REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

HIGH COURT CASE NO: A3062/14
CASE NO: RC/GP/Pal 464/2013

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

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DATE SIGNATURE

In the matter between:

[M……..] S…….. B……. Appellant

And

[M……] T……. C……. Respondent

SUMMARY

Practice and procedure – application to compel discovery in terms of Rules 23(3), 23(6) and 23(8) of the Magistrates' Courts Rules – appellant and

responding in process of divorce – appellant's application for further and better discovery refused by Regional Magistrate – interlocutory order of Regional Magistrate in refusing application to compel further – whether appealable and if so – whether appellant entitled to production and inspection of documents required for proper and equitable distribution of assets of joint estate in pending divorce – appeal allowed.

J U D G M E N T

MOSHIDI, J:

[1] This is an appeal against the judgment and order of the Regional Magistrate, Palmridge, in dismissing the appellant's application for better and further discovery in terms of Rule 23(8) of the Magistrates' Courts Rules ("*the Rules*").

THE BACKGROUND

[2] The applicant is the plaintiff in a pending divorce action against his wife, the respondent. For the sake of convenience, I shall henceforth refer to the parties as "*the plaintiff*" and "*the defendant*", respectively.

[3] The pleadings in the divorce action are closed, and awaiting a trial date. The defendant has filed a plea and a counterclaim. The parties were

married to each other in community of property at Alberton, on 21 June 2001. Out of this union two minor children were born.

[4] In March 2014 the plaintiff served on defendant's attorney's of record, Buthelezi Attorneys ("*Buthelezi Attorneys*"), a notice of discovery in terms of Rule 23(1) of the Rules. In April 2014, the defendant made discovery. The plaintiff, unhappy with such discovery, and acting in terms of Rule 23(3) of the Rules, requested better and further discovery. In such request, the plaintiff specified certain documents as set out in Annexure "A" of his notice. I shall deal with the nature of these documents later herein below. The defendant's response to the above request, in the form of an affidavit dated 19 June 2014, was that:

> "*I am not in possession of all documents mentioned in annexure "A" in terms of Rule 23(3), all the documents aforementioned are actually in the possession of the plaintiff who took the entire bag with all my personal and private documents since we are in the process of divorce …*"

[5] On 9 June 2014, the plaintiff filed and served a notice of motion in which he claimed relief under Rule 23(8) of the Rules. The latter Rule provides as follows:

> "*If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6)(a), omits to give a time for inspection as provided for in subrule (6)(b) or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.*"

The application was opposed by the defendant who was legally represented by Buthelezi Attorneys. On the other hand, the plaintiff, as in the present appeal appeared in person. On 3 July 2014, the learned Regional Magistrate dismissed the application. This led to the instant appeal in which the defendant has elected not to participate.

THE APPEALABILITY OF THE REGIONAL COURT ORDER

[6] It is trite that court orders that are interlocutory in nature, having no final or irreparable effect, are not appealable.[1] However, orders refusing or granting better discovery and the production of documents may, depending on the circumstances, be appealable. See *Santam Ltd and Others v Segal.*[2] In the latter case, and in preparation for trial, the appellant's caused a notice in terms of Rule 35(3) of the Uniform Rules to be served on the respondent. The appellants were not satisfied with the answers given in the respondent's reply, and launched an application in terms of Uniform Rule 35(7). The Court *a quo* dismissed the application with costs, and a subsequent application for leave to appeal was dismissed. The appellants thereafter applied for special leave to appeal to the President of the Supreme Court of Appeal, which leave was granted. In ultimately allowing the appeal, the Court said:

> "*In event of a challenge a court will only order production of documents for inspection if it is necessary either for disposing of the matter or for saving costs. The burden of proof must be on the party making the challenge. The Court has a discretion to order production, which discretion must be exercised judicially. A court will in each case have*

[1] See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A), and *Metlika Trading Ltd and Others v Commissioner, SARS* 2005 (3) SA 1 (SCA)
[2] 2010 (2) SA 160 (N)

> *to strike a balance between the importance of ordering production, from the point of view of doing justice or saving costs in the proceedings in question, and respecting confidentiality. A distinction must be drawn between confidentiality as between the immediate parties to the litigation and confidentiality involving third parties. In my view the discretion to refuse production of documents should most commonly be applied where disclosure would breach confidentiality involving a third party. See Science Research Council v Nassê (1980) AC 1028.*"[3]

In the present appeal, the question of the appealability of the order made by the learned Regional Magistrate was never raised at any stage. Not even in the learned Regional Magistrate's reasons for judgment. As stated above, the defendant chose not to take part in this appeal. Her only resistance to the better and further discovery as sought by the plaintiff was that the plaintiff '*stole an entire bag with all her personal and private documents*'. She does not claim any privilege to the documents requested. In any event, the plaintiff has denied strongly the allegation of theft.

