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REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 49805/2021

REPORTABLE: No

OF INTEREST TO OTHER JUDGES: No

8/8/2022

In the matter between:

X [...] L [...] 1 (BORN Y [...] 1)

Plaintiff

and

JOE L [...] 2

Defendant

And

CASE NO: 49806/2021

In the matter between:

S [...] H [...]

Plaintiff

and

Y [...] 2 Z [...]

Defendant

JUDGMENT

*This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.*

Gilbert AJ:

1. Having heard counsel for the plaintiff in each of these divorce actions which were set down for hearing before me on an unopposed basis, I removed the matters from the roll and stated that my reasons would follow so to enable the parties to attend thereto.

2. In each of the matters a decree of divorce was sought together with a settlement agreement to be made an order of court. Each matter was remarkably similar, even leaving allowance for the fact that the same firm of attorneys represented the plaintiffs in each matter. For example, each of the settlement agreements is dated 18 October 2021. While this might have been coincidental, what is remarkable is that in each matter the settlement agreement followed similar wording and in particular provided for the plaintiff in each matter to be the sole guardian of the child in each matter, for the defendant in each matter to have no right of contact with and access to the child and for one or other of the parties being solely responsible for the child's maintenance with no obligation on the part of the other party to contribute towards that maintenance.

3. In the second matter, it appears that in certain clauses in the settlement agreement the reference to the parties may have been transposed, which further complicates matters.

4. As was the case with the other documents prepared in the matter, the affidavit setting out the evidence of each plaintiff as is required in terms of the Practice Directives is also remarkably similar. I set out paragraphs 13 to 17 in the first action, which is substantially identical to that in the second action.

*“13. The Family Advocate did not endorse the Settlement Agreement as being in the best interests of J [...] on the basis that, inter*

*alia the terms of the settlement agreement intend to have the Defendant's parental responsibilities and rights terminated. I annex a copy of the Family Advocates endorsement as "FA5".*

14. *It is correct that the Defendant and I have agreed that all the Defendant's parental responsibilities and rights be terminated in terms of section 28 of the Children's Act, 38 of 2005 ("the Act"). The Defendant has made it clear that he does not want anything to do with J [...] and does not want to be a part of his life.*

15. *I respectfully submit that in terms of s28 of the Act, I am able to apply to this Honourable Court in my divorce matter for an order terminating the Defendant's parental responsibilities and rights. Same has been agreed to by the Defendant and I.*

16. *It is further submitted that, by virtue of the above, an investigation by the Family Advocate will unfortunately not change the fact that the Defendant has no interest in our son. It is humbly requested that the above Honourable Court, as upper guardian of all minor children, grant the order as prayed for.*

17. *A confirmatory affidavit of the Defendant is annexed hereto marked "FA6".*

5. Attached to each affidavit is a confirmatory affidavit by the defendant confirming what is set out in the primary affidavit.

6. Accordingly, in each of these matters the court is presented with a couple that wishes to be divorced but where one of the parties wishes to have nothing to do with his or her child and is to exonerated from any obligation to pay maintenance, albeit that that party no longer has any contact with or rights of access to the child.

7. It is not surprising in my view that the family advocate refused to endorse each settlement agreement and instead, in the first action, recorded as follows:

*“It appears that the parties’ intention to have the defendant’s parental responsibilities and rights in respect to the child, terminated. Therefore, we are of the view that same may not be in the best interests of the child, and as a result, the matter warrants an investigation / inquiry into the welfare and best interests of the minor child, by our office.”*

8. Substantially the same wording appears in the family advocate’s refusal to endorse the settlement agreement in the second action.

9. When I raised my concerns with counsel appearing for the plaintiff in each matter, I was informed that the plaintiffs in each of these matters knew each other and for that reason approached the same attorney, apparently simultaneously. While this may be so, it is remarkable that in each of these matters an order is sought making the settlement agreement an order of court that has the consequence as set out above, and where the family advocate in both refuses to endorse the settlement agreement and requires an investigation / inquiry into the welfare and best interests of the child.

10. Submissions were made by counsel that the investigation would make little difference because the parties had made up their mind as to what the position should be in relation to the child. But what this overlooks is the family advocate’s expressed concern that the settlement agreement may not be in the child’s best interest in each matter. I agree with the family advocate that an investigation / inquiry is warranted in each matter in the best interests of the child.

11. It is in these circumstances that I removed the matters from the roll, so that this issue could be addressed.

12. I further order that in each of the actions cannot be re-enrolled for hearing until the concerns as set out in this judgment have been addressed.

13. Accordingly, the order in each of the actions is:

13.1. the matter is removed from roll, no order as to costs;

13.2. the matter cannot be re-enrolled until the concerns set out in the judgment of 8 August 2022 have been addressed.

Gilbert AJ

Date of hearing: 5 August 2022

Date of judgment: 8 August 2022

Counsel for each plaintiff: Advocate R Putzier

Instructed by: N Xenophontos Attorneys

No appearance for each defendant.