IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 56513/2008

Date: 31 March 2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED ✓

31/3/2011
DATE SIGNATURE

In the matter between:

DESMOND DAWID MARAIS Plaintiff

And

ADÉLE MARAIS Defendant

JUDGMENT

PRETORIUS J.

The defendant applies to court for an order in terms of which the plaintiff is ordered to comply with the request for further particulars in terms of rule 21 (4) and to deliver within ten days of the granting of this order to deliver further responses in accordance with rules 35 (3) and 35 (6) and to make available for inspection the documents required as set out in the notice of motion.

The defendant applies, in the alternative, that the plaintiff's claim and the plaintiff's defence to the defendant's claim in reconvention should be dismissed.

This application is in relation to a matrimonial action which is set down to be heard in this court on 9 Mei 2011. The disputes in the action relates to the amount of maintenance for the minor child, aged two and half years; whether the plaintiff is liable to pay rehabilitative maintenance for the defendants and whether the plaintiff is liable for payment of a settlement amount.

On 2 August 2010 the defendant's request for further particulars in terms of rule 21 (2) was delivered and the ten days for plaintiff's reply thereto expired on 17 August 2010.

Defendant's first rule 35 (3) notice was delivered on 19 March 2010, the second rule 35 (3) notice was delivered on 25 March 2010 and the third rule 35 (3) was delivered on 3 August 2010.

The defendant's rule 30 A (1) notices in respect of the first and second rule 35 (3) notices was delivered on 10 August 2010 and the rule 30 A (1) notice in respect of the third rule 35 (3) was delivered on 19 August 2010.

The trial date has been set for 9 May 2011 for the divorce action. The key issues pertain to maintenance for the minor child, rehabilitative maintenance for the defendant and the liability and extent of a resettlement allowance for the defendant.

It is strictly necessary for both parties to provide particulars of not only their assets and liabilities, but also of their income and expenditure. On 26 March 2010 the plaintiff's attorneys complained when the defendant's discovery affidavit had not been served and mentioned that the monthly income and monthly expenditure were necessary to enable the plaintiff to prepare for trial. At that early stage the plaintiff indicated that the information which is presently not being supplied to the defendant is important for the adjudication of the action.

Defendant's request for further particulars:

The complaint in regards to the answer given by the plaintiff as to the question of the value of his assets is a legitimate complaint as no present value or market value was set out in the statements supplied by the plaintiff. A statement of assets and liabilities dated 23 March 2010 was served on the defendant, which only set out the properties at cost price and does not set out the value on 7 November 2008 or at present. It is clear this information in necessary for the defendant to ascertain the financial position of the plaintiff at present and to prepare for trial. The trusts, company and close corporation mentioned in this document are not properly set out and it cannot be ascertained as to what the plaintiff's share, if any, is in the respective entities.

It is clear from the plaintiff's response to these allegations that all the financial statements had not been delivered as the plaintiff sets out:

> *"Ek heg egter hierby aan, gemerk bylaag "DDM7", wat aandui dat dit my balansstaat is vir die tydperk soos op 31 Desember 2009. Daar was nie veel verandering in my bate posisie vanaf 31 Desember 2009 tot 23 Maart 2010 nie. Die werklike bates het nie verander nie en weens die huidige ekonomiese klimaat het die waarde van die bates ook geensins verander nie."*

There is no proof to confirm and sustain these averments by the plaintiff. No recent statement of the value of the assets and liabilities is attached.

The defendant further requested the plaintiff's total gross income for four periods from 1 March 2007 up to February 2011. The plaintiff replied that as soon as the financial statements become available they will be delivered to the defendant and that the defendant should be able to determine the income and expenditure from the statements which had already been delivered. It is clear that the financial statements for the periods 2007 – 2008; 2008 – 2009 and 2009 – 2010 should have been available and no reason is furnished why these financial statements could not be furnished.

The plaintiff did not list each individual source of income from the separate entities, as requested, but supplied the defendant with a letter from Equifin dated 13 May 2009 in which Equifin stated:

> *"Volgens inligting en verduidelikings ontvang vanaf Mnr D D Marais*

(Bestuurstate 28 Februarie 2009), kan bevestig word dat mnr D D Marais 'n bruto maandelikse inkomste, voor kapitaal besteding, van R 100 000 verdien."

