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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. A97/2021

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED **Yes**

13/5/2022

In the matter between:

B[....], K[....] J[....]

APPELLANT

And

B[....], H[....]

RESPONDENT

Coram: Mngqibisa-Thusi, Mali *et* Millar JJ

Heard on: 4 May 2022

Delivered: 13 May 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the Gauteng Division and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 13 May 2022.

Summary: Failure by appellant to furnish security – subsequent voluntary surrender by appellant of his estate – trustee evincing no intention to pursue appeal – appeal dismissed with costs.

ORDER

On appeal from: The High Court, Pretoria (Khumalo AJ sitting as Court of first instance):

(1) The appeal is dismissed with costs.

JUDGMENT

MILLAR J

1. This is an appeal against a judgment handed down on 25 June 2020. The action between the parties concerned the determination of the amount of the accrual of the appellants estate during the marriage between himself and the respondent that had since ended in divorce.

2. Leave to appeal was granted by the *court a quo* against its order that the appellant pay to the respondent the sum of R2 512 748.32 being one half of the accrual. The appellant then proceeded to prepare the appeal record and for enrolment.

3. The parties were unable to agree on the amount of the security for costs¹ that should be provided by the appellant. This dispute was subsequently put before the registrar and on 4 October 2021, the amount of security to be put up by the appellant was determined by the registrar to be R195 350.00.

¹ Rule 49(13) of the Uniform Rules of Court provides that unless the court granting leave to appeal has ordered that the obligation to provide security is waived in whole or in part, the obligation to do so remains upon the appellant. Where the parties are unable to agree on the amount of the security as in the present case, the matter is submitted to the registrar for decision.

4. By the time that the security had been determined the appeal had already been set down for hearing. The appellant failed to furnish security despite being requested to do so on several occasions.

5. On 13 December 2021 the appellants attorneys withdrew. No new attorney was ever appointed to continue with the prosecution of the appeal.

6. On 8 March 2022, the respondent's attorney was presented with a *fait accompli* that the appellant had, without notice to the respondent, applied for, and been granted an order for the voluntary surrender of his estate as insolvent on 22 February 2022².

7. The notification had come from the appellants attorney who had represented him in those proceedings – it suffices to say that there can be no doubt that the respondent was deliberately kept ignorant of the appellants intention to surrender his estate so that she could not, had she so chosen, oppose the application.

8. The application for sequestration was placed before us by the respondent. In his affidavit in that application, the appellant asserted:

‘I confirm that I wanted to appeal the ruling and leave was granted to appeal but I am at that stage that I, nor the Company have any funds to proceed with the Appeal and even if I am successful with the appeal, my estate would still be insolvent, and an amount will be due to my ex-wife.’

9. The respondent's attorney ascertained the identity of the trustee in the appellants estate and wrote to the trustee on 12 April 2022. In the letter the trustee was invited to withdraw the appeal and tender costs having regard to the failure to furnish security. The response from the trustee, received on 26 April 2022 was that the appeal had been:

² In terms of section 6(1) of the Insolvency Act 24 of 1936

‘Noted, your client is noted as a creditor in the insolvent estate and should submit a claim.’

10. From the assertion of the appellant in his sequestration application and the vague response of the trustee, it is made plain that the appeal was not going to be pursued by the trustee. Indeed, there was no appearance for the appellant when the appeal was called. The respondent seeks an order for the dismissal of the appeal with costs. There is in the circumstances no reason why such an order should not be granted.

11. Accordingly, I propose that the appeal be dismissed with costs.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE, AND IT IS SO ORDERED

N MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE

N MALI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 4 MAY 2022
JUDGMENT DELIVERED ON: 13 MAY 2022

NO APPEARANCE FOR THE APPELLANT

COUNSEL FOR THE RESPONDENT: ADV C VAN SCHALKWYK
INSTRUCTED BY: ARTHUR CHANNON ATTORNEYS
REFERENCE: MS O SCHEEPERS