**FREE STATE HIGH COURT, BLOEMFONTEIN**
**REPUBLIC OF SOUTH AFRICA**

**Case No. : 6911/2008**

In matter between:

**KRISHNER(KRISHNA) MOODLEY** Plaintiff

and

**JANE MAY MOODLEY** Defendant

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**HEARD ON:** 23 APRIL 2009

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**JUDGMENT BY:** C.J. MUSI, J

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**DELIVERED ON:** 21 MAY 2009

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[1] This is an application, in terms of Rule 41(1)(c) of the Uniform Rules of Court, for an order for costs. The applicant seeks the following relief:

> "1. That the respondent, being the plaintiff in case number 1574/2007 in the above Honourable Court, be ordered to pay the applicant's costs in the case number 1574/2007 in the above Honourable Court on the scale as between party –and-party.

2. That the Respondent be ordered to pay the costs of this application on this scale as between party-and-party."

[2] The respondent instituted a divorce action in this Court against the applicant under case number 1574/2007. The applicant defended the action and filed his plea and a counterclaim. During November 2007, after the pleadings were closed, the respondent applied for a trial date.

[3] In the action the respondent, as plaintiff in convention, claimed the following relief:

"A Decree of Divorce, forfeiture of the patrimonial benefits arising out of the said marriage, costs of suit, further and/or alternative relief." There was no prayer for maintenance for herself.

[4] The respondent subsequently, in terms of Rule 43, applied for maintenance, for herself, *pendente lite*. On 8 November 2007, Mabesele AJ ordered the applicant to pay the respondent, *pendente lite,* R6 700.00 per month maintenance and to pay a contribution in the sum of R3 500.00 towards her legal costs.

[5] The parties endeavoured to settle the action. The settlement negotiations bore no fruits. The main reason for the deadlock was the respondent's insistence on maintenance, for herself, for a period exceeding 12 months after the divorce. She refused to sign a proposed settlement agreement that was drawn by her erstwhile attorneys.

[6] The respondent's refusal to sign the proposed settlement agreement was perceived as unreasonable by the applicant. On 2 June 2008, the applicant's attorney wrote a letter to the respondent's attorneys wherein it was *inter alia* stated that: "Should your client refuse to sign the settlement agreement, our instructions are to withdraw the defence and counterclaim immediately. On such event, your client will get less than she bargained for, if anything at all."

[7] The respondent's attorney then intimated to the applicant's attorneys that he had instructions to withdraw the action in this Court and to institute an action in the Eastern Cape High Court, Bhisho, firstly because the respondent is currently

permanently resident in East London and secondly because the particulars of claim were not properly drafted.

[8] On 15 September 2008 the applicant's attorneys instructed their Bloemfontein correspondents to withdraw his defence and counterclaim, which was done. On 18 September 2008 the respondent's attorneys were informed about the withdrawal of the defence and counterclaim.

[9] On 25 September 2008 the applicant filed a notice of set down, whereby the divorce action was purportedly set down for hearing on the 23 October 2008 on the unopposed roll. Meanwhile, on 25 September 2008 the respondent signed and dispatched her notice of withdrawal of the action to the applicant via registered mail. The applicant only received it on 2 October 2008.

[10] On 23 October 2008 the parties appeared before Beckley J and the applicant moved for an order in terms of the respondent's particulars claim. The respondent objected and indicated that she did not want to proceed with the action, because she has withdrawn it. Although the applicant initially

insisted that the matter should proceed on an unopposed basis he later consented to the respondent's withdrawal of action. The consent was couched as follows:

"Kindly take notice that the defendant hereby accepts and consents to the plaintiff's withdrawal of action dated 25th September 2008, costs to be paid by plaintiff in terms of Rule 41."

No order was made on 23 October 2008, by Beckley J, ostensibly because of the consent.

[11] On 24 October 2008, the applicant's attorneys enquired from the respondent's attorneys whether the respondent would agree to a fee or whether she requires them to have their costs taxed. The respondent denied liability for the applicant's costs and suggested that the matter be set - down so that the issue of costs could be argued. It was common cause that the respondent did not, at any stage, agree to pay the applicant's costs.

[12] Mr Perumaul on behalf of the applicant argued that the respondent's notice of withdrawal was ineffective for non-compliance with Rule 41(1) (a) because it was done without the applicant's consent after the matter was purportedly set-

down, by the applicant. He further argued that the respondent is liable to pay the applicant's costs because she is in the same position of an unsuccessful litigant.

[13] Mr Zietsman, on behalf of the respondent, argued that the applicant ceased to be a party to the proceedings when he withdrew his defence and counterclaim. He further argued that the notice of set down was improper and invalid and that the respondent was therefore entitled to withdraw the action without the applicant's consent.

[14] Rule 41 reads as follows:

1(a) A person instituting any proceeding may at anytime before the matter has been set down and thereafter by consent of the parties or leave of the Court withdraw such proceedings in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."

[15] It is clear from the Rule that the respondent was entitled to withdraw the action, without the consent of the applicant or leave of the court, at any time before the matter was properly set down. Once the matter is properly set down the consent of the applicant or leave of the court was needed. If no consent or leave was given then the withdrawal will be incompetent and invalid. See **Protea Assurance Co Ltd v Gamlase** 1971(1) SA 460 (E) at 465 G.

[16] Mr Zietsman referred me to **Nel v OVS Staalkonstruksie en Algemene Sweiswerke** 1977 (3) SA 993 (0) at 995 G as authority for his argument that the applicant ceased to be a party to the action when he withdrew his defence and counterclaim. That case is not authority for his proposition. In **Nel v OVS Staalkonstruksie** the respondent/plaintiff withdrew his action against the applicant/1st defendant. The first defendant then ceased to be a party to the suit because the party that initiated the suit against him withdrew it. In this

matter the applicant remained a defendant in the action. He only withdrew his defence and counterclaim. The respondent still sought relief against him. He therefore remained a party to the action.

