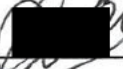


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2021-043212

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
2025/01/28	
DATE	SIGNATURE

In the matter between:

DM

Applicant

and

DM

Respondent

Summary

Section 7 of the Matrimonial Property Act 88 of 1984 – interpretation of “necessary” – court having discretion as to when disclosure under provision should be ordered.

JUDGMENT

FRIEDMAN AJ:

- [1] Section 7 of the Matrimonial Property Act 88 of 1984 (“the MPA”) provides that, “[w]hen it is necessary to determine the accrual of the estate of a spouse or a deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate.”

- [2] This application raises a crisp legal question: what does this provision mean when it says: “when it is necessary to determine the accrual of the estate of a spouse”? Despite the longevity of this provision, and the regrettable tonnage of divorce litigation, there is no clear answer to this question in the decided cases. In particular, there is no clear answer to the question of the scope of the discretion vested in courts, if any, to decline to order compliance with the provision at various stages of divorce proceedings.

- [3] Section 3 of the MPA deals with the accrual system. In essence, and at the risk of over-simplifying (especially in my failure to address the various exceptions to the general rule), accrual applies where two people get married out of community of property, thus rendering their estates separate despite the marriage, and do not exclude the accrual system by contract. At the end of the marriage (as a result of death or divorce), it becomes necessary to compare the value of each estate to its value at the commencement of the marriage. The spouse whose estate has shown no accrual, or less accrual than the other spouse, then has a claim to receive transfer of half of the difference between the accrual of the respective estates. Section 3(2) provides that, subject to the exception created by section 8 (which is not relevant for present purposes), a claim to transfer arising from accrual “arises at the dissolution of the marriage”.

- [4] Several cases have already established the proposition that, despite the rule summarised in the last sentence of paragraph [3] above, it is not improper for a party to claim an order for divorce and a determination of accrual in the same

proceedings.¹ On this basis, it would defeat the purpose of section 7 if the furnishing of the particulars which must be provided under that provision could only be demanded after a divorce order was first made.²

- [5] So, it is now established that one spouse may insist on being furnished financial particulars during the course of divorce proceedings where accrual is applicable. The courts have (justifiably) turned against a procedure requiring a divorce order first to be obtained, and then a separate enquiry being held into the appropriate financial division of the estate. The latter is routinely (but not necessarily) part of the divorce proceedings themselves.
- [6] But the question raised by the present case is novel, at least as far as I can tell.
- [7] The parties are involved in a protracted and acrimonious pending divorce action. It has, as is evident from the Caselines file, resulted in two full judgments on interlocutory issues (an exception and a rule 43 application), as well as several orders in other preliminary disputes. In the application before me, the applicant seeks an order compelling the respondent to reply to a notice which the applicant issued on 12 January 2024 in terms of section 7 of the MPA, within ten days of this Court's order. There are multiple defendants who have been joined in the divorce action. They are not participants in the dispute before me. For simplicity, I simply refer to the applicant (ie, Mrs M) and the respondent (Mr M) below, and will indicate when it is necessary to refer briefly to any of the additional defendants in the trial action.
- [8] The reason why this case raises a novel question is that there is no decided case which has addressed the direct question of *when* a section 7 notice may be demanded. The applicant's starting point is that a response must be provided as soon as a spouse asks for it. According to this argument, as long as there are pending divorce proceedings in which an accrual calculation will be made, a respondent has no basis to refuse to make disclosure. The respondent's starting

¹ The two main cases on this issue, being decisions of the Supreme Court of Appeal ("SCA"), are *AB v JB* 2016 (5) SA 211 (SCA) at para 19 and *ST v CT* 2018 (5) SA 479 (SCA) at para 17.

² See *ST v CT* (above n 1) at para 17ff, which held that the duty to make disclosure in terms of section 7 of the MPA arises before the final determination of the divorce proceedings (ie, it is part of the suite of procedures, such as discovery and requests for further particulars, which enable the parties to prepare for trial).

point is that he is entitled to refuse to respond to the section 7 notice because it is not yet the right time for him to be expected to provide the financial details of his estate. Although not framed in this way, the respondent's argument is contingent on interpreting section 7 to confer on courts a discretion to refuse to order compliance (or in finding that discretion elsewhere).

- [9] The wording of the second paragraph of the applicant's notice has some significance to the outcome of this application and so I quote it here in full:

"The plaintiff requires the first defendant to provide full and comprehensive details of all of the assets and liabilities that comprise his estate irrespective of whether such assets are held in his own name or in the name of a nominee including any trust/s and irrespective of whether the assets are situated in the Republic of South Africa or elsewhere, including but not limited to movables, immovable property, pension interests, endowments or other policies of insurance, shares in private and public companies, moneys standing to the credit or debit of bank accounts and moneys held by third parties or other entities including trusts for the benefit of the first defendant."