This letter only sets out the gross monthly income which does not take the matter any further as it is mentioned that this amount was before capital expenditure had been taken into account and no further information is given.

The plaintiff was requested to furnish the present market value of the immovable and movable properties mentioned in item C2 of the plaintiff's supplementary discovery affidavit.

The defendant is once again met with the response that defendant can inspect the documents at the plaintiff's auditors. It is not the duty of the defendant to visit plaintiff's auditors. The plaintiff has to deliver the necessary information to the defendant.

The same answer is given when particulars of the trust are requested. The defendant is met with the answer that the plaintiff does not have the documents in his possession and that the defendant's attorneys will be notified when the auditor's supply the statements. Again the plaintiff is obliged to furnish the necessary statements. It is clear that the financial issues in the action are the issues, in both the claim and counterclaim, which will be dealt with in the divorce action. The fact that the plaintiff has denied that he is liable for the amount maintenance claimed for the minor child and denied that defendant is entitled to maintenance for herself or a resettlement allowance makes the financial position of the parties crucial in the action.

In **Civil Procedure in the Supreme Court, LTC Harms** at p B1-153 the learned author sets out:

> *"The particulars must be necessary for purposes of trail. The purpose is to prevent surprise at the trial and to inform a party with greater precision what the other party intends to prove in order to enable the former to prepare his case to meet those allegations. The object is not to tie the other party down and limit his case unfairly."*

The plaintiff did not allege that the defendant is not entitled to the further particulars, but alleged that the particulars are not yet available or that the defendant can see the relevant documents at the plaintiff's auditors. The court finds that the plaintiff has to provide the further particulars as requested.

Dicovery – rule 35 (3):

On 19 March 2010 the defendant's notice in terms of rule 35 (3) was served and in paragraph 4:

> *"The plaintiff's income tax returns and income tax assessments for the tax years commencing from the tax year ending 28 February 2007."*

was requested. The response once again was that the defendant can obtain the documents from Equifin Chartered Accountants. The plaintiff did not give any explanation as to why the plaintiff cannot obtain the documents and provide them to the defendant.

On 25 March 2010 the defendant's second rule 35 (3) notice was served. The defendant requested the Z-counts generated by the eight cash registers operated by the business conducted by the plaintiff. Once again the response was that the Z-count was not in the plaintiff's possession.

On 3 August 2010 the third rule 35 (3) notice was served. On 18 August 2010 the attorney for the plaintiff requested an extension until end October 2010 for the plaintiff's response, which was not granted. The response was received on 31 August 2010. The response received in regards to item C4 of the plaintiff's initial discovery affidavit and item C1 of plaintiff's supplementary discovery affidavit were once again that the relevant documents were with the plaintiff's auditors. The same applied to paragraph 3.7 of the notice in regards to item C2 of plaintiff's supplementary discovery affidavit and paragraph 4.2 of the notice in regards to paragraph 2.1.1 of plaintiff's reply to the first rule 35 notice regarding the Desmondi Incentive Trust, as well as paragraph 5.2 of notice in regards to paragraph 2.1.2 of the plaintiff's reply to the first rule 35 notice.

After an inquiry by the defendant's attorney on 10 September 2010 about the documentation as mentioned above he received a response on 14 September 2010 advising:

> *"U kan die dokumente gaan insien by die ouditeure. Soos u weet is die ouditeure besig om antwoorde op u vrae voor te berei en sal dit die*

ouditeure se werk vertraag as die dokumente nou daar weggeneem word. Ons versoek u om aan ons vyf datums te verskaf sodat ons met die ouditeure kan reël dat u insae kry op die inligting op 'n tyd wat die ouditeure en u pas."