[8] I must say more about the appealability of the kind of order under discussion. In *Invictus Holdings (Pty) Ltd (formerly Meridian Investments Holdings (Pty) Ltd and Others v AdvTech Ltd and Others*,[4] the Court held that in deciding the appealability of the order all factors impacting on the issue must be considered. It had also become clear that the stringent approach adopted on the appealability of interlocutory orders in *Zweni v Minister of Law and Order (supra)* has since become somewhat modified. In this regard, in *Phillips v SA Reserve Bank and Others*,[5] the Court held, *inter alia*, that:

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[3] See para [9]
[4] [2009] JOL 24145 (GSJ) para [4]
[5] [2012] 2 All SA 532 (SCA)

"*The appealability of an order made in proceedings which have not yet terminated has generally been addressed against the question of whether or not the order is definitive of the rights being contended in the main proceedings, and whether it disposes of any relief claimed. However, the present Court referred with approval to case authority for the proposition that those factors are not decisive.*"

At para [25] of the judgment, the Court went on to state that:

"*It must be remembered, however, that, as Hefer JA said in Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) at 10F [also reported at [1997] JOL 161 (A) - (Ed], the passage in Zweni: 'does not purport to be exhaustive or to casts the relevant principles in stone'.*"

At para [26], the Court went on to say that:

"*The question of appealability in a case such as this, where a party seeks to attack on appeal an order made in judicial proceedings which have not yet terminated, was discussed by Nugent JA in a judgment with which the other members of the court concurred in National Director of Public Prosecutions v King 2010 (2) SACR 146 (SCA) at 166e-167c (paragraphs [50]-[51]) [also reported at 2010] 3 All SA 304 (SCA) – Ed], where he said the following:*

> *'There will be few orders that significantly affect the rights of the parties concerned that will not be susceptible to correction by a court of appeal. In Liberty Life Association of Africa Ltd v Niselow (in another court), which was cited with approval by this court in Beinash v Wixley 1997 (3) SA 721 (SCA), I observed that when the question arises whether an order is appealable what is most often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. I said that two competing principles come into play when that question is asked. On the one hand justice would seem to require that every decision of a lower court should be capable not only of being correct but of being corrected forthwith and before it has any consequences, while on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice. In this case it was said on behalf of Mr King that the order is not appealable because it is interlocutory. Whether that is its the proper classification does not seem to me to be material. I pointed out in Liberty Life that while the classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been*

> *directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle. Even the features that were said in Zweni v Minister of Law and Order to be characteristic, in general, of orders that are appealable was later said by this court in Moch v Nedtravel (Pty) Ltd not to be exhaustive nor to cast the relevant principles in stone. As appears from the decision in Moch, the effect that the order is not 'definitive of the rights about which the parties are contending in the main proceedings' and does not 'dispose of any relief claimed in respect thereof', which was one of the features that was said in Zweni to generally identify an appealable order, is far from decisive.'*
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> *See also Trustees for the time being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others (Legal Resources Centre as amicus curiae)*."[6]

[9] Based on all of the above legal principles, in particular, those set out in *Santam Ltd and Others v Segal (supra)*, I was more than persuaded that in the circumstances of the present matter, the order of the learned Regional Magistrate in dismissing the plaintiff's application for better and further discovery, was appealable. I was also convinced that to now order the defendant to make discovery of the documents in question, as requested by the plaintiff, will be in the interest of justice. The learned Regional Magistrate's reasons for the order, requested at the instance of this Court shortly before the hearing of this appeal, and pursuant to the plaintiff's failure to obtain such reasons, took the matter no further in favour of the defendant. The documents sought by the plaintiff are clearly relevant to the pending action.