- [10] I return to the significance of the wording of this paragraph of the notice in due course.

- [11] Counsel for the applicant made it very clear to me, in the course of a debate which we had during argument, that her position is that I have no discretion to decline to order the respondent to furnish a response to the section 7 notice. This absolutist stance is logical because it is consistent with the applicant's favoured interpretation of section 7. Since, on her argument, the section may be invoked at any time while divorce proceedings are pending, there is no room for a court to exercise a discretion not to compel compliance when compliance is sought (as it is in the present application).

- [12] The respondent says that it is not "necessary or appropriate" for me to order him to respond to the section 7 notice now. To explain his submission, I must refer briefly to the background to this dispute.

Background

- [13] In September 2021, the applicant launched a divorce action against the respondent. In addition to citing the respondent as the first defendant, she cited

him in his official capacity as a trustee of the Houghton Trust, and she also joined various companies and trusts as further defendants (amongst other defendants not relevant here). Her basis for citing most of the additional defendants is her contention that these entities are *alter egos* of the respondent or are controlled by him and were established to house part of the respondent's personal estate to the prejudice of the applicant. This is, perhaps, a slight simplification, but it makes the necessary point for present purposes.

[14] On 12 July 2024, the respondent brought an application to separate certain issues in the pending divorce action, in terms of rule 33(4) of the Uniform Rules. The respondent wants two issues to be separated:

- a. First, "whether section 4(1)(a) of the Matrimonial Property Act should be interpreted in accordance with section 39(2) of the Constitution to provide that "*the nett value of the estate*" of a spouse includes the financial value of assets held by a trust *de facto* or *de iure* controlled by the spouse that would have acquired and owned the assets in his/her own name but for the trust".
- b. Secondly, "whether the assets held by a company that are beneficially owned by a spouse should be taken into account in determining the accrual".

[15] The respondent says that it is premature for the applicant to insist on a response to the section 7 notice, when the pending separation application has the potential to resolve, at least in part, the question of what assets form part of the respondent's estate for the purposes of the accrual calculation.

[16] The respondent has another argument, which is where the wording of the notice becomes relevant. The respondent says (with reference to the text of the notice – see paragraph [9] above) that the applicant illegitimately seeks to circumvent the fact that, in terms of the plain text of section 7, only a spouse is obliged to disclose his or her assets. This is because, according to the respondent, the applicant expects the respondent to procure from the various entities cited as defendants in the pending divorce information about their assets which are not

covered by section 7 at all (given that none of these trusts or entities is a spouse of the applicant).

A discretion?

[17] In *ST*,³ the Supreme Court of Appeal (“SCA”) said, as part of dealing with the duty of disclosure under section 7, that the provision “sets out the duty which a spouse has, to make full disclosure of relevant information *when requested to do so by the other spouse*”.⁴ Because the SCA was not dealing with the question whether a section 7 notice is compellable on demand, it is not at all clear to me that the SCA intended to make a finding (or even a remark in passing) that there is a categorical obligation on a spouse to respond to a request in terms of section 7 simply on the asking. This is relevant to the question whether I have a discretion to refuse this application. If the applicant is entitled to a response simply on the asking, then I am obliged to grant the application without more. In other words, I have no discretion to refuse it.

[18] In another decision of the SCA, the (inexplicably) unreported decision of Gorven AJA in *DEB v MGB*, the Court, referring to section 7, held that it is “clear that the legislature requires that a spouse furnish full particulars *if requested*”.⁵ This language, which is similar to the language used in *ST*, again suggests that the duty to comply is triggered simply by a request of the other spouse.

[19] Sight should not be lost of the fact that section 7 itself refers to the obligation of a spouse to furnish full particulars “at the request of the other spouse”. The remarks of the SCA in the two judgments mentioned above, must be understood in that context. I do not understand the SCA to have expressed a substantive view, in either of the quoted remarks, about the scope of a requesting spouse’s

³ Above n 1.

⁴ *ST* above n 1 at para 33.

⁵ *DEB v MGB* [2014] JOL 32339 (SCA) at para 5.

rights under section 7, or the question whether a section 7 notice is compellable on demand.

