

SOUTH AFRICA / JUDGMENT

V.A.V v T.L.V (DIV90/2013) [2015] ZANWHC 83 (17 September 2015) [2015] ZANWHC 83

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

DIV90/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: DIV 90/2013

In the

matter between:

V.
V.
A.
Applicant
and
V.
T.
L.
Respondent
DATE
OF HEARING
: 05
SEPTEMBER 2015
DATE
OF JUDGMENT

: 17
SEPTEMBER 2015
COUNSEL
FOR THE APPLICANTS
:
ADV.
GROENEWALD COUNSEL
FOR RESPONDENTS
: MR
WESSELS

JUDGMENT

HENDRICKS J

[1] An action for divorce was instituted on 13 April 2013 by the Plaintiff. A special plea and counterclaim was then filed by the Defendant and the pleadings became closed. A notice in terms of Rules 35 (1), 35

(8) and 35 (10) was served by the Plaintiff's (Applicant's) Attorneys on the Defendant's (Respondent's) Attorneys. The Respondent ultimately complied with the notice in terms of Rule 35 (1) and filed a discovery affidavit.

[2] The Applicant on 25 February 2015 served and filed a notice in terms of Rule 35 (3) in which the following documents were requested for inspection:

"1. Finansiële state van Verweerder vir finansiële jare geëindig 2010, 2011, 2012, 2013 en 2014.

2. Finansiële state van JCT Dairies vir die finansiële jare 2010, 2011, 2012, 2013 en 2014.

3. Finansiële state van Venter en Seuns BK vir die finansiële jare 2010, 2011, 2012, 2013 en 2014.

4. Alle aansoeke om krediet deur Verweerder voltooi by enige finansiële instansie of Landbou Koöperasie of Landbou Maatskappy sedert 1 Januarie 2012 tot datum.

5. Alle verkoopsfakture ten opsigte van Landbou produkte of vee deur Verweerder verkoop gedurende die periode 1 Januarie 2012 tot datum.

6. Alle kredietooreenkomste aangegaan deur Verweerder met enige ander person of finansiële instansie vir die periode 1 Januarie 2012 tot datum.

7. Alle dokumente met betrekking tot die verkoop van melk deur Verweerder en/of JCT Dairies sedert 1 Januarie 2012 tot datum.

8. Alle annuïteitspolisse deur Verweerder aangegaan.

9. Alle waardasies deur Verweerder verkry ten opsigte van sy plase vir doeleindes van kapitaalwinsbelasting of enige ander doel die afgelope 10 jaar."

No response was forthcoming.

- [3] The Applicant then served and filed a notice of motion dated 30 April 2015 containing the following prayers:-

“1. Dat Respondent beveel word om die dokumentasie soos gelys in Bylae “LS3” hiertoe beskikbaar te stel soos bedoel deur Hofreël 35

- (6) binne 5 (VYF) DAE na datum van verlening van hierdie bevel, alternatiewelik dat Respondent binne gemelde periode ‘n beëdigde verklaring aflewer waarin onder eed verklaar word dat sodanige dokumentasie nie in sy besit is nie in welke geval hy moet aandui waar dit gevind kan word.
2. Dat Respondent beveel word om die koste van hierdie aansoek te betaal.
3. Dat verdere en/of alternatiewe regshulp aan Applikant verleen word.”

- [4] Attached to this notice of motion is an affidavit deposed to by the attorney of record of the Applicant. In support of the application

the attorney for the Applicant states:-

“7.3 Ek is oortuig daarvan dat die dokumentasie soos versoek deur Applikant se kennisgewing ingevolge Hofreël 35 (3) (Byae “LS3”) in die Respondent se besit is en is hy in staat om dit ter insae beskikbaar te stel soos deur die Hofreëls vereis.

7.4 Die dokumentasie soos versoek word deur Applikant benodig ter voorbereiding vir hierdie verhoor. Ek vestig eerbiediglik die Agbare Hof se aandag daarop dat die omvang van die Respondent se finansiële posisie van kardinale belang is by beslegting van die geskilpunte tussen die partye in die egskeidingsgeding. Ek doen eerbiediglik aan die hand dat dit van Respondent verwag word om, veral aangesien hierdie ‘n egskeidingsgeding is, om sy volle samewerking te gee ten einde sy finansiële posisie aan die Agbare Hof te openbaar. Hierin gebeur presies die teenoorgestelde deurdat Respondent, nieteenstaande die spesifieke onderneming van sy prokureur na 8 maande steeds nie sy finansiële state beskikbaar gestel het nie.”

- [5] In reply thereto, the Respondent served a notice of opposition on the Applicant's correspondent attorneys on 30 April

2015. On 18 June 2015 the Respondent filed a “notice of a legal point in terms of Rule 6” which contains the following:-

“1. The documentation requested by Plaintiff to be discovered in terms of paragraphs 1, 2, 3, 4, 5, 6, 7 of Plaintiff's notice to discover annexed to Plaintiff's application as Annexure “LS3” relates to documents and the state of Defendants' estate before litis contestatio.

