**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No.: **D5862/2018**

In the matter between:

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| **G[...] C[...] W[...]** | Applicant |
| and | |
| **S[...] W[...]** | Respondent |
| *In re:* | |
| **S[...] W[...]** | Plaintiff |
| and | |
| **G[...] C[...] W[...]** | First Defendant |
| **G[...] C[...] W[...]** ***NO*** | Second Defendant |
| **S[...] W[...]** ***NO*** | Third Defendant |
| **KERWIN GRANT VAN NIEKERK** ***NO*** | Fourth Defendant |
| **CRAIG VICTOR SIMPSON** ***NO*** | Fifth Defendant |
| **MASTER OF THE HIGH COURT, PIETERMARITZBURG** | Sixth Defendant |

## ORDER

It is ordered that-

(1) The applicant's non-compliance with the normal rules of this court relating to service, filing, and time limits, is condoned, and this matter is dealt with as one of urgency in terms of rule 6(12).

(2) The respondent is directed to deliver to the applicant's attorney, by 16h00 on Wednesday, 5 July 2024, copies of the following documents-

2.1 the annual financial statements for N[...] 1[...] CC (Reg. No. CK2000/003183/23) for the financial years 2012, 2013, 2014, 2015, and 2016, until it was converted from a close corporation into a private company, and became known as M[...] I[...] (Pty) Ltd on 31 January 2017;

2.2 the annual financial statements for M[...] I[...] (Pty) Ltd (Reg. No. CK2016/539830/07) for the financial years 2017, 2018, 2019, and 2020, until it changed its name to G[...] G[...] (Pty) Ltd on 29 April 2021;

2.3 the annual financial statements for G[...] G[...] (Pty) Ltd (Reg. No. 2016/539830/07) for the financial years 2021, 2022, and 2023;

2.4 the respondent's salary advice slips issued by G[...] G[...] (Pty) Ltd for the period from May 2021 to date;

2.5 all documents evidencing payment of dividends to the respondent by G[...] G[...] (Pty) Ltd, for the period from May 2021 to date;

2.6 all documents evidencing payment of bonuses to the respondent by G[...] G[...] (Pty) Ltd, for the period from May 2021 to date;

2.7 all documents evidencing all and any perquisites paid by G[...] G[...] (Pty) Ltd to or on behalf of the respondent, for the period from May 2021 to date

(3) The documents referred to in paragraphs 2.1, 2.2, and 2.3 of this order shall not be disclosed to the applicant, and shall only be utilised by the applicant's legal representatives and expert witnesses in preparation for trial, and may be utilised as documentary evidence
at the trial.

(4) Costs are reserved.

**JUDGMENT**

**HARRISON AJ**

[1] These are the reasons for the order which I granted in respect of the urgent application on 20 June 2024.

[2] The order so granted is for the respondent to discover financial documents and financial information relating to the close corporation/company of which he is a director, together with his salary advices, dividends, bonuses, and perquisites.

[3] The applicant and respondent were married on 17 October 1998, out of community of property. In May 2018 the applicant, as plaintiff, instituted divorce proceedings against the respondent, as first defendant.

[4] The applicant and respondent have, over the years, structured their financial affairs in a manner which they believed to be most beneficial, including through the use of trusts and the respondent has, as a businessman, been a member of or director of various entities.

[5] There are two trusts involved in this matter, the S[...] Trust and the C[...] Trust. The one trust owns what was the matrimonial home, and the other trust owned

members interest and shares for the companies where the respondent was a member or director.

[6]

[7] The purpose of this urgent application was to compel the respondent to discover documents and financial records relating to his financial affairs, for the purposes of the divorce trial which is set down for hearing from 12 August 2024.

[8] It is common cause that the respondent is currently a director in an entity known as G[...] G[...] (Pty) Ltd ("G[...]").

[9] That company was formerly M[...] I[...] (Pty) Ltd ("M[...]"), a company which converted from a close corporation in 2016. The close corporation was N[...] 1[...] CC ("N[...]"). G[...], M[...], and N[...] are, accordingly, referred to in the order.

