



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

REPORTABLE

CASE NO: 3106/2008

In the matter between:

DATE: 2/4/2008

BREITENBACH, LYNETTE

Applicant

And

BREITENBACH, RENIER

Respondent

JUDGMENT

LEDWABA, J

[1] The applicant filed an urgent application seeking an order in the following terms:

‘1. *Condoning the Applicant’s non-compliance with the rules of this Honourable Court in terms of Rule 6(12) (a) in regard to time periods and the determination of this application.*

2. *Committing the Respondent to goal for a period of thirty (30) days (or such lesser period as to this Honourable Court may seem meet), and on such terms as this Honourable Court deems just, which period of imprisonment is to be suspended on condition that*

the Respondent discovers the documents as set out in attachment "A" hereto, within three (3) days of the date of this order.

3. Ordering the respondent to pay the costs of this application on the scale as between attorney-and-own-client.'

- [2] The main reason why the application was brought on urgent basis, according to applicant, is that a second preferential trial date has been allocated and the matter has been set-down for hearing from the 5th to 20th June 2008. Applicant now wants further discovery documents listed in annexure "I" of the papers so that she can make preparation for the trial and determine if the forensic audit needs to be conducted by an expert. Applicant submitted that if this application is set-down for hearing in the normal cause, it will only be heard after the allocated trial date.
- [3] The respondent filed opposing papers wherein he further submitted that the urgency in the application is self created in that the applicant could have requested the document mentioned in annexure "I" earlier.

BACKGROUND:

- [4] The relevant background which in my view, is relevant to this application is as follows:
- 4.1 The applicant and the respondent were married to each other in community of property and their marriage was dissolved by this court on 9th September 1999 under case number 33193/1997. An agreement of settlement which they entered into which dealt, *inter alia*, with the division of their joint estate was incorporated in the divorce order.

- 4.2 The respondent issued summons against the applicant under case number 25683/2002 to enforce certain terms of the agreement dealing with how their joint estate was to be divided.
- 4.3 The applicant is defending the action and has filed a counterclaim. One of the defences she raised is that the respondent made some fraudulent misrepresentation which induced her to sign the aforesaid agreement of settlement.
- 4.4 After the respondent filed a discovery affidavit, on 27th November 2006, applicant served an extensive Rule 35(3) Notice on the respondent's attorneys requesting respondent to discover documents mentioned in the notice. The respondent did not comply fully. The applicant thereafter launched an application to compel in terms of the rules compelling the respondent to comply, which application, was opposed by the respondent.
- 4.5 After the aforesaid application was argued, Phatudi AJ, made the following order:
- ‘1. *The Respondent shall within sixty days from date hereof discover the documents set out in paragraphs 1 to 29 of the Applicant's notice in terms of Rule 35(3) from 1 January 2001 to 27 November 2006, whether such documents be in the Respondent's personal possession or in the possession of his attorney, or agent, or other persons acting on his behalf.*
2. *Pending the aforesaid discovery the Respondent, his attorney, or agent, or other persons acting on his behalf are directed to afford the Applicant's*

accountant Mr. GERT VAN WYK access to the aforesaid documents.

3. The costs of the application are reserved for determination by the trial court."

4.6 Despite the court order of Phatudi AJ, respondent failed to comply. Advocate R. Rosenberg SC, for the applicant, submitted that when the aforesaid application was argued, the respondent did not indicate that he could not discover the requested documents in his affidavit.

4.7 Applicant launched another application for committal under case number 50820/2007, (*"the first committal application"*). The respondent deposed to an affidavit in the *"first committal application"* wherein he stated that he would make full discovery of the documents requested by 20th November 2007.

4.8 Subsequent to the launch of this application, (the second committal application), the respondent filed a supplementary discovery affidavit commissioned on 26th February 2008, (responding to the original Rule 35(3) Notice), wherein he discovered the documents mentioned in annexures **D1**, **D2** and **D3**. In the supplementary discovery affidavit, he further mentioned that he also specifically refers to the notice of motion under case number 3106/2008 (the second committal application) and further said he noted annexure **A** of the second committal application. In paragraph 6 of the supplementary discovery affidavit he said:

"Ek het geen verdere dokumentasie in my besit en/of onder

my beheer as die dokumentasie wat ek hierin en in die vorige verklarings blootgelê het nie.”

[5] It would be proper to refer to the provisions of Rule 35(3), (6) and (7), at this stage, which read as follows:

‘35 *Discovery, Inspection and Production of Documents*

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

(6) Any party may at any time by notice as near as may be in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver to him within five days a notice as near as may be in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of his attorney or, if he is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period

of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude him from using it at the trial, save where the court on good cause shown allows otherwise.

(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid 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. (own underlining).

[6] I understand the nub of the applicant's case being that the respondent should be committed to prison because of his failure to comply with the court order of Phatudi AJ. More particularly, in that he failed to discover documents in annexure "I", (see paginated pages 99-101), being books and records of primary entry.

