

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

**CASE NO: EL 305/2010
ECD 705/2010**

In the matter between:

DAVID JOHN ALEXANDER DOWLING Plaintiff/First Defendant in Reconvention

and

THERESA JANE DOWLING (born McMULLAN) Defendant/Plaintiff in Reconvention

PETER ALEXANDER GEORGE DOWLING N.O. 2nd Defendant in Reconvention

PATRICIA MARGARET DOWLING N.O. 3rd Defendant in Reconvention

DAVID JOHN ALEXANDER DOWLING N.O. 4th Defendant in Reconvention

ANGELA LEIGH WILD N.O. 5th Defendant in Reconvention

DAVID JOHN ALEXANDER DOWLING N.O. 6th Defendant in Reconvention

PETER ALEXANDER GEORGE DOWLING N.O. 7th Defendant in Reconvention

STEVEN HAYNES N.O. 8th Defendant in Reconvention

JUDGMENT

Y EBRAHIM J:

- 1] In this application the Defendant (Plaintiff in Reconvention) seeks an order directing the Plaintiff (First Defendant in Reconvention) and the Second to Eighth Defendants in Reconvention to comply with the provisions of Rule 35(1), (2), (4)

and (6) in regard to the notice in terms of Rule 35(3) and (6) dated 14 September 2011 served on them. The applicant also seeks a postponement of the matter and an order for costs. For convenience I shall refer to the applicant as the defendant and to the respondent as the plaintiff and to the second to eighth defendants in reconvention as they have been cited herein.

- 2] The issue for determination is whether the plaintiff and the second to eighth defendants in reconvention have complied with the Rule 35(3) and (6) notice.

The relevant provisions of Rule 35 of the Uniform Rules of Court read as follows:

'(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.

(2) The party required to make discovery shall within twenty days or within the time stated in any order of a judge make discovery of such documents on affidavit as near as may be in accordance with Form 11 of the First Schedule, specifying separately –

- (a) such documents and tape recordings in his possession or that of his agent other than the documents and tape recordings mentioned in paragraph (b);
- (b) such documents and tape recordings in respect of which he has a valid objection to produce;
- (c) such documents and tape recordings which he or his agent had but no longer has in his possession at the date of the affidavit. A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent.

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

(4) A document or tape recording not disclosed as aforesaid may not, save with the leave of the court granted on such terms as to it may seem meet, be used for any purpose at the trial by the party who was obliged but failed to disclose it, provided that any other party may use such document or tape recording.

- (5) (a) ...
(b) ...
(c) ...
(d) ...

(4)

(5)

(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 purpose 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 for inspection shall preclude him from using it at a trial, save where the court in good cause allows otherwise.'

- 3] The Rule 35(3) and (6) notice was served in the divorce action the plaintiff instituted against the defendant. The defendant and the plaintiff were married to each other after the commencement of the Matrimonial Property Act 88 of 1984 in terms of a duly registered antenuptial contract with community of profit and loss excluded and the accrual system applicable. In an annexure to the notice the defendant specified the plaintiff had to discover thirty sets of documents. These documents, so the defendant alleges, she requires for the purpose of quantifying her claim for the accrual of her estate during the subsistence of the marriage.
- 4] The plaintiff responded to the notice and disclosed those documents which were in his possession, and available for inspection, and those which were not. Thereafter, the legal representatives of the parties engaged in correspondence in relation to inspection of the documents and the defendant was informed that these were available for inspection at the offices of Mr S Haynes, an accountant, who is the eighth defendant in reconvention. This the defendant accepted subject to the right to insist on proper discovery and compliance with the Rules of

Court.

- 5] On 7 December 2011, accompanied by a Mr L Tebbutt, the defendant inspected documents at the offices of the eighth defendant in reconvention for a period of two hours before the office closed for the day. The defendant states that a further inspection could not take place prior to the offices of the eighth defendant in reconvention closing for the Christmas period. The plaintiff asserts, on the other hand, that an inspection could have been taken place.
- 6] This situation precipitated further correspondence and on 11 January 2012, after the offices of the eighth defendant in reconvention had re-opened, the defendant and L Tebbutt carried out a further inspection. They were given two large cardboard boxes containing numerous documents dating back to 2006 and were informed that those prior to 2006 had been archived. The documents were not in chronological order, were insufficiently identified, and certain bank statements were not available. The documents were also not 'labelled as a "bundle of documents" of a specified nature which had been initialled and consecutively numbered by either the plaintiff or any of the other Defendants in Reconvention.' In view of this it was not possible to identify which documents specified in the notice had been made available for inspection. In the limited time available they had to 'rummage through them in order to find and identify for ourselves documents listed in the said Rule 35(3) and 35(6) Notice.'
- 7] Mr De La Harpe submitted that discovery was incomplete and inadequate and prejudiced the defendant. The defendant was therefore entitled to the relief

sought, namely that there be an order directing the plaintiff and the second to eighth defendants in reconvention to comply with the provisions of Rule 35(1), (2), (4) and (6) and that the matter be postponed.

8] The plaintiff has not denied the documents were presented in the manner described by the defendant. The plaintiff nevertheless asserts there was proper discovery and that the defendant's 'inspection was not hampered in any way.' The defendant and L Tebbutt, the plaintiff states, were provided with 'a substantial number of documents required for inspection' and informed that 'should they require any documentation or copies thereof they were to request same' but '[n]o requests were made during both inspections or after their particular visits for any additional documentation.'

