NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA**

**(EAST LONDON CIRCUIT LOCAL DIVISION)**

In the matter between: Case No: EL 538/2019

**MELINDI BARNARD (previously KRIEL, born BESTER)** **Applicant**

**and**

**RIAAN BARNARD** **Respondent**

---

JUDGMENT

---

**Govindjee AJ:**

**Background**

[1] The parties are embroiled in divorce proceedings. They were officially married on 18 October 2018, but lived together since 2017 and enjoyed an elaborate 'wedding ceremony' (seemingly without registering a marriage) on 4 October 2017. The marriage is out of community of property, with the accrual system being applicable. It is common cause that the respondent is an affluent businessman with interests in various companies, and that the nett value of his estate at the commencement of the marriage is the sum of R24,8 million.

[2] The applicant approached the Court in terms of Rule 35(7) of the Rules of Court to compel the respondent to comply with the applicant's second notice in terms of Rule 35(3) and 35(6).

[3] The respondent has already replied to the applicant's initial notice in terms of Rule 35(3) (disclosing an initial 24 items, and an additional 86 items by way of supplementary affidavit),[1] but contends, *inter alia,* that 'The description of the further documents called for by the Plaintiff is so wide and all-inclusive that it is not possible for me to determine the relevance of these further documents and precisely what documents are or are not included in the request, as opposed to the first request.' The respondent appears to be overwhelmed by the vastness of the documentation sought and claims to have no further documentation available that is relevant to a maintenance claim.

[4] The applicant's request is based on the information sought by its appointed expert. This is ostensibly in order for that individual to consider historical documentation pertaining to the respondent's interests in five juristic entities (including contracts entered into and profit-sharing arrangements) in order to calculate the value of the respondent's estate properly. The respondent contends, essentially, that documentation prior to October 2018 is irrelevant and that the documentation sought is irrelevant to any issue that will arise at trial, and the request is too broad, vague and unspecified.

[5] The issue to be decided is whether the applicant has made out a case to compel the respondent to discover the documents contained in the applicant's second notice in terms of Rule 35(3) and 35(6). The respondent frames the key question as follows: 'Whether the Applicant has set out sufficient information to enable the Court to consider whether or not to exercise its discretion in her favour to compel the production of every document (unlimited) in the Applicant's second Notice.'

[6] The applicant's particulars of claim go beyond a claim for maintenance, and includes the execution of the terms of the antenuptial contract entered into between the parties. It contends that the documentation requested is relevant for the following reasons:

---

[1] The respondent discovered various documentation in his supplementary affidavit, including bank statements from 2015, 2016 and 2017; documentation from Basfour 3538 (Pty) Ltd, including an annual financial statement for the period ending 30 September 2017 and bank statements from 2015 to 2020; SARS ITA34 for 2014, 2016 and 2017; and EB5 Investment (offshore) dated in 2019.

a. The applicant's claim is for the accrual as well as maintenance and should the plaintiff have a significant accrual claim this will impact on the possible maintenance award. The respondent's means and earning capacity must be assessed to determine the applicant's claim for maintenance;

b. A forfeiture can only be awarded if the defendant's estate has shown the larger accrual, which must first be established;

c. The award of costs is dependent on the means of the parties and can only be properly assessed through the disclosure of the requested documentation.

**Applicable law**

[7] The discovery process is intended to assist in ensuring that the action is determined following a fair trial and due process. Rule 35(1) and (2) require a party to any action who has been requested thereto, to make discovery of all documents and tape recordings 'relating to any matter in question in such action'. The discovery is done on affidavit 'as near as may be in accordance with Form 11 of the First Schedule…'

[8] Rule 35(3) provides:

> 'If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with subrule (6), or to state on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.'

[9] The test as to whether or not a document should be discovered is one of relevance, having regard to the issues defined in the pleadings:[2]

> 'After remarking that it was desirable to give a wide interpretation to the words "a document relating to any matter in question in the action", Brett LJ stated the principle as follows:

[2] *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A.

> "It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."'

[10] Courts are nonetheless reluctant to question a discovery affidavit, which is *prima facie* taken to be conclusive, unless a probability is shown to exist that the deponent is either mistaken or false in his assertion.[3] The Court, in determining whether to go behind the discovery affidavit, will only have regard to the following:

i. The discovery affidavit itself;

ii. The documents referred to in the discovery affidavit;

iii. The pleadings in the action;

iv. Any admissions made by the party making the discovery affidavit;

v. The nature of the case or the documents in issue.