- [20] There is a clear distinction between the words “necessary” and “appropriate”. The latter lends itself far more readily to discretionary evaluation than the former. Had section 7 used the term “appropriate”, the issues which I seek to address here would hardly be worthy of attention. If section 7 compelled a spouse to respond to a section 7 notice “when appropriate”, then clearly courts would have to make an assessment (whether exercising a true discretion⁶ or not), on the facts of each case, to decide if compelling the notice was appropriate in the circumstances.
- [21] On the other hand, it could well be said that the question of whether something is “necessary” lends itself to an objective enquiry with far less scope (but not necessarily none) for a value judgement. That being so, as long as a judge considered that it was objectively necessary for a spouse to comply with section 7 to determine the accrual of his or her estate, the judge would be compelled to order the recalcitrant spouse to comply with the other spouse’s notice.
- [22] If this distinction is valid, then the choice of the legislature of the word “necessary” might suggest that the enquiry is very narrow. As long as a spouse needs the information to prepare for a trial at which an accrual calculation will have to be made, the jurisdictional requirement of the provision would be triggered. The applicant’s argument, which is certainly not unsustainable on the wording of section 7, goes even further. On her argument, as long as the accrual system applies in the first place, it will always be “necessary” for the requested

⁶ It is often said that a court has the discretion to decide this or that issue. My understanding of a true discretion is that the Court is entitled to reach a range of outcomes, none which could be said to be preferable to the others, based on legitimate considerations. So, for instance, one of the best examples of a true discretion in our law is the power of courts to make costs orders. Another is to grant a just and equitable remedy in terms of section 172(1)(b) of the Constitution. The fact that a court holds a true discretion to make orders under these categories does not mean that it can make any decision which it likes. If a court misdirects itself when making a costs order – either by making a material factual error or by misunderstanding the law – then its decision will be wrong and liable to be set aside on appeal. But, as long as the court understands the law correctly and takes account of relevant factors, it will be entitled to make a range of decisions, even if reasonable lawyers might have done something different. The assessment of what an open term means on the facts of a case, on the other hand, is not necessarily the same as exercising a true discretion. If a particular provision was interpreted by the courts not to confer a true discretion, but rather to require an objective assessment of the meaning of a particular term, then there could be only one right legal outcome (carrying the implication that a court reaching any conclusion but the right one would be liable to have its order overturned on appeal).

information to be provided as part of trial preparation. In other words, there is no need for a case-by-case assessment of “necessity”.

[23] Despite this, it seems to me essential to conclude that a court considering an application to compel a section 7 notice retains a discretion to grant or refuse the application. Section 173 of the Constitution confers on this Court the “inherent power to protect and regulate [its] own process”. Once this is so, courts must retain a discretion to refuse to compel a spouse to comply with a section 7 notice in appropriate circumstances. If the facts of a particular case suggest that it would be impractical, premature or prejudicial for a spouse to be compelled to furnish particulars of his or her estate at the time when the other spouse demands compliance with section 7, then the court’s inherent power to protect its own process must enable it to decline to require compliance at that stage. Generally speaking, the exercise of a process-related power by a court engages a true discretion, which is only susceptible to being overturned on appeal in the case of a misdirection.⁷ If our courts were not vested with a true discretion to determine whether to order the furnishing of a section 7 notice in the context of the facts of a case and the time at which the demand was made, then the power to protect and regulate their own process would be illusory.

[24] To be clear, I appreciate that the determination of when it is “necessary” to require a spouse to furnish particulars of his or her estate could lend itself to differences of opinion amongst reasonable lawyers. I could imagine an interpretation of the provision which confers an element of discretion on courts as to when to order compliance. But that is not what I have in mind. This is because, it is equally plausible to conclude that the question of necessity is an objective enquiry. If so, then there is indeed a right or wrong answer – which would be revealed through the casuistic development of the law – of what “necessary” means in section 7. So, it could well be that a future court interprets the word “necessary” very narrowly, leaving judges with very little discretion as to when provision of the envisaged information is required. It is not necessary for me to wade into this question because I locate the discretion in an entirely

⁷ I have already given the example of costs orders above. Other examples include: the power to grant condonation for non-compliance with the rules of court; the power to grant a postponement; and the power to permit the filing of a further affidavit in motion court.

different place; ie, a place which has nothing to do with the use of the word “necessary”, its proper interpretation and the scope of the power which it confers.

[25] What I have in mind is this. If a party in a trial action considers his or her opponent to have failed to make proper discovery, then the innocent party is entitled to bring an application in terms of rule 30A of the Uniform Rules to compel the guilty party to comply with rule 35. The MPA has no provision analogous to rule 30A. It is, of course, well-accepted that courts are empowered to issue mandamuses to compel compliance with statutory obligations.⁸ And perhaps that is what the applicant had in mind in this case, although she does not say so expressly in her founding affidavit. But, in my view, any enforcement of a procedural right during the course of litigation also engages the power of the courts to regulate their own process. It follows that, in any application to enforce those rights, the courts must retain a discretion to decide whether such an attempt is premature, too late, too wide, an abuse of process or something analogous. It is true that no court could make a final and categorical decision, in a particular case, that a spouse is not entitled to the information envisaged by section 7. That would be to undermine the clear intention of the legislature and infringe the separation of powers. But a court must surely hold a discretion to regulate the timing of compliance. In other words, to determine *when*, during the course of divorce or related proceedings, a spouse must provide the necessary information.

