

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case No.: HC-MD-CIV-ACT-MAT-2023/00287

In the matter between:

REVONIA REZELDA DE WET

PLAINTIFF

and

ABRAHAM DE WET

DEFENDANT

Neutral citation: *De Wet v De Wet* (HC-MD-CIV-ACT-MAT-2023/00287)

NAHCMD 289 (30 May 2023)

Coram: Schimming-Chase J

Heard: 8 May 2023

Order: 8 May 2023

Reasons: 30 May 2023

Flynote: Law of Persons – Divorce proceedings – Restitution of conjugal rights – A final order of divorce may be issued in circumstances where there is an existing final protection order issued by the Magistrates

Court Domestic Violence Unit.

Rules of court — Compliance with rules of court — Lay litigant — Although court should be understanding of difficulties experienced by lay litigants, the rules apply equally to all.

Practice — Case Management — Failure to participate meaningfully or at all in the case management process — Failure to file pleadings on time or at all — Rule 54(3) applicable and defendant *ipso facto* barred.

Summary: The plaintiff instituted divorce proceedings against the defendant on the grounds of desertion alleging, amongst others that during the course of the marriage her husband, the defendant, had emotionally, verbally, psychologically, and physically abused her resulting in the plaintiff obtaining a final protection order from the Windhoek Magistrates Court Domestic Violence Unit on 20 December 2022, effective for three years. In terms of the protection order the defendant was restrained from coming anywhere near the plaintiff at any time except in circumstances related to the defendant's reasonable access to the parties' minor children. The defendant defended the matter and delivered a notice to oppose. The defendant refused to partake in the making of any case plan, and also failed to file his plea in accordance with the case plan order. The defendant was accordingly barred from pleading and the plaintiff was permitted to lead evidence in support of her claim on an unopposed basis.

Held that, the defendant's failure to participate in the case management of this matter, and failing to file a plea in terms of the case plan at any time, resulted in him being *ipso facto* barred in terms of rule 54(3). The defendant's reliance on being a lay litigant and not understanding the rules was not in line with his behaviour during the case management process or his failure to file the plea. The rules of court apply to everyone and in this instance, there was no excuse. The plaintiff was permitted to lead evidence in support of the restitution order on an unopposed basis.

Held that, the order for restitution of conjugal rights is issued by the court in circumstances where there is a genuine and serious intention and willingness by the parties to resume the marital relationship. It is inadvisable for the court to order restoration of conjugal rights where allegations of violence are pleaded in the papers and where a protection order is granted against one of the parties.

A final order of divorce was thus granted in favour of the plaintiff.

ORDER

1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.
2. The custody and control of the minor children, namely: Elshedei Hotago Belinda De Wet and Faith De Wet is hereby awarded to the plaintiff.
3. The court hereby appoints a Social Worker with the mandate to investigate the question of the defendant's reasonable access to the minor children.
4. The social worker must compile a report to the Children's Court for the District of Windhoek, for its determination on or before 16 October 2023.
5. The Office of the Registrar is directed to ensure that a copy of this order is served on the Ministry of Gender Equality, Poverty Eradication and Social Welfare.
6. The defendant is ordered to pay maintenance in respect of the minor children in the amount of N\$500.00 (Five Hundred Namibia Dollars) per month per child.
7. The plaintiff and the defendant must contribute 50% each of all costs in respect of the said children's school, scholastic expenses, extra-mural activities, books and stationery as well as school clothes. In the event that the children show an aptitude for tertiary education both parties will be equally liable for all costs pertaining thereto including hostel fees.
8. The plaintiff shall retain the minor children on her medical aid scheme

and the defendant shall pay all excess payments.

9. Division of the joint estate.
 10. Costs of Suit.
 11. The matter is removed from the roll: Case Finalised.
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REASONS

SCHIMMING-CHASE J:

[1] On 8 May 2023, and after hearing the evidence of the plaintiff in this divorce action, the court made the order above. Here are the reasons.

[2] The plaintiff instituted action against the defendant on 21 January 2023, seeking a restitution order on the grounds of the defendant's desertion.

[3] The parties were married to each other in community of property on 3 November 2007 at Windhoek. Two minor female children were born from the marriage, ages 15 and 6 respectively. At the time of institution of the divorce, the elder of the parties' minor children resided with the defendant. However, the plaintiff claimed custody of both children, subject to the defendant's rights of reasonable access.

[4] The defendant was granted the opportunity to defend the action, and he did so by filing a notice to defend on 15 February 2023.

[5] A case planning conference notice was issued on 21 February 2023, directing the parties to attend a case planning conference to be held at Windhoek on 13 March 2023 at 15:30. The notice further ordered the parties to file a joint case plan in terms of rule 23(2) and (3) at least three days before the case planning conference to the managing judge.

[6] The plaintiff's legal practitioner filed a unilateral case plan on 9 March

2023. The plaintiff's legal practitioner also filed a status report on 13 March 2023, with annexures, indicating that the defendant was refusing to participate with her in the preparation of a joint case plan, and was acting in a derogatory and disrespectful manner towards her, aimed, *inter alia*, at delaying the matter.

[7] A consideration of the email exchange shows that the plaintiff's legal practitioner attempted to contact the defendant telephonically a number of times and there was no response. She then transmitted an email with a draft joint case plan to the defendant and asked him to consider and advise whether he agreed with the dates proposed for delivery of his pleadings. The defendant responded that the dates were not suitable to him as he was unavailable due to work commitments.

