

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

**CASE NO: 21132/05
19/11/2008**

UNREPORTABLE

In the matter between:

MAGDALENA JOHANNA JACOBA ARLOW

Applicant

and

DENNIS ARLOW

Respondent

JUDGMENT

MURPHY J

1. The applicant has brought an application in terms of Rule 35(7) for an order compelling the respondent to discover properly and to answer to a Rule 35 notice, specifically to paragraphs 1, 2, 3, 4, 11, 12, 13 and 29 thereof. In terms of Rule 35(7) if any party fails to give discovery as required by the rules, or fails to give inspection, the party desiring discovery or inspection may apply to a court which may order compliance with this rule and failing such compliance dismiss the claim or strike out the defence.

2. The applicant and the plaintiff were married and are now engaged in a divorce action. The action was instituted on 22 June 2005 and the pleadings have been closed. The parties have been married for more than 32 years, initially in community of property. They have subsequently amended their matrimonial property system to one of out of community of property with the accrual system.
3. The applicant is the plaintiff in the divorce action. She seeks an order of divorce and a further order that the respondent (defendant) make payment of half of the net accrual in the estate of the respondent once he has made full disclosure of the net value of his estate. The applicant also seeks an order directing the respondent to pay her maintenance in the sum of R50 000 per month. The respondent has filed a counterclaim in which he too seeks an order of divorce and an order that the applicant make payment of half the net accrual of her estate once there has been full disclosure of that. He tenders maintenance in the amount of R10 000 per month.
4. The essential questions for determination at trial will accordingly be the question of the accrual and the amount of maintenance payable.
5. On 16 May 2006 an order was made by this court in terms of Rule 43 which ordered *inter alia* that the respondent should make a contribution of

R8000 for the purpose of valuing his assets and an additional R25 000 for the appointment of a forensic auditor to value his estate. It was further ordered that the parties should ensure that full discovery is made. The contributions will be payable once full discovery is made and a pre-trial conference held.

6. After the respondent filed a discovery affidavit the plaintiff filed a notice in terms of Rule 35(3). The rule provides that where any party believes that there is in addition to documents disclosed other documents 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 Rule 35(6) or to state under oath within 10 days that such documents are not in his possession, in which event he will state their whereabouts if known to him. The applicant's Rule 35(3) notice stated that she was of the opinion that there were documents in the possession or under the control of the respondent which he had not discovered. She then goes on to list 41 items. However, in terms of the notice of motion she has limited her claim to 8 items mentioned. These are:

1. The financial statements of "Die Makelaarhuis Korttermyn (Brits) (Edms) Bpk, for the past three years.

2. Financial statements of Denbou Makelaars BK for the past three years.
 3. Financial statements Erf 453-4 Brits (Edms) Bpk for the past three years.
 4. Financial statements of Dennis Arlow Trust for the past three years.
 11. The ledgers of Die Makelaarhuis Korttermyn (Brits) (Edms) Bpk.
 12. General ledger of Denbou Makelaars BK for the past three years.
 13. General ledger for Erf 453-4 Brits (Edms) Bpk for the last three years.
 29. Any bank statements (which includes savings accounts, cheque accounts, credit cards) which the defendant might have had for the past two years.
7. Prior to bringing this application it is clear that the applicant through her attorneys attempted to obtain fuller discovery without any success.
8. In short the plaintiff then seeks the financial statements of the three companies in which the defendant has an interest as well as those of the Dennis Arlow Trust. She requires the general ledgers in respect of the

three companies and further any bank statements relating to all the various accounts held by defendant over the past few years.

9. The applicant requires these details and documents because she has a limited amount of information with regard to the assets and income of the respondent in that the parties have been living separately since May 2005. It seems to be common cause that amongst his various assets the defendant owns a shareholding in both Die Makelaarhuis Korttermyn (Brits)(Edms)Bpk and Erf 453-4 Brits(Edms)Bpk as well as a membership interest in the close corporation known as Denbou Makelaars BK. This much appears from annexure D to the application which is the defendant's statement in terms of section 7 of the Matrimonial Property Act 88 of 1984, which statement he filed after being compelled to do so by an order of this court.
10. The objections raised by the respondent to providing the documents are that the financial statements are not in his possession but are in the possession of the auditors of the various entities and that he has given the auditors instructions to provide the necessary extracts of the statements in respect of the defendant's interests and shareholding in the aforesaid entities as well as the income earned there from. Moreover, he states that his co-shareholders and co-directors object to the discovery of the financial statements and the ledgers. He adds that the applicant has not

requested the financial statements from the auditors who have audited the statements and that his attorney of record has stated that the financial statements are available at his offices. He makes the point that the Trust does not form part of the action between the parties. He also suggests that certain of the documents are privileged and that his directors are entitled to object thereto.