[10] Rule 23(8) of the Magistrates' Courts Rules, is the equivalent to Uniform Rule 35(7). (*Cf Envirosore (Pty) Limited v Energy Brokers (Pty)*

[6] [2013] 1 All SA 648 (SCA) at para [25]

Limited.[7] In certain foreign jurisdictions, failure to comply with a court order to make further and better discovery can have drastic repercussions for the party in default. For example in Texas, US, in a recent decision, in *Byrd v Phillip Galyen, P.C*[8] the facts were briefly as follows: the plaintiff ran into trouble in his divorce proceedings. He had commenced the divorce action during April 2006, and was served with a discovery request during November 2006. However, by February 2007, when no response had been provided, his wife, the defendant, moved to compel and for sanctions. In September 2007, the Court ordered the plaintiff to respond to the outstanding discovery. At a later hearing, the Court struck the plaintiff's pleadings, and prohibited him from making any claim for a disproportionate division of property in his favour, and committed him to jail for 30 days for failure to comply with the court's order compelling discovery responses. (Underlining added.) Apart from the drastic sanctions, the facts in the above case, are pertinent in some way to the conduct of the defendant in the instant matter.

[11] In the instant matter, the plaintiff in the pending divorce action has claimed division of the joint estate in the event of a divorce order, based on the irretrievable breakdown of the marriage. He has also undertaken to contribute towards the maintenance of the minor child. In addition, he has claimed that 50% of the pension interest due to his wife up to the date of the divorce order be paid to him. The defendant, in her plea and counterclaim, in which she also seeks a divorce, has claimed that the plaintiff be ordered to forfeit the benefits in respect of the common home, situated at 2380 Mokhothu

[7] [2014] JOL 32038 (GP)
[8] S.W. 3d, 2014 WL 1499648 (Tx.Ct.App)

Street, Spruitview Gardens, Katlehong, as well as an order for the plaintiff to forfeit any benefits in respect of her pension fund. It is common cause that the respondent is employed as a professional nursing sister and a member of the National Pension Fund For Municipal Works.

[12] The documents presently sought by the plaintiff by way of further discovery contained in Annexure "A" of its application, are undoubtedly relevant for the equitable and just determination of the total value of the joint estate in the divorce. These documents include the defendant's bank statements, bank accounts, credit card statements, a statement of the defendant's assets and liabilities, shares in companies, her interest in her pension or provident fund, loan accounts, income tax assessments for 2010 up to 2012 tax years, salary advices, investments, as well as copies of her employment contract. In the counterclaim, the defendant admitted that she had a motor vehicle on hire purchase, loans and credit card with banks, and with Old Mutual.

[13] In his closing argument, the plaintiff, appearing in person before us, appeared impressive and genuine in his pursuit to have the listed documents, primarily to ascertain the total value of the liability of the joint estate. He requires the documents in order to challenge the defendant's counterclaims. The order of forfeiture sought by the defendant in the pending divorce proceedings is a rather drastic one. The divorce court ought to be placed in the best position to make a proper assessment in terms of sec 9 of the Divorce Act 70 of 1979. In my view, these are genuine concerns and

pertinent to the pending divorce action. The defendant's discovery affidavit was rather evasive and scanty and highly suspect, to say the least. Her assertion that she was not in possession of the requested documents, as well as the reasons therefor, appeared significantly improbable. In any event, the nature of the documents sought by way of better and further discovery is such that the defendant has easy access thereto or copies thereof. Examples of these are her monthly bank statements and pension/preservation fund details.

[14] It is so that the court in matters of this nature was not entitled to proceed beyond the oath of the deponent in discovery. See, for example, *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd.*[9] However, in the circumstances of the instant matter, there was more than sufficient grounds to do so. In *Federal Wine and Brandy Co. Ltd v Kantor,*[10] the Court said that:

> "*An affidavit of discovery is conclusive, save where it can be shown either (i) from the discovery affidavit itself or (ii) from the documents referred to in the discovery affidavit or (iii) from the pleadings in the action or (iv) from any admissions made by the party making the discovery affidavit, that there are reasonable grounds for supposing that the party has or has had other relevant documents in his possession or power, or has misconceived the principles upon which the affidavit should be made. Following Tait v Bothwell, 1912 C.P.D. 60, the conclusiveness of an affidavit of discovery can always be challenged where mala fides can be shown.*"

In my view, this aptly described the conduct of the defendant in the present matter. See also *Continental Ore Construction v Highveld Steel and*

