IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 45854/2020

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: No

In the matter between:

Y[....] R[....] Applicant/Defendant

and

P[....] R[....] Respondent/Plaintiff

JUDGMENT

MARITZ AJ

A. INTRODUCTION

1. The Applicant/Defendant launched an application in terms of Rule 35(7) of the Uniform Rules of Court to compel the Respondent/Plaintiff to comply with her notice in terms of Rule 35(3) of the Uniform Rules of Court, which notice was served on the Respondent/Plaintiff on 17 March 2021.

2. The Respondent/Plaintiff failed and/or refused to comply with the Applicant's/Defendant's notice in terms of Rules 35(3).

3. It is common cause that the parties are currently engaged in divorce proceedings.

4. For ease of reference I will refer to the parties as in the divorce action namely the Applicant being the Defendant and the Respondent being the Plaintiff.

B. RELEVANT BACKGROUND FACTS AND CHRONOLOGY OF EVENTS

5. The Plaintiff instituted a divorce action against the Defendant on 11 September 2020.

6. It is clear from the summons that the parties were married to each other on 24 February 2004, out of community of property with inclusion of the accrual system. Two minor children were born out of the marriage between the parties.

7. On 28 May 2020 at Centurion, the parties concluded a settlement agreement , which agreement includes, *inter alia*, arrangements regarding the primary residence of the minor children, contact rights, as well as all propriety issues between the parties, as a consequence of their marital regime and the issues flowing from the contemplated divorce.

8. Subsequent to the conclusion of the settlement agreement the Defendant served her plea on 14 January 2021. In paragraph 5.3 of the plea the Defendant

pleaded that the settlement agreement was conditionally entered into on the *bona fide* premises that the Plaintiff made full and proper disclosure of all assets and the value thereof under his ownership and control.

9. The Defendant specifically pleaded that post May 2020 she received information that the Plaintiff failed to honestly and fully disclose the nature and value of all assets under his ownership and control. Despite a request made to the Plaintiff on 3 November 2020 to provide her with source documentation and detailed information in relation to the extent and value of all of his assets the Plaintiff has to date of this application failed and/or refused to provide the requested information and documentation.

10. It is the case of the Defendant that all source information and documentation in relation to the extent and value of all assets under the Plaintiff's ownership and control is required for the accrual system, as provided for in the Matrimonial Property Act, 88 of 1984, to be applied and the actual and true accrual to be calculated.

11. It is the case of the Plaintiff that the aforementioned settlement agreement settled the whole divorce between the parties and that all discovery relating thereto has been made.

12. The Defendant contends that insufficient discovery was made by the Plaintiff regarding the full nature and extent of his assets prior to her entering into the settlement agreement with him.

13. On 4 February 2021 the Plaintiff served his replication in which he *inter alia*, pleaded in paragraph 3 thereof that the Defendant is estopped from relying on any such further agreements and/or other agreements for the reasons that the Plaintiff fully complied with all his obligations in terms of the settlement agreement and that the Defendant was aware of all material and relevant facts in relation to the settlement agreement and/or the divorce and that she elected to abide by the terms of the settlement agreement and accepted the performance of the Plaintiff as full and final settlement of any and all obligations of the Plaintiff towards her.

14. On 8 March 2021 the Plaintiff filed his discovery affidavit. From the discovery affidavit it is clear that the Plaintiff failed to discover any document(s) other than the pleadings, notices and annexures thereto and some correspondence between the parties' respective attorneys and the parties.

15. On 15 March 2021 the Defendant served a re-joiner in which she re-joined issue with the content of specifically paragraph 3 of the Plaintiff's replication on the basis that she denied that any final settlement agreement had been entered into and that she is as such estopped. The Defendant further denied that the Plaintiff fully complied with all possible obligations arising from the conditional agreement and therefore she denied that she has accepted performance by the Plaintiff in full and final settlement of any and all obligations of the Plaintiff towards her.

16. On 17 March 2021 the Defendant served a notice in terms of Rules 35(3) on the Plaintiff's attorneys of record in which the Defendant states that she believes that there are, in addition to the documents already discovered, other relevant documents which are relevant to the matter in question in the possession of the Plaintiff, and gave notice to the Plaintiff to make available for inspection and copying by the Defendant in accordance with subrule 35(6), within 10 days the documents as referred to in the notice or to state on oath that such documents are not in his possession and then disclose their whereabouts.

17. The documents required to be discovered in terms of the above notice include *inter alia* a complete list of all the Plaintiff's banking accounts, South African and foreign, held by the Plaintiff in the pre-ceding 60 months as well as all information relating thereto and copies of bank statements, all foreign currency transactions, copies of all documents that reflect the complete history of shares/securities obtained and held by the Plaintiff in local and foreign entities and relevant information pertaining to the shares/securities as stated in the notice as well as copies of all share/security certificates, etc. A copy of the notice is attached to the papers for a full description of the requested documents to be discovered.