[26] I conclude, therefore, that a court considering an application to compel compliance with section 7 has a discretion as to whether to grant the application. Put differently, a court has the power to refuse an application to compel compliance with section 7 if the court considers it to be in the interests of justice to do so at that particular stage of the proceedings.

How should the discretion be exercised?

[27] As I have mentioned, there are few cases in South Africa on the meaning and scope of section 7 of the MPA. However, our courts have referred to a principle which, in its broader application not limited to section 7, has received far more

⁸ See, for example, *Zokufa v Compuscan (Credit Bureau)* 2011 (1) SA 272 (ECM).

attention (both from South African and English judgments). That is the general duty of spouses in litigation relating to their estates to give full and frank disclosure.⁹ The point has been made, in more than one decision, that the concept of accrual presents unique challenges. The estate of each spouse is separate from that of the other, and accrual only arises, generally speaking,¹⁰ on death or divorce. Because the estates are separate, one spouse will often be in the dark as to the financial position of the other. This heightens the duty of disclosure, because full disclosure is essential to prevent the hiding of assets.¹¹

[28] In this spirit, it seems to me that courts would generally incline towards requiring compliance, unless there was some pressing reason to refuse an application to compel it. It is impossible to try to identify the considerations which might justify refusal. I accept that the respondent's case in this application might properly raise one of these circumstances. If compelling compliance now will pre-empt the separation application and prejudice the respondent, then it might well suggest that the application should be dismissed. Other examples which occur to me, which are not intended to reflect anything like a closed list, are when the application is an abuse of process because the applicant already has the necessary information from some or other recent disclosure in a different context, the application is unnecessary because full information has already been provided in compliance with section 7 (ie, the applicant is abusing section 7 by issuing multiple notices for no good reason), the notice can clearly be shown to have been issued for an ulterior purpose, or similar situations. But, because the requesting spouse is at an inherent disadvantage, the default position will no doubt be in favour of disclosure.

[29] A related, but separately important, consideration is the "catch-me-if-you-can" principle, first expressed by Gorven AJA in *DEB v MGB*.¹² Courts would not wish to provide parties with an incentive to hide assets, or to abuse the inherent power of the courts which I have mentioned above to entrap their opponents in endless

⁹ See *ST* above n 1 at paras 35-6 and the authorities cited there. See also *MB v DB* 2013 (6) SA 86 (KZD) at para 40 and the authorities cited there (paragraph 40 of this judgment remains good law, although the court's conclusion that accrual must be assessed at close of pleadings has subsequently been overruled in *AB v JB* above n 1.

¹⁰ Section 8 of the MPA creates an exception to this.

¹¹ See *ST* above no 1 at paras 35-6.

¹² Above n 5.

interlocutory litigation in order to wear them down and drain their resources (both financial and otherwise).

- [30] *Ms Howard*, who appeared for the applicant, says that this is precisely what the respondent seeks to do in this case. She says that the respondent's attitude to the section 7 notice and his decision to launch the separation application are motivated by a desire to cause delay, and enable the respondent to kick this matter into touch while he executes his plan to leave the country. I have insufficient basis to make a positive finding to this effect. But, in principle, I agree with *Ms Howard* that such conduct should be discouraged at all costs, and respondents in these situations should not be given any enticement to abuse court processes to evade their responsibility to make full disclosure. This issue gave me pause, and left me concerned about the implication of recognising the discretion which I have described above. But section 173 of the Constitution points, in my view, in only one direction. And requiring a respondent to demonstrate compelling reasons before a court declines an application under section 7, coupled with wide powers to make appropriate costs orders, should hopefully dissuade respondents from abusing court processes.

The discretion in this case

- [31] Proceeding from the premise that she is entitled to compliance with her notice on demand, the applicant's founding affidavit is less than three pages. It deals solely with the facts relating to the presentation of the section 7 notice to the respondent's attorneys, and the failure of the respondent to comply. The cause of action is pleaded in one paragraph, with a simple reference to the text of section 7. No further motivation is given. This is perhaps unsurprising, given the applicant's stance on the scope and meaning of the provision.
- [32] The respondent, for his part, devoted much attention in his answering affidavit to advancing the proposition that the applicant is only entitled to the information envisaged by section 7 on dissolution of the marriage. This defence is self-evidently unsustainable on the clear SCA authority which I have discussed above. It had the unfortunate effect of drawing the applicant into refuting the cogency of this defence, creating an unnecessary debate in the answering and

replying affidavits, which also had to be addressed in the applicant's heads of argument. *Ms Meyer*, who appeared for the respondent, quite properly did not attempt to press that defence in argument.