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[9] 1958 (1) SA (T) 66 at 70
[10] 1958 (4) SA 735 (E) at 749H

Vanadium Corp Ltd,[11] and *S v Western Areas Ltd and Others.*[12] In addition, see *MV Alina II Transnet Ltd v MV Alina II,*[13] at para [19] where the Court said:

> "*Rule 35(7) is designed to assist a party that is dissatisfied with the discovery or supplementary discovery that has been made, and remedies under rule 35(3) have been exhausted (Tractor and Excavator Spares (Pty) Ltd v Groenedijk 1976 (4) SA 359 (W)). Rule 35(7) empowers the court to dismiss a claim or strike out the defence, if a party fails to give discovery in compliance with the rules. Discovery was defined in STT Sales (Pty) Ltd v Fourie and Others 2010 (6) SA 272 (GSJ) at 276C-D as 'a tool used to identify factual issues once legal issues are established'. The purpose of discovery is not only to assist the parties as well as the court in determining the truth, but also to save costs as stated in Air Canada v Secretary of State for Trade [1983] 2 AC 394 at 445-446 and Santam Ltd and Others v Segal 2010 (2) SA 160 (N) at 162E-F.*"

For a proper context of the present matter, Rules 23(3), 23(6) and 23(8) of the Magistrates' Courts Rule are the equivalents of Uniform Rules 35(3), 35(6) and 35(7), respectively. I am not aware of any subsequent Appellate Court decision disapproving of the principles set out in *Santam Ltd and Others v Segal (supra).* The plaintiff argued that he requires the documents in Annexure "A" of his papers in order to assert his rights in an equitable distribution of the joint estate in the divorce action. He has no other means of doing so except by way of compelling the defendant to produce the documents. In my view, this is a legitimate request.

[15] There was, in my view, another reason why the appeal must succeed. This is that, from the annexures to the plaintiff's application, there is *prima*

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[11] 1971 (4) SA 589 (W)
[12] 2005 (5) SA 214 (SCA)
[13] 2013 (6) SA 556 (WCC)

facie evidence, which may suggest strongly that the defendant had been unfaithful to him, during the marriage. It was unnecessary though, for present purposes, to make any definitive finding on this issue. In fact it would be premature to do so.

[16] For all the aforegoing reasons, I conclude that the order made by the learned Regional Magistrate was appealable in the particular circumstances of this matter, and that the appeal must succeed. The plaintiff is entitled to the documents requested in order to ensure an equitable distribution of the joint estate.

COSTS

[17] There is no reason why the costs should not follow the result. The defendant was served with the appeal proceedings. On 26 August 2014 the plaintiff served on her attorneys of record an application for a trial date of the appeal. In addition, on 10 September 2014 the Registrar of this Court notified the defendant's attorneys of record of the date of the hearing of this appeal. In spite hereof, the defendant elected not to appear at the hearing. More disturbing and *prima facie* unprofessional, was the fact that, on the same day of the hearing of the appeal i.e. 20/10/2014, Buthelezi Attorneys, on behalf of the respondent, sent and e-mail to the Registrar of this Court, enquiring about the outcome of the appeal. This was unacceptable procedure since judgment had inevitably to be reserved for a proper consideration of the matter.

ORDER

[18] In the result I make the following order:

1. The appeal succeeds.

2. The order of the court *a quo* is hereby set aside and replaced with the following order.

3. "*The defendant is ordered to make discovery to the plaintiff of all the documents listed in Annexure "A" of his notice to compel, and in terms of Rules 23(3), and 23(6) and 23(8) of the Rules of the Magistrates' Courts Rules. This order shall be complied with within fifteen (15) days of this judgment.*

4. Failing compliance with order number three (3) above, the plaintiff is hereby granted leave to apply to this Court (Palmridge Regional Court), on the same papers (duly amplified as necessary), for an order striking out the defendant's defence to the plaintiff's claim with costs."

5. The respondent is ordered to pay the costs of this appeal.

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D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur:

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P KENNEDY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPELLANT	IN PERSON
INSTRUCTED BY	IN PERSON
COUNSEL FOR THE RESPONDENT	NO APPEARANCE
DATE OF HEARING	20 OCTOBER 2014
DATE OF JUDGMENT	31 OCTOBER 2014