[17] Could the applicant set the action down on the unopposed roll? When the applicant withdrew his defence and counterclaim the matter became unopposed and the respondent as *dominus litis* had to decide whether she still wanted to proceed with the matter or not. The applicant did not allow her to make that election; he set the matter down as if he was *dominus litis*.

[18] I was referred to **Van Winsen et al the Civil Practice of the Supreme Court of South Africa 4th Edition** at page 566 where the learned authors state that:

"When the pleadings in a trial action have been closed the case is ripe for trial, and in order to have it heard, it must be set down on the roll of actions for hearing.

The uniform rules provide no procedure for set - down. Each division preserved its set -down rules at the time of promulgation of the uniform rules, and the judge president of each provincial division may make further rules regulating set-down of matters in his division…

In most provincial divisions there are set-down rules in operation which are substantially the same in form, and embody what is commonly referred to as the "continuous roll" procedure. In terms of this procedure, after pleadings are closed the attorney for the plaintiff sets the case down in writing on a roll kept by the registrar for that purpose. If he fails to do so within a stated time, any other party to the suit may do so. Whoever sets the case down must forthwith give notice to the other parties that he has done so…"

The set-down procedures of this Court are set out in **Eastvaal Motors (Edms) Bpk v Niceffek (Edms) Bpk** 1993 (4) SA 528 (O) at 532 A-D.

[19] The procedure mentioned above is the procedure in relation to defended trial matters. The respondent already applied for a trial date in terms of the procedure of this Court. She had to wait for the registrar to allocate a trial date. I know of no Rule or practice in this Court whereby a defendant who has withdrawn his/her defence and counterclaim may set a divorce action down on the unopposed roll. It is not the applicant that made out a case for the relief that the respondent sought in the action. The respondent, as the plaintiff, must set the matter down. It is then incumbent upon her to show that she is entitled to the relief that she seeks.

She may even decide to amend her particulars of claim before setting the matter down on the unopposed roll.

[20] If there is an inordinately long delay in the prosecution of an undefended claim by a plaintiff – which is not the case in this matter – a defendant has other remedies, like an application for the dismissal of the action, but setting the matter down on the unopposed roll is in my view not one of them. In my view, the purported notice of set down was irregular and invalid. That being the case, the respondent was entitled to withdraw her action without the applicant's consent.

[21] The strategy of the applicant is clear. He purportedly set the matter down in order to force the respondent to get his consent before withdrawing her action. When she did not ask for his consent he counter-intuitively hoped that the prayers in her particulars of claim will be granted on an unopposed basis. If he could achieve this, it would automatically mean that the respondent would forfeit her entitlement to maintenance and the Rule 43 maintenance order would also lapse, *ex lege*.

[22] The applicant withdrew his defence and counterclaim without consenting to pay costs in his notice of withdrawal. Mr Perumaul argued that there was no need for the applicant to consent to pay costs, because Rule 41 is not applicable to him as he did not initiate any proceedings. This argument is without merit. A counterclaim is a separate and distinct action that is initiated by the defendant. See **Pilcher & Conways (PTY) Ltd v Van Heerden** 1963(3) SA 205(0) at 209 A-B; **Acs v Acs** 1981(2) SA 795(W) at 797 A – H. See also Rule 24(1) which reads:

"A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with Rule 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea but headed "Claim in Reconvention", it shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention"

It is clear that a claim in reconvention is initiated by a defendant. The applicant therefore initiated the claim in reconvention.

[23] The general rule, in relation to costs orders where a litigant withdraws his or her action, is that the withdrawing party is liable to pay the costs of the proceedings. There must be very sound reasons why the other party should not be entitled to his or her costs. This is so because the withdrawing party is in the same position as an unsuccessful litigant. See **Germishuys v Douglas Bespoeiingsraad** 1973(3) SA 299(NC) at 300 D-E.

[24] I am of the view that there are very sound reasons, in this matter, why the applicant should not be entitled to costs. The applicant withdrew his plea and counteclaim without tendering costs. The reason why the applicant withdrew his defence and counterclaim was in order for him to purportedly set the matter down on the unopposed roll in the hope that a Court would grant him the prayers sought by the respondent/plaintiff in the action – which was in any event irregular and incompetent. It was a bad attempt at abusing the court process. In my view, each party should pay his/her own costs of withdrawing their respective actions.

[25] There is another reason why this application should not succeed. Prayer one of the notice of motion is couched very wide. In effect, the applicant prays for an order that the respondent should pay the costs of defending a counterclaim, which he instituted and withdrew. That would be tantamount to ordering a successful litigant to pay an unsuccessful litigant's costs, without good reason. That would be totally unfair and an injudicious exercise of my discretion.

[26] Mr Zietsman pointed out that the applicant would not have opposed this application if the notice of motion was not couched in such overbroad terms and that the applicant should therefore be ordered to pay the costs. The respondent is in any event successful in her opposition of this application and there is no reason why the applicant should not be ordered to pay the costs of this application.

[27] Mr Zietsman requested me to order the applicant to pay the wasted costs of 23 October 2008. The respondent should have requested Beckley J to make an appropriate costs order on 23 October 2008. There is no proper application or

counter application before me for those costs. I am not prepared to make such an order under these circumstances. That matter will have to be set down so that the issue of the costs of 23 October 2008 can be argued.

[28] I accordingly make the following order:

The application is dismissed with costs.

**C.J. MUSI, J**

On behalf of the applicant: Mr. Perumaul
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Phoenix

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On behalf of the respondent: Adv. P J J Zietsman
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