[7] It is important to consider the provisions of Rule 35 and the object of discovery of documents. In **Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 SR at 1083** Tredgold J said the following:

,The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated. It is easy to envisage circumstances in which a party might possess a document which utterly destroyed his opponent's case, and which might yet be withheld from discovery on the interpretation which it is sought to place upon the rules. To withhold a

document under such circumstances would be contrary to the spirit of modern practice, which encourages frankness and the avoidance of unnecessary litigation.,

[8] Subrule 3 is an instrument to assist a party dissatisfied with the inadequate discovery of another party. Subrule 3 cannot be relied upon before provisions of subrule 1 are invoked and there was compliance with the rule in terms of subrule 2.

[9] Subrule 7 should be utilised where a party is dissatisfied with the discovery or supplementary discovery that has been made and remedies under subrule 3 have been exhausted, see **Tractor & Excavator Spares (Pty) Ltd v Groenedijk 1976 (4) SA 359 (W)**.

[10] I need to mention that in this second committal application the respondent did not depose to an affidavit. The answering affidavit is deposed to by his attorney Mr. Braam Grove, who alleged that the order of Phatudi AJ has been complied with. He further referred to the respondent's supplementary affidavit commissioned on 27th February 2008 wherein the respondent alleged that he does not have further documents in his possession and control. He further submitted that an order for committal would not be appropriate since the respondent had no further documents to discover.

[11] Advocat R. Rosenberg SC emphasised that the respondent did make a tender that documents referred to in the order of Phatudi AJ could be inspected and he never suggested that he was unable to make discovery of the documents in the court order.

[12] Counsel further submitted that the respondent and/or his auditors were in terms of statute obliged to retain the documents that the applicant

seeks to be discovered for a period of fifteen (15) years and failure to do so was a criminal offence.

- [13] Counsel argued forcefully that having regard to the contents of the respondent's affidavits, the Court Order and the fact that there is no affidavit by respondent's auditor regarding the whereabouts of the outstanding documents in annexure "I", the order prayed for in the Notice of motion and should be granted.

- [14] It is important to have regard to the provisions of Rule 35(7) which states that if a party fails to give discovery, the party desiring discovery may apply to a court which may order compliance and, failing such compliance, may dismiss the claim or strike out the defence.

- [15] Applicant's counsel's argument that the applicant did not pursue the provision of Rule 35(7) because they would not assist the applicant in preparing for her case has no merit in that it creates an impression that the said remedies in the rule are toothless and committal would be the only effective remedy to assist the applicant. In my view, even if a court may make an order of committal the requested documents may still not be discovered.

- [16] Civil contempt proceedings should not, in my view, be brought solely to bring about compliance with a court order and purely for the sake of punishment especially if there is a statutory remedy for non-compliance with such a court order. The High Court has discretion to make an order for committal. In my view, such a discretion especially in an application of this nature, should be exercised sparingly and in very exceptional circumstances, see **Cape Times v Union Trades Directories and Others 1956 (1) SA 105 N at 121**. Due to serious consequences of incarceration, civil contempt proceedings should be used as a last resort,

see **Banmontyne v Banmontyne 2003 (2) SA 359 SCA at 362 F-263 A.**

- [17] There are other effective remedies that cannot be simply ignored. In this case it is clear that the provisions of Rule 35(7) in respect of applying to court for the dismissal of the respondent's claim and or striking of his defence, was not utilised.
- [18] The applicant can also pursue the punitive committal through criminal proceedings if the respondent failed to retain the documents that the applicant needs in terms of the **Regulations for the Retention, Preservation of Company Records 1983**. I have carefully considered the requisites in an application for contempt as enunciated in **Facie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326**, and having regard to other relevant authorities I am not satisfied that it would be appropriate to grant an order prayed for in terms of the notice of motion.
- [19] As far as the costs are concerned, it is clear that the applicant has previously made demand for discovery of documents in her Rule 35(3) notice. The respondent was ordered by the court to make discovery of the said document. It was only after this application was filed that the respondent is saying he does not have the said documents in his supplementary affidavit. The respondent has not been honest in my view.
- [20] Despite the order I am going to make and having regard to the manner in which the respondent dealt with the issue of discovery further documents, this is a classical case that warrants that I should not make an order of costs against the applicant.
- [21] **I therefore, make the following order:**

- (i) **The application is dismissed;**
- (ii) **Respondent is ordered to pay the costs of this application.**

A. P. LEDWABA
JUDGE OF THE HIGH COURT

Date of hearing: 13 March 2008

Counsel for Applicant: Advocate R. Rosenberg

Instructed by: Botes Jafta Kyle (PTA) Inc.

% Morris Pokeroy Attorney.

Counsel for First Respondent: Advocate: Advocate Greyling

Instructed by: Grové, Deysel & Partners