

**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION)**

**CASE NO: 676/2007**

**DATE HEARD: 24/4/08**

**DATE DELIVERED: 5/5/08**  
**NOT REPORTABLE**

In the matter between:

**TREVOR FREDERICK KING**

**PLAINTIFF/RESPONDENT**

and

**MAGDALENA JOSINA KING**

**(Previously KALTENBRUNN born: COETZEE) DEFENDANT/APPLICANT**

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**JUDGMENT**

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**PLASKET J**

[1] This is an application brought in terms of rule 41(1)(c) of the Uniform Rules for an order, directing the respondent to pay the applicant's costs in an action that he, the respondent, instituted against the applicant and later withdrew. This application is opposed by the respondent.

[2] The action was an action for divorce. After the applicant – the defendant in the action – had filed a notice of opposition, the respondent – the plaintiff in the action – filed a notice that stated: 'Be pleased to take notice that the plaintiff hereby withdraws the action in the above matter.' No costs were tendered.

[3] Rule 41(1)(a) provides that when withdrawing proceedings a party 'shall

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deliver a notice of withdrawal and may embody in such notice a consent to pay costs', and rule 41(1)(b) provides that such a consent 'shall have the effect of an order of court for such costs'.

[4] Rule 41(1)(c), with which this application is concerned, deals with the situation in which a party withdrawing proceedings does not consent to pay the other party's costs. It provides that '[i]f 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'.

[5] Subsequent to the respondent filing his notice of opposition, this matter was postponed on three occasions with the costs being reserved on each occasion. On 17 April 2008, a week before the matter was to be heard, the respondent filed an affidavit.

[6] In it he stated that shortly after he had issued summons against the applicant, she had approached him and said that she wanted them to attempt to reconcile. He agreed to this. (Although this is not stated explicitly, I can assume that this was why the summons was withdrawn.) The applicant said, however, that she had to pay her attorneys. She did not know how much she owed but the respondent gave her a cheque, made out to her attorneys, in the amount of R10 000.00. The cheque has been cashed. On this basis, the respondent says that 'no bill of costs was ever furnished to myself but I respectfully submit, that I have already paid these costs' and that the application should be dismissed. The applicant chose not to reply to these averments.

[7] It was argued on behalf of the respondent that he had paid the amount of R10 000.00 in full and final settlement of his indebtedness for costs and that his cheque was accepted and deposited.

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[8] In my view, in the absence of evidence to the contrary, it must be accepted that the payment was in full and final settlement. The context in which the payment was made – the settlement of the action for divorce in order to try to reconcile -- makes this inference inescapable. (I may add that I find it difficult to imagine that a party and party bill of costs would even come close to what has been paid, given that the only document filed by the applicant's attorneys was a notice of opposition.)

[9] As stated above, the matter has been postponed on three occasions. In each instance costs were reserved. The respondent stated in his affidavit that 'I have not filed an affidavit to date as lengthy and intense negotiations have taken place between my legal representatives and the defendant's legal representatives to try to resolve all issues between the defendant and myself'. In these circumstances, it appears to me to be equitable for each party to pay their own costs.

[10] In the result, the application is dismissed and each party will pay their own costs.

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**C. PLASKET**

**JUDGE OF THE HIGH COURT**

### **APPEARANCES:**

For the Applicant: Mr R Brooks instructed by Whitesides, Grahamstown.

For the Respondent: Mr D De La Harpe instructed by Wheeldon, Rushmere & Cole, Grahamstown.