9] Mr Cole submitted on behalf of the plaintiff and the second to eighth defendants in reconvention that his clients had gone to great lengths to facilitate inspection of the documents but defendant had not responded positively to this. His clients had tendered 'full access to whatever information [the defendant] require[d] with regard to the financial affairs of (all relevant parties and Trusts)' but in spite of these efforts the defendant had waited until the last moment to bring this application and seek a postponement. The Court should therefore reject the defendant's contention that offering inspection of the documents at the offices of the eighth defendant in reconvention did not, in the specific circumstances of this case, constitute compliance with the notice.

10] Subrule 2(c) clarifies the manner in which documents are to be made available for inspection by the other party, namely that '[a] document shall be deemed to be

sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent.'

11]The purpose of presenting the documents in the prescribed manner should be apparent since lack of identification would not enable the defendant to call for it nor would the Court be able to establish whether or not the document in question has been produced.¹ In addition, in the absence of compliance with these requirements the Court would not be in a position to impose the sanctions set out in Rules 35(4) and/or (6).²

12]The fact that the documents were not presented in the manner prescribed in the Rules has not been disputed by the plaintiff and the second to eighth defendants in reconvention. Save for elucidating that documents were 'provided for inspection in annual bundles marked, per year', they in fact confirm that the documentation presented to the defendant was voluminous in nature and not readily capable of identification. The eighth defendant in reconvention, in the confirmatory affidavit he attested to in his capacity as Accountant for the David Dowling Family Trust, underscored this was the position. He has stated therein that he informed the defendant's attorney there was 'a substantial amount of documentation in volume and computer data. I believe you will have great difficulty navigating through the sheer volume of books and records during the court proceedings.'

13]It is clear that the situation that confronted the defendant, when she attended the

¹ Erasmus *Superior Court Practice* at B1-254; (It bears repeating that the Rules are made for the Courts, not the Courts for the Rules, see *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (AD) at 783A)

² *Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at paras [27] and [28]

offices of the eighth defendant in reconvention to inspect the documents, does not support the claim of the plaintiff and the other defendants in reconvention that they made proper discovery.

14] I accept the defendant's claim that she was presented with a mass of documents not properly identified, as required in terms of subrule 2(c), and that it was expected of her to rummage through them to locate the documents the opposing parties were required to discover. I accordingly agree with Mr De La Harpe's submission that there has not been proper compliance with the Rule 35 notices on the part of the plaintiff and the second to eighth defendants in reconvention.

15] Insofar as costs are concerned, Mr Cole submitted that the defendant should be liable for the costs of the application and postponement of the matter as she delayed in inspecting the documents and in bringing the application. In support of this Mr Cole relied on the case of *Webster v Webster*.³ Mr De La Harpe contended that the facts in *Webster* were distinguishable and that the plaintiff and the second to eighth defendants in reconvention should be liable for the costs.

16] In my view, it would not be correct to determine the question of the costs of the application and those of the postponement of the matter as separate issues. It is obvious that if the application succeeds the matter must be postponed to afford the second to eighth defendants in reconvention an opportunity to comply with the order. A specific order postponing the matter would in such circumstances

3 1992 (3) SA 729 (E)

be superfluous. The question is whether there are cogent reasons to deprive the successful party of an order for costs. I am of the view there are none. I agree with Mr De La Harpe that the facts in this matter are distinguishable from those in the *Webster* case. Even though there could have been a greater measure of urgency on the part of the defendant she took steps to try and resolve the failure of the other parties to provide proper and adequate discovery. Any tardiness on the part of the defendant in launching this application is outweighed by the failure of the plaintiff and the second to eighth defendants in reconvention in properly complying with the provisions of Rule 35(3). It is their conduct that necessitated the defendant having to bring this application. In the circumstances I consider it just that the costs of the application are awarded in favour of the defendant. Similarly, the wasted costs occasioned by the postponement are to be borne by the plaintiff and the second to eighth defendants. In both instances they are liable for such costs jointly and severally.

17] In the result, there is an order in the following terms:

- a) The Plaintiff and Second to Eighth Defendants in Reconvention are directed to comply with the provisions of Rule 35(1), (2), (4) and (6) in regard to the Defendant's Notice in terms of Rule 35(3) and 35(6) dated 14 September 2011 within 20 days of the granting of this order and specifically in respect of the documents referred to in items 8 and 10 to 19 and 22 to 23 and 25 to 30 of annexure "A" thereto.
- b) The Plaintiff and Second to Eighth Defendants in Reconvention shall jointly

and severally, the one paying the other to be absolved, pay the costs of the application.

- c) The Plaintiff and Second to Eighth Defendants in Reconvention shall jointly and severally, the one paying the other to be absolved, pay the wasted costs occasioned by the postponement.

JUDGE Y EBRAHIM

27 March 2012

Judgment delivered on:

29 March 2012

Counsel for the Defendant/ Plaintiff in Reconvention:

D H De La Harpe

Attorneys for the Defendant/ Plaintiff in Reconvention:

Bax Kaplan

EAST LONDON

Counsel for the Plaintiff and Second to

Eighth Defendants in Reconvention:

S H Cole

Attorneys for the Plaintiff and Second to

Eighth Defendants in Reconvention:

Cooper Conroy Bell & Richards

EAST LONDON