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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: A55/2022

In the matter between:

P[....] J[....]

Appellant

and

H[....] J[....]

Respondent

CORAM: LOUBSER, J et MPAMA, AJ

HEARD ON: 10 OCTOBER 2022

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 10 NOVEMBER 2022

[1] This is an appeal concerning the question whether a party in divorce proceedings in the Regional Court can be compelled to furnish certain further particulars to enable the other party to prepare for trial. In the court *a quo*, the

Regional Court Magistrate ordered the Appellant to provide answers to certain paragraphs of the Respondent's request for further particulars for the purposes of trial. It is in respect of this order that the Appellant now comes into higher contention.

[2] A request for further particulars for trial is governed by the provisions of Rule 16 of the Magistrate's Court Rules. The provisions of the Rule relevant to the present case, are the following:

16(1) Subject to subrules (2), (3) and (4) further particulars shall not be requested.

16(2)(a) After the close of pleadings any party may, not less than 20 days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him or her to prepare for trial.

16(4) If a party who has been requested in terms of this rule to furnish any particulars fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as it deems fit.

[3] In the Court *a quo*, the Respondent delivered a notice requesting further particulars, but afterwards she was of the view that paragraphs 5 and 6 of her request were not sufficiently, or at all answered. She then launched an application to compel in terms of Rule 16(4). This application was successful, as indicated above. It is clear from the final words of the subrule that a court retains a discretion to grant or refuse an order for the delivery of further particulars.

[4] A Court sitting as a court of appeal will only interfere with the exercise of a discretion where it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by the wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court directing itself to all the relevant facts and principles.¹

¹ **Mabaso v Law Society, Northern Provinces, and Another 2005 (2) SA 117 (CC) at para 20**

[5] To consider whether the Magistrate has exercised her discretion correctly, the facts of the matter must be considered first. It appears from the pleadings that the Appellant and the Respondent were married to each other out of community of property with inclusion of the accrual system. The Appellant sued for a divorce, and the Respondent defended the action. In his particulars of claim, the Appellant claimed *inter alia* a decree of divorce, that he be ordered to pay the reasonable maintenance needs of the minor child, and compliance with the antenuptial contract. Maintenance for the Respondent is not mentioned in the particulars of claim.

[6] The Respondent thereafter filed a plea and a counterclaim. In the plea, most of the allegations in the particulars of claim are either admitted or confessed and avoided. The parties, however, agreed that the marriage relationship between them has broken down irretrievably.

[7] In her counterclaim, the Respondent *inter alia* claimed maintenance for herself until death or remarriage. In response to this claim for maintenance, the Appellant pleaded the following: "The contents hereof are denied. Plaintiff pleads specifically that Defendant is able to provide for her own maintenance needs. Defendant is a qualified forensic social worker in private practice for nineteen (19) years and with twenty-five (25) years experience. Defendant holds two (2) university degrees and is currently busy qualifying for her doctorate degree".

[8] Soon hereafter both parties requested by way of notices in terms of Section 7 of the Matrimonial Property Act that they be provided with the full value of the assets and liabilities of the other party's estate "in order to determine the accrual" in the respective estates. Both parties complied with the request contained in these notices.

[9] Merely a week after the Respondent filed her Section 7 notice, she also filed a request for further particulars for trial purposes. This request contained a long list of questions relating to the Appellant's financial position, but for present purposes I quote only paragraphs 5 and 6 of the request for further particulars, which read as follows:

“5. Particulars in respect of any company, corporation, firm, business, venture or syndicate of whatsoever description (“the entity”) in which the Plaintiff holds any interest, whether direct or indirect (through his interest in any trust or any other entity). Plaintiff is requested to provide full particulars regarding any income or benefit received by him from such entity in each tax year for the past three financial years, including:

- 5.1 dividends/profit distributions accrued or received by him;
- 5.2 trustee’s remuneration accrued or received by him;
- 5.3 salary and/or commission accrued or received by him;
- 5.4 director’s fee accrued and/or received by him;
- 5.5 bonuses received or accrued by him;
- 5.6 drawings made on loan accounts by Plaintiff;
- 5.7 interest accrued on credit loan accounts;
- 5.8 loans advanced to Plaintiff;
- 5.9 telephone, traveling and entertainment allowances paid by the entity on Plaintiff’s behalf or allowance received by Plaintiff in cash or in kind;
- 5.10 credit card payments made by the entity on Plaintiff’s behalf or use of a corporate credit card;
- 5.11 medical aid and pension fund contributions paid on Plaintiff’s behalf;
- 5.12 contributions paid by entity to short term insurance premiums and premiums in respect of investments and life policies in respect of Plaintiff’s life.

6. Plaintiff is requested to furnish full and precise particulars of:

- 6.1 His gross and net income (after payment of tax) for each month during the past three financial years to date and the sources thereof;
- 6.2 His anticipated gross and net income for the next twelve months (from whatsoever source) and the sources thereof.”