11. With regard to the accounting records, I am of the opinion that the respondent's objections and arguments are in the main technical and formalistic. In terms of Section 284 of the Companies Act every company is obliged to keep accounting records as are necessary to present the state of affairs and business of the company and to explain the transactions and financial position of the trade or business of the company. It is clear from this section that the records referred to include the actual accounting ledgers and journals as well as the financial statements. In terms of Section 284(3) the accounting records shall be kept at the registered office of the company or at such other place as the directors think fit. The provision goes on to state that the record shall be at all times open to inspection by the directors. In *Spoor & Fisher vs Registrar of Patents* 1961 (3) SA 476 (A) it was held as a general principle that any person exercising their right of inspection is entitled to take copies of the documents inspected. The right to copy is incidental to any right of inspection, whether arising by virtue of contract or statute. It follows, in my

view, that the ledgers and financial statements do indeed fall in the possession and control of the respondent. The fact that he is in a position to instruct the auditors to provide certain financial statements is evidence that he is in control of the documentation sought. The position is akin to that of documents in possession of a party's attorneys. It is trite that such documents are required to be discovered.

12. As regards the claim of privilege, I am unaware of any right to privilege that attaches in respect of the documents sought. Moreover, as Mr Woodrow, counsel for the applicant, submitted the claim of privilege constitutes hearsay and has not been raised by any person who might if at all be entitled to such privilege.
13. Given that the respondent appears to have organised his assets and affairs through various corporate entities, I am not persuaded that his interests in the Dennis Arlow Trust is not relevant. Even though the applicant herself is a beneficiary of the trust there can be no harm in requiring the respondents to discover the financial statements of the trust. Such will indeed be relevant to determine whether or not the interests therein can or should be taken into account for the purposes of determining the accrual to the estate as well as any income received by the respondent which would be relevant to determining the question of maintenance.

14. I also do not believe it will be sufficient if the respondent be permitted to merely tender what he considers to be relevant extracts of the ledgers and the statements. Access to the ledgers is required in order to verify that the financial statements, albeit audited, correctly reflect the transactions in the ledger. It is for the applicant to determine what will be the appropriate extracts. There is no basis or cause for the respondent to be allowed to tailor the information to be discovered.
15. With regard to item 29 of the Rule 35(3) notice, the documents requested here are all the bank statements of the respondent including savings accounts, cheque accounts and credit card accounts for the last two years. The respondent maintains that he has discovered all bank statements that were in his possession and he refers to his discovery affidavit and his additional discovery affidavit. A perusal of these affidavits does not immediately disclose any bank statements. His counsel submitted in argument that the respondent has discovered his tax returns and his bank information can be gleaned from them. That is insufficient. While there are certain references to certain bank statements, it will be in the interests of the proper ordering of the litigation if the applicant were to set out clearly each bank account in his own name that he has had for the past two years and to provide statements for the past two years in respect of such bank accounts. One assumes that such will be in his possession

or under his control by virtue of the fact that he would have required them for tax and other purposes.

16. In my opinion, the manner in which the respondent has replied to the Rule 35(3) Notice is obstructionist. Accordingly there is no reason why he should not be ordered to pay the costs of this application.

17. In the result the following order is issued:

1. The respondent is ordered to reply to the applicant's Rule 35(3) notice, in particular to respond properly to paragraphs 1, 2, 3, 4, 11, 12, 13 and 29 in accordance with the directions of this judgment thereof within 10 days of this order.

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

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 30 October 2008
For the Applicant: Adv Chris Woodrow, Pretoria
Instructed By: Möller en Pienaar Inc.
For the Respondent: Adv J de Beer, Pretoria

Instructed By:Tintingers Inc.