[33] But, as I have noted, the respondent does also raise the arguable defence that the section 7 notice seeks to pre-empt the separation application. In substance, that argument constitutes the respondent's sole basis for refusing disclosure, although he does advance the related argument that the notice goes further than what section 7 allows.

[34] One of the main issues in the proceedings as a whole is whether the respondent is the beneficial owner of a range of assets, despite them not being registered in his name. The definition of "beneficial owner" in the Companies Act, which offers some useful guidance here (and is directly applicable at least to some of the claims of the applicant in the divorce), is so broad as to include the ability to "exercise control, including through a chain of ownership or control" and to "otherwise materially influence the management of that company". In other words, a person will be treated as the beneficial owner of a company if he or she has the ability to exercise either of these two forms of control.

[35] Some energy was devoted by the parties in argument to the phrase in the section 7 notice which requires the respondent to disclose all of his assets and liabilities comprising his estate "irrespective of whether such assets are held in his own name or in the name of a nominee including any trust/s". The respondent says that the current application seeks to pre-empt the separation application because, if granted, the court will in substance determine in the present application whether various assets which are (as is common cause) not held in the respondent's name are, in fact, his assets because he is the beneficial owner. The applicant, on the other hand, says that the notice does no more than give effect to the wording of section 7 of the MPA, because the value of the respondent's estate includes assets of which he is the beneficial owner.

[36] Before I tackle the respondent's formulation of the issues which he apparently¹³ wants separated, it seems to me that there is potentially a higher-level problem here. Leaving aside the separation application for a moment, the bigger problem is that it seems difficult to imagine the parties escaping a never-ending loop of interlocutory litigation. If I grant the order sought in this case, then the respondent seems likely to disclose only assets which are held in his own name. *Ms Meyer* essentially said as much in argument. This will no doubt trigger a further application to compel on the part of the applicant. This will presumably, in turn, trigger a response from the respondent that the applicant is trying to use section 7 to pre-empt the hotly contested main issue in the trial. And so it will go.

[37] I debated the seeming futility of this whole exercise with counsel. *Ms Howard* suggested that the respondent's response to the section 7 notice would have self-standing value because it could be useful to the applicant in future settlement discussions or to serve as a basis for another rule 43 application.¹⁴ I agree with *Ms Meyer*, who argued that section 7 was not designed to be used for the ulterior purpose of achieving an advantage in different litigation, or for some strategic benefit in negotiations. Nothing else raised in argument gave me much comfort that the relief envisaged in the applicant's notice of motion would, if granted, take the dispute between the parties on the scope of the respondent's estate any further.

[38] Despite my despondency, I am of the view that, in the proper exercise of the discretion which I believe that I have, the application should be granted. This is for the six reasons which I provide below.

[39] First, as noted above, the strong default assumption has to be that an application of this nature should be granted. Something compelling would need to be raised by the respondent to resist disclosure. Other than the reference to the separation application (as to which, see below), I cannot discern any real basis for the

¹³ As of now, the respondent has not filed a replying affidavit despite the fact that the applicant filed her answering affidavit on 29 August 2024.

¹⁴ I am aware of at least one such application already having been brought. The judgment of Bezuidenhout AJ in that application is in the Caselines file in this matter and is discussed again below.

respondent to decline the applicant's request for compliance with section 7 at this stage.

[40] Secondly (and this relates to the first), the respondent has pointed to no real prejudice if the application is granted. Even if the respondent is correct that the separation application will have a major impact on the scope of the section 7 response, I cannot see any real prejudice if the respondent is required to explain his current understanding of his assets and liabilities, to enable the applicant to prepare for trial. The fact that the battle lines have already been drawn in the affidavits in related proceedings (like the separation application and the rule 43 application in which the parties exchanged detailed affidavits on financial issues), does not mean that the applicant is not entitled to disclosure under section 7.

[41] Thirdly, I am not convinced that the separation application has the significance that the respondent attaches to it.

[42] I have set out above the two issues which the respondent wants to be separated under rule 33(4) (see paragraph [14] above). The first issue, as formulated by the respondent, arises from the applicant's amended particulars of claim in the divorce action. There, the applicant seeks a declaratory order that has been reproduced in the wording of the respondent's first proposed separated issue (see paragraph [14]a. above). The second proposed separated issue arises, according to the applicant, from what she says is the respondent's misunderstanding of her pleaded case in the divorce action. She says that she is not claiming that the assets of certain of the companies cited as defendants in the divorce action are actually assets of the respondent. Rather, her claim is for a declarator that the respondent is the beneficial owner of the shareholding of these defendant companies and that their shares should be transferred to him (which is reflected in a prayer in the amended particulars of claim in which this Court is asked to direct the relevant defendants to deliver the entire shareholding in the companies to the respondent). So, from the applicant's perspective, the second issue which the respondent wants separated is not actually an issue which arises in the pending divorce action.