[10] There is a clear dispute between the parties as to the respondent's financial affairs, hence the very divorce action which is being so vigorously fought. This application relates to an interlocutory and incidental application to compel certain documents which were requested pursuant to notices in terms of uniform rule 35(3).[1]

[11] The response by the respondent to the applicant's notices are that the items sought are not relevant to the matter, and that there is accordingly no entitlement to receive the documents.

[12] The founding affidavit sets out in some detail the various steps taken to secure certain of the information in question through the mechanisms of subpoenas duces tecum, and how those subpoenas have been met with applications to set the subpoenas aside.

[13] In opposing this application, the respondent has sought to do so on various grounds, *inter alia*-

[1] See: Annexure "SW3",indexpapers, p46 and annexure "SW4",index papers,p50.

(a) urgency;

(b) unavailability of counsel;

(c) the respondent has furnished a document "GW1", which purportedly 'clearly demonstrates' that the C[...] Trust and its subsidiary are not his alter ego;[2]

(d) that the applicant has failed to show any basis for him to make disclosure of this information.

[14] Discovery serves the purpose that all relevant documents and evidence is available to all parties on any issue relevant to a trial. As has often been said, discovery is one of the mightiest tools for the exposure of truth, and it is specifically designed to ensure that where all relevant documents have been discovered, the issues in a trial can be narrowed down to that which is at the heart of the dispute.[3]

[15] In divorce proceedings, a party's income and expenditure is to determining the means and the amount of spousal maintenance, as well as any distribution, a party's income and expenditure. It is not for the respondent to decide what is relevant or must be discovered. Discovery must include documents which may assist the opposing party. The documents relating to the income and expenditure are relevant.

[16] In the commercial sense, income and expenditure is not simply confined to a party's singular bank account, but it also relates to that party's access to and ability to manipulate funds through trusts and corporate structures in order to be tax efficient and/or to manage their affairs in the most beneficial manner possible.[4]

[17] The shares in G[...], where the respondent is employed, is owned by the C[...] Trust, a trust which has the respondent as one of its trustees.

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[2] See allegations in para 34, index papers, p82.
[3] See: *Durbach v Fairway Hotel* 1949 (3) SA 1081 (SR).
[4] *Secretary, Inland Revenue v Geustyn, Forsyth and Joubert* 1971 (3) SA 567 (AD).

[18] As a trustee of a trust, he has the higher duty of ensuring that the accounts are properly kept in accordance with the standard expected of a person managing the affairs of another. The trust records should be kept with diligence and skill.[5]

[19] As regards the corporate records, when the entity was a close corporation, in terms of s56(2) of the *Close Corporations Act*, 1984, the accounting records had to record in relation members-

(a) contributions;

(b) loans;

(c) payments.

[20] Payments to a member had to be recorded as well as any loan accounts in favour of either the member himself, or the trust for which he was the appointed representative.

[21] Similarly, in terms of s30 of the *Companies Act*, 2008 ("*the Act*"), the director's remuneration is required to be specifically specified in terms of s30(4) of the Act.

[22] Section 30 needs to be read jointly with s26 regarding access to the company's records. The Act further requires that the director's interest be clearly set out in terms of *s*75 of the *Act*.

[23] The *Companies Act*, 2008, does not end there. Regulations 25 to 30, impose further duties of how loans are to be recorded to shareholders and directors. There was to be proper financial standards, independent review, and accountability.

[24] In addition, thereto, "KINGIV', at page 48, specifically provides that the governing body should oversee that the information (which includes directors

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[5] *Trust Property Control Act*,1988, s9.

remuneration) should be published on an organisation's website, or other platforms or social media. This includes annual financial statements and other external reports.

[25] Simply put, director's remuneration, loans, and access to funds, is clearly something which is required to be published and disclosed, and as regards the respondent's wherewithal, is highly relevant to his financial standing in a divorce.

