particular the submissions made by Mrs Delport with regard to rule 103, I am of the considered view that instead of striking the matter from the roll the rule nisi should have been extended and the plaintiff's legal practitioner should have been directed to show cause why sanctions should not be imposed in terms of Part 6 of the Rules of Court. The court therefor erroneously erred in striking the matter, as opposed to extending the rule.

Applicability of rule 103

[23] Given the nature of the matter the striking thereof was clearly premature and the order was erroneously granted in the absence of the party affected thereby.

[24] I am satisfied that rule 103 (1) (a) finds application in the matter before me and will on my own initiative after hearing the parties rescind the order dated 12 September 2019 which order struck the matter from the roll.

[25] By rescinding the order dated 12 September 2019 the *status quo* prior to the said order would be restored and the granting of new dates to the plaintiff will cure this matter in its entirety. There would therefore be no reason for this court to reinstate the defence and counterclaim of the defendant.

Costs

[26] Both parties are claiming cost against each other at a punitive scale. In light of the fact that this is a matrimonial matter I am of the opinion that there should be no order as to costs.

[27] My order is therefore set out as above.

Judge's signature	Note to the parties:
	Not applicable.

Counsel:	
Applicant	Respondents
Adv Diedericks Instructed by FB Law Chambers	Mrs Delport Of Delport legal Practitioners