[43] It is, undoubtedly, for the Court hearing the separation application to decide what to do. But I have to express some sympathy for the applicant's view of the second proposed separated issue. I cannot discern any basis in law for the assets of a company to be included in the estate of a shareholder, even if that shareholder is the beneficial owner of the entire shareholding. The shares, of course, are a different matter, but I cannot imagine that there is any controversy that, if indeed the respondent is the beneficial owner of a company, its shares are assets in his estate. That is already the law and so the dispute that remains is a factual one – is the respondent the beneficial owner of the companies which the applicant says he is?

[44] The point is that, as a matter of law, there can be little doubt that a person who is the beneficial owner of a company as defined in the Companies Act must declare the shares in that company as an asset in his or her estate. Since that is already the law, it is no different to saying that a person must disclose assets registered in his name, as part of tabulating the assets of his estate. In law, the two categories are the same. The only difference is that beneficial ownership is more controversial because, while a title deed is quick proof that a person owns a property (for example), disputed beneficial ownership will have to be proved. If, for instance, the basis on which a person is alleged to be the beneficial owner of a company is that she exercises effective control of the company through the ability to influence the management of the company materially,¹⁵ then this will have to be established with evidence.

[45] The respondent's complaint, at least in part, is that the section 7 notice refers to assets held "in the name of a nominee including any trust/s" and "monies held by third parties or other entities including trusts for the benefit of the [respondent]". This is what led the respondent to argue that the notice relates to assets which might in due course (in the separation application) be held not to form part of the respondent's estate. But, if one looks at the plaintiff's amended particulars of claim, there are various allegations that certain assets (such as shares) are held by defendants other than the respondent as nominees of the respondent or for the benefit of the respondent. Many of these allegations are not the subject of

¹⁵ See subsection (f) of the definition of "beneficial owner" in the Companies Act, 2008.

the respondent's separation application. Therefore, even if there were no separation application, the applicant would be entitled to hear from the respondent about the status of those assets.

[46] I could understand the respondent's stance a little better if he had asked, in the separation application, for the factual issue of beneficial ownership to be separated and addressed upfront. Then his argument – ie, that ordering compliance with the section 7 notice would be premature and that his response should await the outcome of that dispute – would have been more compelling. But that is not what he has sought to separate – understandably so, given that beneficial ownership is one of the main factual disputes in the whole trial and it hardly seems sensible to deal with it separately. That being so, I cannot see the merit in waiting for the outcome of the separation application before requiring the respondent to furnish his section 7 response when it is already clear what the law requires in respect of the vast majority of the disputed assets.

[47] The respondent, of course, will have his own factual understanding of whether he is the beneficial owner of the various assets. If he genuinely believes that he is not, then he will not include them in his response. If he is dishonest in his response, then the trial presents the opportunity for the applicant to try to extract the truth, as do various other interlocutory mechanisms. In principle, this is no different to any divorce action where one spouse necessarily has to trust the honesty of the other spouse in disclosing his or her assets unless he or she has independent lawful means to investigate the other spouse's affairs. Even if there is no allegation about beneficial ownership or sham transactions, a spouse could have a basis, in certain divorce proceedings, for suspecting that the other spouse has not disclosed everything which he or she owns. In that type of case there would be the same type of fight which may arise here – ie, as to whether the section 7 response is comprehensive.

[48] Fourthly, I disagree with the respondent when he says that the applicant's notice seeks to go further than what section 7 allows. As I explained above, the respondent sees the notice as requiring entities other than the respondent to disclose their assets. This, according to the argument, conflicts with section 7 because the provision imposes a duty of disclosure on a spouse, and a spouse

only. I disagree. The notice (see paragraph [9] above) does nothing more than to require the respondent to disclose assets of which he is the beneficial owner. The duty rests on him, and not any third parties or trusts in whose name the assets may be registered. If he is the beneficial owner of an asset, then he should be able to identify and disclose it. No involvement of a third party or trust is required to enable him to discharge that obligation.