On 8 October 2010 the defendant's attorney addressed a letter to plaintiff's attorney, Mr Kruger, requesting a response to the further particulars. He contacted Mr Kruger, telephonically on 21 October 2010 after he had received no response. Mr Kruger assured him that he would get all the relevant information in the last week of October 2010. On 26 October 2010 the defendant's attorney received a fax from Mr Kruger which was accompanied by a financial statement of Des Marais Familie Trust, without making any reference to the outstanding financial statements. On 4 November 2010 the plaintiff's attorney once again reminded Mr Kruger of his undertaking. Mr Kruger responded on 16 November 2010:

> *"Ons plaas op rekord dat ons in ons Reël 21 (2) antwoord in paragrawe 14 en 15 u meegedeel het dat die inligting wat u benodig by ons kliënt se ouditeure, mnre. Fourie & Botha is. Die dokumente en rekenings is by hulle om dit behoorlik te rekonsilieer en in 'n behoorlike vorm vir u en vir die hof voor te berei. U kan hulle kontak om afskrifte van al die dokumente en rekeninge te bekom indien u nie in 'n verwerkte vorm soek nie of indien u dit self wil verwerk. Ons instruksies is dat die ouditeure teen die einde van November 2010 sal klaar wees met die verwerking van die dokumente."*

The plaintiff does not deny that the defendant is entitled to the documents, but the plaintiff does not comply with the provisions of rule 21 (2) and the provisions of rule 21 (2) and the provisions of rule 35 (3) and 35 (6) although the plaintiff has had ample opportunity to do so. The plaintiff's excuse throughout has been that the documents are at the auditors and that it will be delivered to the defendant at a later stage. It is clear that these documents are essential for the proper preparation for trial by the defendant. There is no affidavit by the plaintiff that any of the documents are privileged or that the defendant is not entitled to the documents or that the documents are irrelevant and unnecessary for trial. The court must therefore accept that the information sought by the defendant is necessary for preparation for trial and/or to narrow the disputes between the parties before trial.

The court has considered the pleadings, the affidavits and the arguments by counsel. It is clear that the plaintiff is not complying by hiding behind the fact that the required documents and facts are with the auditors and will be furnished in due course. The plaintiff should ensure that the documents are delivered to the defendant's attorney in the prescribed manner so that the trial can commence on 9 May 2011. The acrimony between the parties is not conducive to having all the facts and documents available before trial. Any further delay in providing the relevant documents will most probably lead to another postponement.

The court finds that all the plaintiff has to comply with the rules and makes the following order:

1. The plaintiff is ordered in terms of rule 21 (4) to deliver, within 5 days from the date of this order, a further reply to the defendant's request for further particulars (served on 2 August 2010), in which further reply the plaintiff shall provide the further particulars as requested by the defendant in the following paragraphs of the defendant's aforesaid request, namely:
   1.1 Paragraph 9.1 (including subparagraphs 9.1.1 and 9.1.2)
   1.2 Paragraph 9.2 (including subparagraphs 9.2.1 and 9.2.2)
   1.3 Paragraph 9.3 (including subparagraphs 9.3.1, 9.3.2, 9.3.3 and 9.3.4)
   1.4 Paragraph 9.4
   1.5 Paragraph 11.1
   1.6 Paragraph 13.1
   1.7 Paragraph 14.2
   1.8 Paragraph 15.2
   1.9 Paragraph 16

2. The plaintiff is ordered in terms of rule 30A(2) to deliver, within 10 days from date of this order, a further response in accordance with subrules (3) and (6) of rule 35 to make available for inspection the documents required by the defendant in the hereinafter mentioned paragraphs of the defendant's rule 35 (3) notices:
   2.1 Paragraph 4 of the defendant's rule 35 (3) notice served on 19 March 2010.
   2.2 The following paragraphs of the defendant's third rule 35

(3) notice served on 3 August 2010:

2.2.1 Paragraph 1 (re item C4 of plaintiff's (initial) discovery affidavit).

2.2.2 Paragraph 2 (re item C1 of plaintiff's supplementary discovery affidavit).

2.2.3 Paragraph 3.7 (re item C2 of plaintiff's supplementary discovery affidavit).

2.2.4 Paragraph 4.2 (re the Desmondi Incentive Trust).

2.2.5 Paragraph 5.2 (re the Desmondi Empowerment Trust).

3. Cost of this application will be costs in the divorce action.

Judge Pretorius

Case number	56513/2008
Heard on	29 March 2011
For the Applicant / Plaintiff	Adv De Klerk SC
Instructed by	Rynhardt Kruger
For the Defendant	Adv Peters SC
Instructed by	Wandrag & Marais INC

Date of Judgment : 31 March 2011