[26] In opposing this matter, the respondent has sought to suggest that it is not urgent. The urgency in this matter has been created by the respondent's failure to be open and make disclosure. It is unacceptable for the respondent to use his own failure to discover and to make documents available, to then argue that the matter is not urgent. I found that the matter was urgent.

[27] The availability of counsel is an argument with which I am unpersuaded. This is a commercial divorce matter and there are numerous counsel at the Durban Bar, capable of arguing the matter.

[28] As regards the reliance on annexure "GW1", I note that the respondent repeatedly relies and refers to this document.[6] The repeated reliance on this annexure is at the heart of the respondent's defence, namely, that this document shows that the trust is not his alter ego, and that he has made whatever financial disclosures is necessary, more than three and a half years ago.

[29] Unfortunately, both the drafter of "GW1" and the drafter of the answering affidavit failed to appreciate that annexure "GW1" is nothing more than a summary. It is hearsay and does not prove its contents. Notably, it lacks the status of an original source document, nor is it indeed a secondary document. It is a statement extrapolated from either source documents or a book of prime entry, or from a secondary source, such as an annual financial statement.

[6] See the following paragraphs in the answering affidavit-34, 81, 82, 84, 106, 107, 112.5.1, 112.13, 112.14, 112.16.1, and 117.4.

[30] Considering that this document is not an original source, the respondent can hardly be surprised that the applicant has brought the application for the discovery of the documents which underpin and underlie that summary.

[31] If the summary is true, the respondent cannot be prejudiced by being asked to produce the documents which underpin that statement, and if they are false, then he will soon be found out and his reliance on the document Is misplaced. In light of the emphasis which the respondent has placed on "GW1" in a 67-page opposing affidavit, he can hardly be surprised that an order was granted.

[32] Regarding the allegation that there are disputes of fact, the respondent overlooks a crucial point. It is indeed correct that there are disputes of fact. Those disputes are the very basis for the action for divorce proceeding as a trial. In order to get to that trial, the parties need to have open and proper discovery, and the furnishing of a statement, "GW1", does not amount to the furnishing of source documents and an open disclosure. The respondent cannot complain about being called upon to discover the documents which give rise to the very information which he has sought to summarise in that annexure.

[33] Paragraph 3 of the order, which ensures that there was a non-disclosure of the documents, was simply to placate and avoid the respondent's argument that the information contained confidential information. I found this argument surprising, as the disclosure of financial information in annual financial statements is a statutory obligation. Furthermore, in terms of "KINGIV', the annual financial statements ought to be published on the G[...] company website. I do not see how that publication can give a competitor an unfair advantage. However, in order to ensure that the matter could proceed, I was prepared to grant that only the expert witnesses have access to the document.

[34] From the draft order sought, which was handed up, I also deleted that the trial for August 2024 be adjourned. If that trial is to be adjourned, it must be adjourned on the basis of a separate application, it was not appropriate to decide that issue at the urgent application.

[35] In the circumstances, I made the following order-

(1) The applicant's non-compliance with the normal rules of this court relating to service, filing, and time limits, is condoned, and this matter is dealt with as one of urgency in terms of rule 6(12).

(2) The respondent is directed to deliver to the applicant's attorney, by 16h00 on Wednesday, 5 July 2024, copies of the following documents-

(2.1) the annual financial statements for N[...] 1[...] CC (Reg. No. CK2000/003183/23) for the financial years 2012, 2013, 2014, 2015, and 2016, until it was converted from a close corporation into a private company, and became known as M[...] P[...] I[...] (Pty) Ltd on 31 January 2017;

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(2.7) all documents evidencing all and any perquisites paid by G[...] G[...] (Pty) Ltd to or on behalf of the respondent, for the period from May 2021 to date

(3) The documents referred to in paragraphs 2.1, 2.2, and 2.3 of this order shall not be disclosed to the applicant, and shall only be utilised by the applicant's legal representatives and expert witnesses in preparation for trial, and may be utilised as documentary evidence at the trial.

(4) Costs are reserved.

**G M HARRISON AJ**

[D5862-18 W[…] v W[…] - Judgment (rb) - 25.07.24]

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