[10] The Appellant replied as follows to the request contained in the above paragraphs 5 and 6: “The particulars requested herein are not necessary for the purposes of trial, are irrelevant to the disputes between the parties and are therefore refused”.

[11] This curt reply prompted the Respondent to file an application to compel in terms of Rule 16(4). It is this application that forms the subject matter of this appeal. In an affidavit accompanying the application, it is stated that the Appellant's answer is inadequate in that the Appellant cannot refuse to make full disclosure having regard to the pleadings, "in particular the Defendant's counterclaim for spousal maintenance". The Appellant opposed this application, but he refrained from filing any opposing affidavit.

[12] In her judgment, the trial Magistrate referred at some length to the provisions of the Matrimonial Property Act dealing with the accrual system. She then referred to the matter of **ST v CT**² where it was held that when accrual is imperative, the spouse concerned must clarify what has been excluded, and must make full disclosure as required by Section 7 of the Matrimonial Property Act. In relation to the issue of maintenance, she stated that full disclosure would be required for the court to determine whether there is a need for maintenance and whether the other party can indeed afford to pay that maintenance. She emphasized that the request for further particulars pertained to these very issues, namely maintenance and accrual. After taking into account that the Appellant had failed to file any opposing affidavit, the trial Magistrate came to the following conclusion: "In light of the above, I can only conclude that the particulars requested is indeed relevant for purposes of trial preparation as it directly relates to an accrual of the respondent's estate".

[13] The first question is then whether the trial Magistrate was correct in finding that the particulars were relevant as far as the issue of accrual is concerned. Unfortunately she was not correct in this respect. Section 4 of the Matrimonial Property Act provides that the accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage. It follows that at the trial proceedings for a divorce, the right to accrual has not yet accrued. It will only accrue when the divorce order is granted, and only at that time must the accrual be determined.³ For purposes of the divorce proceedings, the issue of accrual is

² 2018 (5) SA 479 (SCA)

³ AB v JB 2016 (5) SA 211 (SCA)

therefore irrelevant. Particulars in respect thereof cannot be “strictly necessary”⁴ to prepare for trial.

[14] In addition, the trial Magistrate ignored the fact that the Respondent had already obtained the information relating to accrual after she had served her notice in terms of Section 7 of the Matrimonial Property Act.

[15] The second question is whether the trial Magistrate was correct in finding that the particulars sought were relevant as far as the issue of maintenance is concern. As a point of departure, this question must be answered with reference to the pleadings filed in the main action. In her counterclaim, the Respondent claims to be entitled to spousal maintenance. She therefore bears the onus of proving that she is entitled to maintenance, and to prove the quantum and the duration thereof. This claim by the Respondent was met by a mere denial by the Appellant in his plea to the counterclaim. His denial does not involve any positive averment of some fact relating to the claim for maintenance.

[16] In the matter of **Rall v Rall**, a judgement of this Division,⁵ Claasen, AJ found that a party cannot be required to give particulars in relation to a bare denial. He referred, amongst others, to the judgement in **Carte v Carte**⁶ and **Von Gordon v Von Gordon**,⁷ where the same approach was adopted in similar circumstances. In the **Carte-matter**, Howard J, as he then was, had the following to say at 319 C-D: “The request is simply designed to elicit details of evidence which will be canvassed at the trial, and the Court has long since set its face against compelling the delivery of such particulars in matrimonial actions. In my view proceedings to elicit or compel the delivery of particulars such as those constitute an abuse of the Court’s process and should lie discouraged.”

[17] In the Von Gordon-matter, Bresler, J stated at 213 B-D that “I do not know of a single precedent for the request as framed in the circumstances of the present case, and this is perhaps the most cogent answer of all to it, namely, the realisation

⁴Rule 16(2)(a)

⁵ Under case number 2369/2009

⁶ 1982 (2) SA 318 (D)

⁷ 1961 (4) SA 211 (T)

that the information sought can be secured in Court as it has uniformly been secured in the past by means of relevant cross-examination”.

[18] The learned Magistrate in the court *a quo* failed to follow the judgement in Rall, as she was bound to do by virtue of the doctrine of precedent. She was therefore guided by wrong principles, and she failed to exercise her discretion judicially. The Magistrate’s reliance on the case of **ST v CT**, quoted above, was also misplaced since the Respondent was not entitled to elicit further particulars where the Appellant had made a bare denial.

[19] As for costs, I find no reason to deviate from the general rule.

The following orders are therefore made:

1. The appeal is upheld with costs.
2. The orders of the Court *a quo* are set aside and replaced by the following:

“The application to compel the delivery of further particulars for purposes of trial is dismissed with costs.

P. J. LOUBSER, J

I concur:

L. MPAMA, AJ

For the Appellant: Adv. N Snellenburg SC
Instructed by: Symington De Kok Attorneys
Bloemfontein

For Respondent: Adv. J. C. Coetzer
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