[11] In *Rellams (supra)*, the court held as follows:

> 'Rule 35(1) contemplates the discovery of all relevant documents, specific or otherwise, and indeed provides that a document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specific nature which have been initialled and consecutively numbered by the deponent. If such a bundle of documents existed but was not discovered there could be no valid reason why it should not be permissible to obtain its production under Rule 35(3) which is certainly couched widely enough to allow the production of "a vast number of documents covering a long period".'

[3] *Marais v Lombard* 1958 (4) SA 224 (E) at 227G.

[12] For an order in terms of Rule 35(7), the documents required for inspection must be identifiable. The Rule 35(3) notice may require production of any number of documents. A document need not be described specifically within the notice, but must be described with sufficient accuracy to enable it to be identified. It suffices if the document is described within a *genus* enabling it to be identified.[4] It was not suggested that the documents under request were not described with sufficient accuracy for purposes of identification in this instance. Instead, the focus was on the 'wide and all-inclusive' nature of the request, linked to relevance.

[13] Discovery is a matter for the Court to decide, having regard to the pleadings, and does not depend upon the parties' own views on the matter.[5] It is also particularly significant that the rule refers specifically to documents which *may* be relevant to the action, and that relevance is determined having regard to the issues taken at face value as defined in the pleadings.[6]

**Analysis**

[14] The respondent's reply to the applicant's second notice in terms of Rule 35(3) and 35(6)[7] reflects the misconception that the discovery request is linked only to the respondent's ability to pay maintenance. The pleadings demonstrate that the issues at hand clearly go beyond maintenance and costs and include a claim for 'Execution of the Antenuptial contract' and possible forfeiture. This application must be considered in this light, bearing in mind that a party may only be called upon to discover documents 'relating to any matter in question' (which emanates from a consideration of the pleadings) and that this phrase is given a wide interpretation.[8]

[15] Discovery is intended to ensure that available documentary evidence is considered in order for a proper ventilation of issues to occur at trial.[9] The scope of discovery is wide and extends to documents having only a minor or peripheral bearing on the issues, and to documents which may not constitute evidence but which may fairly lead to an enquiry

---

[4] *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) at 323B-C.
[5] *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) at 404.
[6] *Swissborough supra.*
[7] At paras 3 and 5.
[8] *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) at 385A-C.
[9] On the purpose and benefit of proper discovery, see *Fisher and others v Contribsystems Vertriebs GmbH and others* [2017] ZAKZPHC 52 at para 37 *et seq*.

relevant to the issues.[10] In ***Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei***,[11] the court held that if documents are *prima facie* relevant to the issue before the court, and hence discoverable, it is not appropriate to decide on the weight of those documents at the time of an application to compel discovery. Consequently, discovery may not be refused only on the ground that no weight can be attached to the documents.

[16] In ***Gering v Gering and Another***,[12] the court adopted the following approach to discovery, in the context of the defendant conducting business through three companies:

> 'But the plaintiff's entitlement to maintenance, and the quantum of maintenance to which she might be entitled, are aspects which have been left open, and it may well be relevant, at least on the quantum, to determine the relative financial positions of the parties, and the extent of the first defendant's resources…It is true that, in the case of these companies, their records are not *stricto sensu* in the possession, custody or control of the first defendant in his personal capacity. However, on the facts, those companies are his creatures and his instruments. He is conducting business through them, or holding assets through them and, though they are separate juristic personalities, they are in substance merely part of the machinery by which he alone conducts his business affairs.'