18. The Plaintiff has failed and/or refused to comply with the Defendant's above notice and on 6 April 2021 a letter was send via e-mail to the Plaintiff's attorneys of

record in which the Plaintiff's attorneys were requested to make available for inspection and copying, the requested documents or state on oath that such documents are not in their possession and then disclose the whereabouts of it on or before 13 April 2021.

19. Despite the abovementioned written request the Plaintiff has failed and/or refused to deliver any documents and/or answer to the Rules 35(3) notice within the stipulated time period provided therein or within the extended time period provided for in the above letter neither did the Plaintiff state on oath that such documents are not in his possession or did he state the whereabouts of such documents.

20. On or about 16 April 2021 the Plaintiff served an application in terms of Rule 33(4) for a separation of the issues pertaining to the decree of divorce and the minor children from the contractual and patrimonial issues of the divorce action on the Defendant's attorneys of record. During the hearing of this application the Court was informed that the Plaintiff's application for separation of the issues was already adjudicated and subsequently dismissed by the Honourable Mbongwe J on 3 August 2022. There is therefore no reason to deal further with this aspect.

21. On 15 April 2021 the Defendant served the current application in terms of Rule 35(7) to compel the Plaintiff to comply with her notice in terms of Rule 35(3) to make better and further/full discovery.

22. On 19 April 2021 the Plaintiff served a notice of intention to oppose.

23. On or about 17/18 June 2021 the Plaintiff filed his answering affidavit.

24. On or about 10 November 2021 the Defendant filed her replying affidavit.

C. JUDGEMENT

25. Against this background is the Defendant's application before this Court.

26. The object of discovery was stated in *Durbach v Fariway Hotel Ltd*[1] to be '*to ensure that before trial both parties are made aware of all the documentary evidence that is available. The ultimate purpose is that issues are narrowed and the debate of points which was incontrovertible eliminated'* i.e., purposed for the exposure of the truth.

27. Uniform Rule 35 requires a party to make a discovery of **all documents relating to any matter in question in such action**. The obligation to make discovery of documents relates to documentation which may either directly or indirectly enable the party requiring discovery either to advance his/her case, or to damage the case of his/her adversary. It is not for the party compelled to make discovery to determine whether or not the documents in his/her possession need not be discovered, and the decision does not depend on the subjective views of the legal representative of the party compelled to make discovery. Subrule (1) contemplates the discovery of all relevant documents. Relevance is a matter for the Court to decide. (Own emphasis)

28. Subrule (3) stipulates as follows:

> "*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/her possession, in which event he/she shall state their whereabouts, if known to him/her." (Own emphasis)*

29. Subrule (3) provides the procedure for a party dissatisfied with the discovery of another party. The intention of the subrule is to provide for a procedure to supplement discovery which has already taken place but which is alleged to be inadequate.

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[1] 1949 (3) SA 1081 (SR) at 1083

30. Relevancy in subrule (3) is determined from the pleadings and not extraneously therefrom. The requirement of relevance has been considered by the courts on various occasions. The meaning of relevance is circumscribed by the requirement in both subrules (1) and (3) that the document or tape recording relates to or may be relevant to '*any matter in question'*. The '*matter in question*' is determined from the pleadings.[2]

31. As stated above, subsequent to the conclusion of the settlement agreement the Defendant served her plea and her re-joiner. In paragraph 5.3 of the plea the Defendant pleaded that the settlement agreement was conditionally entered into on the *bona fide* premises that the Plaintiff made full and proper disclosure of all assets and the value thereof under his ownership and control.

32. In paragraph 5.4 of the plea the Defendant specifically pleaded that post May 2020 she received information that the Plaintiff failed to honestly and fully disclose the nature and value of all assets under his ownership and control.

33. In paragraph 2.1 of the re-joiner the Defendant denied that any final agreement has been entered into and that she is as such estopped to such plea. She further denied that the Plaintiff fully complied with all possible obligations arising from the conditional agreement and therefore denied that she accepted performance by the Plaintiff in full and final settlement of any and all obligations of the Plaintiff towards her.

34. In paragraph 2.4 of the re-joiner the Defendant persisted with her plea that the Plaintiff failed to comply with the obligation to present and provide all source documents and detailed information in relation to the extent and value of all assets under his ownership and control that is required for the accrual system, as provided for in the Matrimonial Property Act, 88 of 1984, to be applied and the actual and true accrual to be calculated.

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[2] Rule 35(3) and commentary, Superior Court Practice, Erasmus *et al*

35. Adv Stadler's submission that the Defendant did not allege any defence/cause of action that the settlement agreement entered into is void/voidable due to misrepresentation is without merit.