2. It will be argued that the value of Defendants' estate can be determined only upon litis contestatio.

3. Litis contestatio was reached on the 19th June 2013 with the delivery of Plaintiff's Plea to Defendants' counterclaim."

The opposed motion was set down for argument on 03 September 2015.

- [6] Rule 35(3) of the Uniform Rules of Court provides as follows:

"(3) 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 sub-Rule

- (6) or to state on oath within 10 days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him."

- [7] A party may only obtain inspection of documents relevant to the issues between the parties and the ambit of discovery flows from the pleadings in which the parties have delineated the matters in dispute between them. It accordingly follows that an order to compel in terms of Rule 35(3) read with Rule 35(7) falls within the discretion of the court and would not be made in respect of irrelevant documentation.

See: *Inter alia* *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) *Makate v Vodacom (Pty) Limited* 2014 (1) SA 191 (GSJ)

- [8] Where a party denies the relevance of documents sought by means of further discovery, the onus of proving that such documents are in fact relevant rests upon the party claiming discovery or inspection thereof. The mere subjective belief or even a mere statement as to the existence of such belief by the party seeking further discovery as to the relevance of additional documents is not by itself enough to require the other party on notice to make available for inspection such of those documents as are in his possession. Mr. Wessels on behalf of the Respondent submitted that the mere subjective belief of the Applicants attorney as to the relevance of additional documents is insufficient to require the Respondent on notice to make available for inspection documents pre-dating 19 June 2013. I am in full agreement with this submission.

See: *Continental Ore Construction v Highveld Steel and Vanadium Corporation Limited* 1971 (4) SA 598 (W) *Caravan Cinemas (Pty) Limited v London Film Productions* 1951 (3) SA 671 (W)

Maree v Lombaard 1958 (4) SA 224 (E)

Lenz Township Company (Pty) Limited v Munnick and Others 1959 (4) SA 567 (T)

Federal Wine and Brandy Company Limited v Kantor 1958

- (4) SA 735 (E)

- [9] The Respondent did not file an affidavit in opposition of the Rule 35

- (3) application. The Respondent only filed the notice on a point of law in terms of Rule 6. There is therefore no evidence in the form of an affidavit to contest the allegations contained in the affidavit deposed to by the attorney of record of the Applicant.

However, a further point of contention was whether an attorney should depose to an affidavit under Rule 35(3). In *Rellams (Pty) Ltd v James Brown & Hawer Ltd* 1983 (1) SA 556 (NPD) the following is stated on page 558 C – 559 D:-

“It has long been held that failure to comply with the requirement that discovery affidavits have to be made by the parties themselves and not by their attorneys should only be condoned for cogent reasons and in very special circumstances and only if the attorney was in a position of his own knowledge to make a comprehensive affidavit. Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 401; Nathan, Barnett and Brink Uniform Rules of Court 2nd ed at 220; Union Business and Estate Agency v Weiss 1925 TPD 577 at 582; Freedman v Bauer and Black 1941 WLD 161 at 167; Gerry v Gerry 1958 (1) SA 295 (W); Ocean Accident and Guarantee Corporation Ltd v Potgieter; Potgieter v Ocean Accident and Guarantee Corporation Ltd 1961 (2) SA 783 (O).”

I find this dictum quite apposite in this case. It is not for an attorney to depose to such an affidavit but the litigant must do it himself/herself, unless special circumstances exist why the litigant can't depose to such an affidavit. No special circumstances

exist in this case that warranted the attorney to depose to the affidavit. No cogent reasons were also advanced as to why the litigant could not herself depose to the affidavit.

- [10] Mr. Wessels contended further that the requested documents are irrelevant. So too, is the value of the Respondents estate irrelevant

to the action seeing that the parties are married out of community of property and without the accrual system. The determining factor is, according to him, when *litis contestatio* occurred, namely 19 June 2013. The Respondent has no objection to comply with prayer 1 of the notice of motion in this application

insofar as reference is made to documentation from 19 June 2013 onwards. In the interest of justice, this concession is indeed well made in an attempt to bring this matter to finality.

Order:-

- [11] In the premises, an order in the following terms is made:

- (a) The Respondent (Defendant) is directed to make available for inspection those documents listed in Annexure “LS3” to the application brought in terms of Rule 35(7) which originated after 19 June 2013 and to do so within ten (10) days from date of this order.

ALTERNATIVELY

The Respondent (Defendant) is required to state under oath within ten

- (10) days from date of this order that the documents referred to in paragraph (a) above are not in his possession, in which event he shall state their whereabouts, if known to him.
- (b) The costs of this application shall be costs in the divorce action.

R D HENDRICKS

JUDGE OF THE HIGH COURT

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