[8] In response, the plaintiff's legal practitioner suggested that he include in the draft case plan, the dates that were in line with his availability. The response of the defendant can only be described as a hostile and highly insulting tirade in which he used extremely derogatory remarks in describing the plaintiff. The plaintiff's legal practitioner in the result requested that the terms of the unilateral case plan be made an order of court.

[9] The defendant failed to appear in court for the case planning conference on 13 March 2023. The court accordingly issued a case planning order, requiring the defendant to file a plea on or before 24 March 2023, and requiring the parties to make discovery by 28 April 2023. The case was postponed to 8 May 2023 for a case management conference.

[10] The defendant was served with the court order of 13 March 2023 on 23 March 2023. He however failed to comply with the court order of 13 March 2023.

[11] On 29 March 2023, the plaintiff's legal practitioner reported via a status report that the defendant had not complied with the case planning order and indicated an intention to move for a restitution order on 8 May

2023, as the defendant was barred.

[12] At the hearing and when the plaintiff commenced her testimony, the defendant personally appeared in court. He indicated that he did not oppose the divorce but had other issues that he wanted to hear the plaintiff on, that he had disagreement with. It was pointed out to him that he was barred from pleading and that it was too late to attempt to raise a defence at this late stage.

[13] The defendant indicated that he should be given an opportunity to file a plea as he is a lay litigant and did not understand the rules. In this regard the defendant, who had delivered a notice of intention to defend, had not complied with a single rule of court or court order.

[14] In *Worku v Equity Aviation Services (Namibia) (Pty) Ltd (In Liquidation) and Others*,¹ the Supreme Court held that the court cannot overlook the rules which are designed to control the procedures of the court, and although a court should be understanding of the difficulties that lay litigants experience and seek to assist them where possible, a court may not forget that court rules are adopted in order to ensure the fair and expeditious resolution of disputes in the interest of all litigants and the administration of justice generally. Accordingly, a court may not condone non-compliance with the rules even by lay litigants where non-compliance with the rules would render the proceedings unfair or unduly prolonged.

[15] During this time the court observed the plaintiff becoming particularly uneasy. When asked whether she was alright, she indicated that she was nervous. The issue of the protection order order issued on 20 December 2022 for a period of three years was also raised.

[16] The defendant also became belligerent both with the plaintiff and with the court. He was excused from court and had to be escorted by a court

¹ *Worku v Equity Aviation Services (Namibia) (Pty) Ltd (In Liquidation) and Others* 2014 (1) NR 234 (SC) para 17-19. See also *Somaeb v Standard Bank Namibia Ltd* 2017 (1) NR 248 (SC) paras 20-21.

orderly for disorderly conduct in court.

[17] The plaintiff continued her testimony, and confirmed the allegations of desertion contained in her particulars of claim. She testified that during the course of the marriage between the parties, the defendant with the fixed and settled intention to terminate the marriage, failed to show her love and affection; threatened to inflict physical harm on the plaintiff; emotionally, verbally, psychologically, and physically abused her to the extent that she had no option but obtain a final protection order which remains in place until December 2025. The plaintiff testified further that the defendant gambled regularly, absented himself regularly from the common home, and had an extra marital affair from which a child was born.

[18] The plaintiff also testified that the defendant had over a weekend threatened their firstborn child who was previously residing with him with physical harm, resulting in the minor child moving back with the plaintiff.

[19] The only question that the court is confronted with, at this juncture, is to decide whether this case constitutes an appropriate one in which to grant a restitution order notwithstanding the common cause fact that the plaintiff obtained a final protection order, which in effect prohibits the defendant from coming to or near the plaintiff or his residence.

[20] The evidence of the plaintiff, and in particular the protection order issued by the magistrate's court on 20 December 2022, makes it apparent, not only that the marriage has broken down irretrievable as a result of the defendant's unlawful actions, but that a restitution order would not be appropriate in the circumstances. In this regard the judgment of Masuku J in *Homba v Homba*,² is instructive. In this case it was held,³ the order for restitution of conjugal rights is issued by the court in circumstances where there is a genuine and serious intention and willingness by the parties to resume the marital relationship. Further that:

² *Homba v Homba* (HC-MD-CIV-ACT-MAT-2021/03719) [2022] NAHCMD 600 (3 November 2022).

³ *Ibid* para 17.

'... in cases where allegations of violence which are pleaded in the papers or where, as in this case, there is a protection order issued, it is most inadvisable for the court to order restoration of conjugal rights in that scenario. That is so because where the parties resort to violence one against the other, in the course of complying with a restitution order, the marital home to which restoration is ordered, may be the very cradle of violence, if not the killing field.'

[21] I am in respectful agreement with the above dictum, and on this basis, and the evidence adduced, I find that, in the circumstances, a final divorce order should be made.

[22] Given the uncontested evidence relating to the events that caused the minor child to leave the defendant's home and return to the plaintiff, it would not at this stage be in the best interest of the minor child to award reasonable access to the defendant pending an investigation to be conducted by a social worker appointed in terms of ss 42 and 139 of the Child Care and Protection Act 3 of 2015. Custody arrangements can be amended in the children's court constituted in terms of the Child Care and Protection Act 3 of 2015. The order made reflects the abovementioned circumstances.

EM SCHIMMING-CHASE
Judge

APPEARANCES

PLAINTIFF:

J Janser
of Shikongo Law Chambers,
Windhoek

DEFENDANT:

In person