**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**

(REPUBLIC OF SOUTH AFRICA)

**CASE NUMBER: 39223/2011**

14/3/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14 / 03 / 2016
DATE

SIGNATURE

**In the matter between:**

**ACHESON PHIRI** — **APPLICANT**

**And**

**MMONE VIOLET PHIRI** — **1ST RESPONDENT**

**THE DIRECTOR GENERAL** — **2ND RESPONDENT**

**DEPARTMENT OF HOME AFFAIRS**

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**JUDGMENT**

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**MAVUNDLA. J,**

[1] The applicant seeks leave to appeal to the Full Court of this Division against the whole of judgment granted by this Court on the 5 October 2015.

[2] The notice for leave to appeal stated that the grounds for the application are that this Court erred in one or more of the following grounds:

(a) by granting the said judgment against the applicant;

(b) by ordering the applicant to pay the costs;

(c) in the above-stated premises, the applicant maintains that a different court would have come to a different conclusion than one arrived at by this Court.

[3] The notice further stated that the applicant will amend, or add or vary the grounds / reasons for the application for leave to appeal herein upon receipt of the reasons of the judgment which has been already requested in terms of Rule 49(1)©. This notice for leave to appeal was filed with the registrar of this Court on the 29 October 2015.

[4] It needs mentioning that on the 5 October 2015 this Court dismissed the applicant's application for rescission with costs and indicated that reasons will follow. These were furnished on the 15 January 2016. To date there has been no amendment or

amplification of the grounds upon which leave to appeal is sought. I shall in due course revert to this issue.

[5] There were no heads of argument filed by any of the parties. Counsel for the applicant submitted that the court erred in the following respects:

5.1 The applicant had filed a notice of intention to defend on the 22 June 2011. This notice to defend was defective in that it erroneously provided an incorrect case number "39223/14" instead of "39223 / 2011". The respondent's attorneys of record were not supposed to ignore the notice and proceed to set down the matter on unopposed roll and obtain the default judgment. The Court erred in finding that the defendant was at liberty to ignore this defective notice of intention to defend, regard being had to the fact that the matter related to marital status. In spite the defective notice of intention to defend there was substantial compliance with rule 19 of the Uniform Court Rules. The defective notice to defend should have been brought to the attention of the Court when the first respondent obtained the divorce order by default in the absence of the applicant.

5.2 It was further submitted that in the matter of *Sheriff Pretoria-East v Flink and another 2005 SA 492 (T)* ALL SA at 507 the Court held that "...once it is has been shown that the judgment was erroneously sought and granted, the discretion should be exercised in favour of the applicant without further inquiry. The same would equally apply where judgment has been erroneously given at the very commencement of a matter; say for instance where a defendant's properly served and filed notice of intention to defend was somehow ignored. 'In such instance a proper exercise of the discretion will probably

indicate that the procedure should simply be restored, and the defendant be allowed to set up his defence by way of a plea to be filed in due course and without having to disclose for purposes of rescission. But it remains discretion to be exercised with reference to all the relevant circumstances. Fairness, as well as pubic interest in the finality of justice demands that."

[6] It was further submitted on behalf the applicant that because there was substantial compliance in filing a notice of intention to defend, albeit its defect, the respondent's attorneys were not supposed to ignore it. It is submitted that this Court erred in its finding that: "[8] in the absence of a notice of intention to defend in the court file, it cannot be said that the court erroneously granted the order of divorce on the 14 August 2011. Neither can it be said that the first respondent erroneously sought the order granted. In the circumstances, in my view, the order granted was not erroneously sought nor erroneously granted." It was further contended that the respondent's attorneys were duty bound not to ignore the said notice and should have brought it to the attention of the Court that there was a defective notice of intention to defend, thus allowing the Court to apply its mind on this aspect. It is contended that another court will find differently on this aspect.

[7] On behalf of the respondent it was submitted firstly that the applicant's notice of leave to appeal, as it it stands is not compliant with the rules. The applicant is not at large to raise through submission over the bar, any issue not raised in its notice for leave to appeal, otherwise that becomes an abuse of the Court process.

[8] Secondly, it was submitted on behalf of the respondent that the final divorce was granted on the 14 August 2011. This terminated the marital status of the parties but ordered division of the assets of the parties and therefore there is no prejudice suffered by the applicant. On the contrary there would be great prejudice on the part of the respondent because the application for rescission was brought almost three years later after the pronouncement of the divorce.

[9] An application for leave to appeal is in terms of Rule 49 of the Uniform Court. Rule 49(1)(b) of the Uniform Court Rules provide as follows: 'When leave to appeal is required... application for such leave shall be made and the grounds thereof shall be furnished..." The use of the word "shall" denote that this sub rule is peremptory. The applicant must set out the grounds upon which he seeks to appeal. In the matter of *Sogono v Minister of Law Order* 1996 (4) SA 384 (ECD) the Court held at 385I—386A that: "... the grounds of appeal required under Rule 49(1)(b) must ...be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. .. Rule 49(1)(b)must also be regarded as being peremptory."

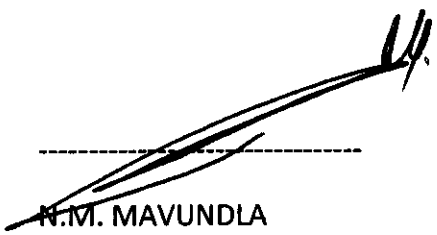
[10] *In casu,* the grounds tabulated in paragraph [2] supra, can hardly qualify to be grounds. In this regard the notice for leave to appeal is fatally defective and on this

ground alone the application for leave to appeal should be dismissed. It does not help the applicant to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in the notice of leave to appeal, no matter how meritorious these might be, which is not the case in my view, otherwise, there is no need for the Rules; *vide Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission* [2006] 2 ALL SA 442 E at 446i-j.

[11] In the event I am wrong, in the conclusion set out in the preceding paragraph, which is not conceded, I am of the view that in the exercise of my discretion I must still dismiss the application for leave to appeal. I hold the view that there is no reasonable prospect of success of the appeal. A court of appeal is loath to entertain an appeal which is of academic consequences. *In casu,* the parties have been pronounced divorced for more than at least four years. The relevant divorce decree severed the marital umbilical cord of the parties. There would be great prejudice to the first respondent were she to be catapulted into a 'dead" marriage. Besides, the order of divorce pronounced that the assets of the parties from the marriage shall be divided. There is no prejudice suffered to the parties by this order of division. There is no purpose in reviving the "dead marriage".

[12] I further take into account that there was an inordinate delay on the part of the applicant in bringing the application for rescission. In this regard there is no reasonable prospect that another court will find otherwise.

[13] Taking into account all the aspects I have referred to herein above, I conclude and so order that the application for leave to appeal should and is dismissed with costs.



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N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE : 10 / 03 / 2016

DATE OF JUDGMENT : 14 / 03/ 2016

APPLICANT`S ADV : ADV K. H. TSWAGO

INSTRUCTED BY : TSWAGO INC. ATTORNEYS

1ST RESPONDANT`S ADV : MR L.E. SEKELE

INSTRUCTED BY : SEKELE ATTORNEYS