[49] Fifthly, since all relevant factors should be deployed in the exercise of my discretion, the failure of the respondent to take the separation application forward is, in my view, to be taken into account. The applicant has filed a comprehensive answering affidavit in that matter. I have not been given any information or evidence to explain why nothing further has been done. I appreciate that this cuts both ways. The applicant can utilise Practice Directive 1 of 2024 (as amended) (“the Practice Directive”), which in substance is the governing Practice Manual in this division, to have the separation application set down for argument as soon as possible. But the respondent is *dominus litis*¹⁶ in the separation application, and he faces the accusation that he is using the separation application to facilitate delay. I would have thought that a respondent wishing to disabuse the applicant (or, at least, the court) of such a notion would have appreciated that his failure to file a replying affidavit in roughly five months (I exclude one month to give the respondent a generous concession to take account of the December holidays) only serves to create negative atmosphere about his motives, as one might put it.

[50] Lastly, this Court has already held once that the respondent has failed to make full disclosure of his financial position. In the judgment in the rule 43 application, which is a reported decision of this Court, Bezuidenhout AJ set out in detail the ways in which, in her view, the respondent had not been frank about his resources.¹⁷ The papers in that application are part of the Caselines file, and so I have access to them. But I must stress that I have not trawled through them, to try to assess the details underlying Bezuidenhout AJ’s findings (much less to try

¹⁶ Loosely translated as “the master of the litigation”, it means that, as the applicant in the separation application and therefore the party seeking relief, there is an expectation that he will drive the litigation and take it forward.

¹⁷ See *DM v DM* [2023] 2 All SA 736 (GJ) at para 60.

to second-guess them). That is not my role. Simply by virtue of the findings of a judge in a binding ruling, it is relevant to the exercise of my discretion that the respondent's own behaviour has given rise to a heightened concern that full and frank disclosure will not, if the respondent is left to his own devices, necessarily be forthcoming.

[51] To tie everything together, I wish to say something about what the courts are trying to tell spouses in the catch-me-if-you-can cases. They are saying that full disclosure means full disclosure. This can be done without waiving legal arguments, and without prejudicing one's case. So, for instance, a section 7 response, which was truly in good faith, could be formulated as follows: the spouse could say, I have X, Y and Z assets in my name. Furthermore, there are the following assets which, on the version of my estranged spouse in her particulars of claim, would arguably fall under the category of beneficial ownership. The assets could then be identified, and the spouse could then make clear that it will be argued in due course that they should be excluded.

[52] Of course, there is a limit to this openness, because there may be categories of assets which the disclosing spouse knows about and the other spouse does not, and which the disclosing spouse genuinely believes do not form part of his or her estate. It would not necessarily be correct to criticise a spouse for failing to disclose those assets. But the problem our system now seems to face is that there is a conflation between assets which spouses genuinely believe to be excluded, and assets which spouses believe *they can get away with saying should be excluded*. Obviously, there is only so much judges can do about the latter.¹⁸ But if parties (and their lawyers) were to proceed on the basis that they have nothing to hide because the correct legal position will be vindicated in due course, then the system would function as it should. As it is, we are left where we are now, which is that divorce actions in which there are disputes about estates worth fighting over drag on for years, with multiple interlocutory skirmishes clogging up the roll, enriching legal representatives¹⁹ at the expense

¹⁸ See, for example, *ST* above n 1 at para 49.

¹⁹ I am, of course, only an acting judge. My day job is as a member of the bar. I, too, earn my living by charging clients to litigate disputes many of which would be unnecessary if one or both of the parties would just see sense. So, I am not casting aspersions on any particular legal representative or the class of legal representatives generally – it would not only be hypocritical but, applied to legal representatives overall,

of the contested estates. The present case is a perfect illustration. Later this year, it will hit the four-year mark, and I frankly have no idea when it will ever be ripe for a hearing on the merits.

[53] The best that courts can do in these circumstances, faced with tasks such as the one facing me here, is to err on the side of requiring as much disclosure as possible, in the hope that one day sanity will prevail.

[54] For these reasons, I am inclined to grant this application.

Appropriate relief

[55] It seems to me that section 7 of the MPA, read with the wide powers of courts under sections 172(1)(b) and 173 of the Constitution, is expansive enough to accommodate tailored relief, in a case such as this, to facilitate as full disclosure as possible. For instance, the applicant could have sought an order in this application (rather than only in the notice itself) demarcating the terms of disclosure in precise language, targeted to ensuring as wide coverage as possible. Or, procedural mechanisms could have been proposed to make it easier to challenge the response, if there were a reasonable basis to assume non-disclosure. As it is, though, the applicant did not ask for anything more than a simple order requiring the respondent to respond to the section 7 notice within 10 days coupled with the right to return to court if the respondent fails to comply. Courts have been admonished not to stray from the pleadings and to grant relief, or take cases in certain directions, not raised by the parties.²⁰ It would, therefore, be inappropriate for me to do anything more than what is sought in the notice of motion.