36. It is clear from the pleadings i.e., the plea and re-joiner, as referred to above, that a misrepresentation is pleaded. A party seeking relief as a result of misrepresentation must allege and prove that the misrepresentation was material, but he/she need not use the word "*misrepresentation*" in his/her pleadings [*See*: *The Law of Contract, 5th Edition, p 282, RH Christie*]. Speaking of a plaintiff in *Service v Pondart-Diana 1964 3 SA 277 (D) 279 Miller J* held:

> "*When he alleges that the defendant made the representation with the object of inducing him to enter into the contract, that he relied upon what he was told as being true and was in fact induced by the representation to conclude the contract, the plaintiff necessarily alleges that the representation were, not incidental or unimportant, but material.*"

37. It is trite law that a misrepresentation by one party eradicates any form of consent and subsequently renders the settlement agreement *void ab initio* (invalid from the onset) [*See*: *Goddard v Metcash Trading Africa (Pty) Ltd 2010 2 BLLR 186 (LC)].*

38. Whether the pleaded misrepresentation in this matter is truthful and material (goes to the root of the agreement) or played a material role in the Defendant's decision to enter into the settlement agreement is not for this court to determine and should be adjudicated by a trial court. Likewise whether the settlement agreement is valid and enforceable or void/voidable due to the alleged misrepresentation, whether the *parol* evidence rule is applicable and what the ultimate effect of the non-variation clause and the full and final settlement clause contained in the settlement agreement is, should be determine by the trial court.

39. There are still issues in question between the parties i.e., regarding the validity and enforceability of the settlement agreement concluded between the parties, whether the agreement is a full and final settlement of all issues in the

divorce action between them, whether full disclosure of all relevant information and/or documentation pertaining to the Plaintiff's assets and financial position was disclosed by him prior to the Defendant signing the settlement agreement as well as issues regarding the accrual.

40. As stated above, the Plaintiff filed his discovery affidavit on 8 March 2021. From the discovery affidavit it is clear that the Plaintiff failed to discover any document(s) other than the pleadings, notices and annexures thereto and some correspondence between the parties' respective attorneys and the parties. Not one single document relating to the Plaintiff's financial position was discovered. The Plaintiff's contention that the aforementioned settlement agreement settled all issues in the divorce between the parties and that all discovery relating thereto has been made, is disregarded in light of the issues in dispute between the parties as pleaded by the Defendant.

41. As stated above Uniform Rule 35 requires a party to make **a discovery of all documents relating to any matter in question in such action**. Furthermore, in paragraph 8.2 of the Plaintiff's application for a separation of issues in terms of Rule 33(4) the Plaintiff acknowledged that the accrual is in dispute by stating *'the inevitable result that will flow from opposition is that the accrual aspect will be at issue*.'

42. For reasons stated above, I find that the documents and information requested in the Defendant's notice in terms of Rule 35(3) are relevant to the issues in question, that the discovery made by the Plaintiff was inadequate and that better and further/full discovery should be made by the Plaintiff of all source information and documentation in relation to the extent and value of all assets under the Plaintiff's ownership and control for the accrual system, as provided for in the Matrimonial Property Act, 88 of 1984, to be applied and the actual and true accrual to be calculated.

43. For reasons stated above, the application succeeds.

D. COSTS

44. Adv Klopper on behalf of the Defendant requested a punitive costs order to be granted against the Plaintiff based on the alleged *mala fide* conduct of the Plaintiff i.e., that directly after the current application was launched the Plaintiff in answer thereto launched an application in terms of Rule 33(4) in an attempt to evade compliance with the Defendant's notice in terms of Rule 35(3). He further submitted that even after the Plaintiff's application in terms of Rule 33(4) was dismissed by the Court the Plaintiff persisted in opposing the current application and failed and/or refused to comply with the Plaintiff's notice in terms of Rule 35(3), which is *mala fide*.

45. Adv Stadler on behalf of the Plaintiff requested that in the event that the Court is inclined to grant the application a costs order on a party and party scale should be granted.

46. After considering the facts, legal principles and submissions made on behalf of the parties I find that a punitive costs order is justifiable.

E. ORDER

The following order is made:

1. The Respondent/Plaintiff is compelled to comply with the Applicant's/Defendant's Rule 35(3) notice to provide better and full discovery, dated 15 March 2021, within ten (10) days of this order.

2. The Respondent/Plaintiff is ordered to pay the Applicant's/Defendant's costs of the interlocutory application to compel the Respondent/Plaintiff to comply with the Applicant's/Defendant's Rule 35(3) notice to provide better and full discovery, dated 15 March 2021, on the scale as between attorney and client.

DATED on this 17th day of NOVEMBER 2022.

BY ORDER

MARITZ AJ

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