

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI**

**JUDGMENT**

Case no: I 271/2016

In the matter between:

**REINHOLD NDAPANDULA LWAANDA**

**PLAINTIFF**

and

**KRESTINA NDAWAPEKA UUSIKU**

**DEFENDANT**

**Neutral citation:** *Lwaanda v Uusiku* (I 271/2016) [2017] NAHCNLD 03 (30 January 2017).

**Coram:** CHEDA J

**Heard:** 17 January 2017

**Delivered:** 30 January 2017

**Flynote:** Where a party whose case is under case management fails to: comply with Rule 14 (3) (a) – (c) relating to address of service – to sign a Joint Case Plan – appear in court and no explanation is given for such failure the said party is adjudged to be in default and subject to sanctions in terms of Rule 53 of the Rules of the High Court. Defendant's defence is struck out.

**Summary:** Plaintiff issued out summons for divorce. Defendant purported to enter an appearance to defend which was defective in that it did not give an address of service in terms of Rule 14 (3) (a) – (c). Defendant’s legal practitioner did not sign a Joint Case Plan and failed to appear in court for a Case Planning Conference. Defendant’s defence was struck out and plaintiff allowed to proceed to set the matter down for Restitution of Conjugal Rights.

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### **ORDER**

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1. The defendant’s purported defence is struck out for lack of compliance with the rules pertaining to case management.
  2. Plaintiff is ordered to proceed with the Restitution of Conjugal Rights (RCR) proceedings.
  3. Defendant shall pay today’s wasted costs for failure to appear in court.
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### **JUDGMENT**

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CHEDA J:

[1] On the 02 November 2016 plaintiff issued out summons for divorce and other ancillary relief against defendant through his legal practitioners Messrs Samuel Legal Practitioners. The particulars of claim of this matters are not relevant for the purposes of these proceedings.

[2] Defendant was served with summons and instructed Messrs Tjombe-Elago Inc. who purported to file a notice of intention to defend and notice of representation. This notice was signed on the 28 November 2016, but, was not filed, although it found itself into the court record.

[3] Despite this development, the Registrar's office by notice to the parties' legal practitioners advised them of a Case Planning Conference to be held on the 17 January 2017 at 09h00 in terms of Rule 23 (1).

[4] There are three issues which fall for determination in this matter.

a) Notice of intention to defend and representation

The above notice was not filed at the Registrar's office and did not give an address for service in terms of Rule 14 (3) (a) – (c). In the absence of this compliance, it stands reason that the notice to defend and representation is defective and not only defective, but, fatally defective and cannot be revived.

b) Case Plan

As per the notices issued by the Registrar on behalf of the Managing Judge in terms of the Rules, the parties are obliged to file their Joint Case Plan which logically should be signed by the parties or their legal practitioners. In *casu* the case plan was signed by plaintiff's legal practitioner only, on the 13 December 2016 and defendant did not sign it. The said case plan was filed on the 15 December 2016. Defendant's legal practitioners were aware that their matter was now under case management, but, did not follow it to an extent of signing the case plan. Therefore, it is plaintiff alone who complied with the rules as stipulated in the Rules of Court. Defendant, therefore, failed to comply with the Rules and in the absence of any explanation as to his failure is deemed to be in default.

c) Appearance in Court

This matter was set down for a Case Planning Conference on the 17 January 2017 at 09h00, a fact which was known to both parties. However, neither defendant nor his legal practitioner appeared in court and no explanation, whatsoever, was given. He was therefore in default.

[5] In the absence of an explanation by defendant and /or her legal practitioner, the court takes a dim view of this conduct as it demonstrates the legal practitioner's uncaring attitude towards both the court and his client.

[6] As this is a matrimonial matter, these courts are slow in granting a final order even if there is default *per se*. It is a legal requirement, however, that defendant should be given notice and /or an opportunity to restore conjugal rights to the plaintiff. For that reason the default judgment only pertains to his defence and most probably to the reason advanced by plaintiff for his reasons to dissolve the matrimonial union.

[7] At this stage, plaintiff indeed can proceed against defendant for the reasons advanced. Therefore, his success is merely partial as the marriage cannot be dissolved by the mere fact that defendant's defence has been struck out. In that regard a final order for divorce cannot be granted without the issuance of a Restitution of Conjugal Rights order.

[8] Accordingly the following is the court's order:

1. The defendant's purported defence is struck out for lack of compliance with the rules pertaining to case management.
2. Plaintiff is ordered to proceed with the Restitution of Conjugal Rights (RCR) proceedings.
3. Defendant shall pay today's wasted costs for failure to appear in court.

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M Cheda  
Judge

## APPEARANCES

PLAINTIFF: N. Tjombe  
Tjombe-Elago Inc.  
The Village 18 Liliencron Street, Windhoek

DEFENDANT: E. Samuel  
Samuel Legal Practitioners  
Unit 2 Chicco's Building, Opposite FNB, Ondangwa