[56] There are only two minor amendments to the terms of the notice of motion which I intend to make. First, in my view, there is no reason to order the respondent to make disclosure within ten days. The section 7 notice itself gave the respondent twenty days. The applicant has given no motivation in the papers for seeking a

unjustified. I simply wish to make the point that, in divorce cases in particular, scorched-earth strategies are particularly self-defeating. At least, for the parties.

²⁰ See *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) at paras 13-15; *DB v CB* 2024 (5) SA 335 (CC) at paras 43-4.

shorter time. I speculate that the intention in seeking disclosure in ten days was to expedite matters because of the respondent's failure to comply for much longer than twenty days by the time that the application was launched (the application to compel – ie the one presently before me – was launched roughly six months after the notice was issued). Leaving aside that it is not for me to speculate when the matter is not addressed in the pleadings, the difference between ten and twenty days, in a context where it is almost exactly a year since the notice was served, seems insignificant to me. I would prefer to give the respondent a proper opportunity to respond. The applicant can only benefit if the respondent is given the chance to be as comprehensive in his reply as possible.

[57] The second minor departure from the notice of motion is that it is unnecessary for me to grant the applicant's prayer to be given leave to return to court, on the same papers (duly supplemented), if the respondent does not comply with my order. I appreciate that it is common practice to ask for such relief, but it is unnecessary. The rules of court and the Practice Directive already give a party various options in such circumstances. No court order is required to permit the applicant to take such steps, if she considers it appropriate to do so.

[58] In closing, and for the benefit of any judge who has to consider the Caselines file in this matter in the future, I should point out that there was initially a minor skirmish over the late filing of the respondent's answering affidavit. At the hearing, *Ms Howard* placed on record that the applicant did not wish to make anything of it, for which I am grateful. There is therefore no need to address that issue further.

Costs

[59] Each party accused the other of abuse of process and sought a punitive costs order as a result. There is no doubt a reasonable possibility that, if the divorce action ultimately goes to trial, one or both of the parties will be shown to have behaved inappropriately at some or multiple stages of the process. I only say that because that is what one expects in acrimonious proceedings of a personal

nature such as divorce. But I have no evidence to suggest that the respondent opposed this application in bad faith. The respondent's argument that this application was premature is not devoid of any merit, and before I read the papers thoroughly and considered the issues fully it had some appeal to me. Certainly nothing in the proceedings before me could remotely be seen as evidence of the type of conduct warranting a punitive costs order against the respondent. The accusation of bad faith is perhaps motivated by the acrimony colouring the entire proceedings. But I am not at liberty to enter that fray.

[60] Since both parties were so focused on their desire to see me make a punitive costs order, they did not address me on the scale to apply should I decide not to acquiesce in their request to punish the loser. Perhaps I should have asked them in oral argument, and I regret not doing so. *Ms Meyer*, in her heads of argument, asked for the application to be dismissed with "costs on an attorney and client scale, Scale B". That is not competent, because the scales apply only to party and party costs.²¹ She did not address scale B separately.

[61] Because the parties did not address the issue, I am inclined simply to apply the default – ie, scale A. In addition to them not arguing the point, I cannot see any reason to depart from the default in the circumstances of the case. This application is no doubt important to the parties, and the divorce action as a whole is no doubt very important to them. They may be able to motivate for a higher scale in the action itself. In the present matter, though, scale A is adequate.

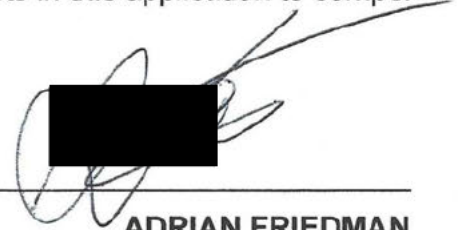
[62] I accordingly make the following order:

Order

- (1) The respondent is ordered to deliver a reply to the applicant's notice in terms of section 7 of the Matrimonial Property Act 88 of 1984, dated 12 January 2024, within 20 (twenty) days from the date of this order.

²¹ See *Mashavha v Enaex Africa (Pty) Ltd* 2024 JDR 1686 (GJ) at para 5. The decision in *Mashavha* is, with respect, undoubtedly correct when regard is had to the text of rule 67A(1) of the Uniform Rules.

- (2) The respondent is to pay the applicant's costs in this application to compel on a party-and-party basis (scale A).



ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter. The date for hand down is deemed to be **28 January 2025**.

Heard:

21 November 2024

Judgment:

28 January 2025

For the applicant:

K Howard, instructed by Billy
Gundelfinger Attorneys

For the respondent:

S Meyer, instructed by Ulrich Roux
and Associates