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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 012580/16

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
[Date]

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In the matter between:

T T

Plaintiff

and

T R

Defendant

Coram: Thompson AJ

Date of Hearing: 7 December 2017

Date of Judgment: 19 December 2017

JUDGMENT

LEAVE TO APPEAL

THOMPSON AJ:

[1] In this matter I made an order whereby the seeking of unopposed matrimonial relief was removed from the roll, together with an order that the Plaintiff is to pay the costs occasioned by the enrolment of the matter on the unopposed roll. The Plaintiff now seeks leave to appeal against my alleged refusal to grant an unopposed decree of divorce and the resultant costs order.

[2] For various reasons this application must fail. Foremost, the matter was removed from the roll by agreement between the Plaintiff and the Defendant. The only issue that was argued before me was the issue of costs. At this moment I need to digress. Prior to the hearing of the matter I had grave doubts regarding the correctness and validity of the order by Shirelele AJ. This concern I raised with Counsel for the Plaintiff when the matter was called, and the matter was stood down. When the matter was recalled Counsel for the Plaintiff indicated that the matter is to be removed from the roll. Counsel for the Defendant agreed to the removal of the matter from the roll, however he wished to argue the issue of costs. During the costs argument the validity of Shirelele AJ's order was debated at length. I, during argument, indicated to Counsel for the Plaintiff that the Plaintiff's contention that the divorce can proceed on an unopposed basis could only possibly have been entertained if the Plaintiff's liability for spousal maintenance was not in issue. Plaintiff's Counsel, after having taken instructions in court, formally conceded that the Plaintiff is liable to the Defendant for spousal maintenance.

[3] The matter, however, did not end there. The Defendant contended that the matter is still not ripe for hearing due to various proprietary issues that still requires to be dealt with. Counsel for the Plaintiff, on the other hand and in light of the concession made on behalf of the Plaintiff, did not seek to renege from the agreement with the Defendant's Counsel whereby the matter is to be removed from the roll.

[4] In addition to the above, the order whereby the matter was removed from the roll does not constitute an order that is final in effect¹ and is not susceptible to an appeal. Counsel for the Plaintiff sought to overcome this difficulty by relying on paragraph 16 of my judgment whereby I noted that at least one proprietary claim is related to the matrimonial property regime. When the application for leave to appeal was filed, the original court file was missing. Despite a request therefor, I was not provided with a set of pleadings at the time of hearing this application for leave to appeal. No prejudice can result to the Plaintiff in this regard due to the fact that the unopposed divorce was removed from the roll by agreement and not susceptible to an appeal. However, in so far the Plaintiff believes that I made a final finding on the state of the pleadings and the issues to be traversed through evidence, this belief does not bear scrutiny. I heard no evidence and no argument of substance was addressed to me on the pleadings. I was also not required to make any finding in relation thereto. As such my remark can be construed as nothing more than *obiter*.

[5] I must also point out that the necessity for my judgment was borne out of the fact that a real possibility existed that the Plaintiff may attempt to set the divorce down again on the unopposed roll on the strength of the order by Shirelele AJ. In my view there is no need for another court to be burned with an unopposed divorce on the strength of an order that, in my view, is void *ab initio*.

¹ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J - 533A; *Pitelli v Everton Gardens Projects* 2010 (5) SA 171 (SCA) at 176D

[6] After the Plaintiff's Counsel, during the hearing for the application for leave to appeal, conceded that the matter was removed from the roll by agreement and there was no attempt by the Plaintiff to renege from the agreement, Plaintiff's counsel urged me to grant leave to appeal against the costs order only. In my view the principles relating to appeals generally and costs orders are against the Plaintiff in this regard.² Counsel for the Plaintiff did not make any submission that I did not exercise my discretion judicially, nor were any such ground advanced in the filed application for leave to appeal. The only submission that Counsel for the Plaintiff made in this regard is that as I allowed argument in the matter despite the Plaintiff's non-compliance with the Practice Manual of this division, I should not have made a costs order against the Plaintiff.

[7] My willingness to condone the failure of the Plaintiff of filing a proper J117 was premised thereon that most matters before me that morning did not comply with the J117 requirement. Refusal to hear any unopposed divorce due to non-compliance with the J117 requirement would have led to a situation where only some 4 divorces that morning would have been granted. I am of the view that I am fully justified to condone a procedural defect whilst, at the same time in my judicial discretion, expressing my displeasure at the Plaintiff's failure to comply with the provisions of Practice Manual.

[8] I am not satisfied that another court will reasonably come to another conclusion or that compelling reasons exists why leave to appeal. Accordingly, I make the following order:

1. The application for leave to appeal is dismissed with costs.

² *Logistic Technologies (Pty) Ltd v Coetzee* 1998 (3) SA 1071 (W)

CE THOMPSON

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff: Adv M Tshivhase

Instructed By: TS Tshantsha Attorneys
Johannesburg

For the Defendant: Adv KM Mokotedi

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