[17] It is inappropriate to cite the volume of documents requested over a long period of time, and allude to associated practical difficulties. If the documents are in the defendant's possession and relevant, they must be made available for inspection.[13] The arguments advanced on behalf of the respondent reflect the approach of the court *a quo* in ***Rellams*** to the effect that a vast number of documents had been requested 'no doubt in the hope that something useful may be revealed'. On appeal, it was confirmed that Rule 35(3) entitles a party who believes that there are documents which *may* be relevant to give notice that these may be made available for inspection.[14]

[18] Perusal of that judgment also puts paid to any suggestion that this is an 'all or nothing' situation and that it was somehow inappropriate for counsel for the applicant to have

---

[10] *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083; *Swissborough supra* at 316I.
[11] 1991 (4) SA 214 (Tk) at 216B-F, cited with approval in *Fisher* at para 58.
[12] 1974 (3) SA 358 (W) at 361B-C, 361H.
[13] *Rellams supra* at 564C.
[14] *Rellams supra* at 563 A.

made certain concessions from the bar based on the breadth of the request or irrelevancy.[15] Extending that principle, there is no reason why the court cannot exercise its discretion in refusing access to documents which have been requested but are considered to be irrelevant or beyond the scope of what could reasonably be required.

[19] Barring the limited exceptions indicated below, the respondent's sworn response that all the documentation requested is irrelevant must, in the circumstances, be rejected given the probability that has been shown to exist that the respondent Is either mistaken or false in that assertion.[16] I am satisfied that the overall denial of relevancy is incorrect and that the court should exercise its discretion accordingly.[17] As Revelas J held in ***J[…] A[…] M[…] (born C[…]) v G[…] S[…] M[…] and 27 Others***,[18] it can hardly be disputed that the applicant would be prejudiced in her preparation for trial and in presenting the evidence allowing the just determination of the issues in dispute, if she were denied access to much of the documentation requested:

> 'It may very well be that the applicant has indeed cast the net very wide but that is a natural consequence of the nature of her claim against the first respondent. It has always been foreseen that the applicant's case would involve a quest for financial details, information and documents pertaining to the various trusts linked to the first respondent…'

[20] It is so that some of the information sought is overbroad and seemingly irrelevant and must be excluded from consideration. Applicant's counsel indicated at the hearing of the matter that the information requested in paragraphs 5, 11 and 12 of the applicant's second notice in terms of Rule 35(3) and (6) was to be struck from consideration. Many of the other requests relate specifically to information from 1 March 2017, but this is not always the case. The requests in the following paragraphs should be read to relate to information from 1 March 2017:

- 3.6.5;
- 3.6.6;

---

[15] See *Rellams supra* at 564E *et seq*.
[16] *Marais v Lombard* 1958 (4) SA 224 (E) at 227G.
[17] See *Fisher supra* at para 31.
[18] Unreported case 3145/2015 (ECD – Port Elizabeth) at para 41.

- 3.6.16;
- 3.6.20;

The request for information in the following paragraphs is considered irrelevant and need not be provided:

- 3.6.13;
- 3.6.21;
- 6.3;
- 13.

[21] Even though 1 March 2017 predates the signing of the antenuptial contract, I am satisfied that information from that date is potentially relevant for calculating financial aspects of the accrual and associated matters emanating from the pleadings.

**Order**

[22] The following order shall issue:

1. The respondent is ordered to comply with the applicant's notice in terms of Rule 35(3) dated 25 May 2020 by –

    a. making available for inspection in accordance within Rule 35 (6) all the books and documents enumerated in the said notice except for items 3.6.13; 3.6.21; 5; 6.3; 11; 12 and 13 and with the exception of information prior to 1 March 2017 in paragraphs 3.6.5; 3.6.6; 3.6.16 and 3.6.20; or

    b. stating on oath within 21 days from date hereof that such books or documents are not in his possession in which event he shall, if known to him, state their whereabouts, failing which the applicant shall be entitled to apply on the same papers duly amplified for an order dismissing the respondent's defence with costs;

2. The respondent is directed to pay the costs of this application.

_____

**A. GOVINDJEE**

**ACTING JUDGE OF THE HIGH COURT**

**Appearances:**

| | | |
|---|---|---|
| *Obo the Applicant* | *:* | *Adv K Watt* |
| *Instructed by* | *:* | *Difford Underwood Attorneys, 14 Bonza Bay Road, Beacon Bay, East London* |
| | | *Ref: Mrs C Difford* |
| *Obo the Respondent:* | *:* | *Adv S Cole* |
| *Instructed by* | *:* | *Burmeister Vickers Attorneys, 16 Cecil Lloyd Street, Stirling, East London* |
| | | *Ref: Mrs Z Burmeister* |
| *Heard* | *:* | *25 March 2021* |
| *Delivered* | *:* | *20 April 2021* |