



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO. 635/2022

In the matter between:

B[...] P[...] D[...] Applicant/Defendant

and

M[...] A[...] D[...] Respondent/Plaintiff

**JUDGMENT IN RESPECT OF INTERLOCUTORY
APPLICATION TO COMPEL BETTER DISCOVERY**

HARTLE J

[1] The applicant, who is the defendant in divorce proceedings, issued out an interlocutory application to compel the plaintiff to furnish better discovery.

[2] The application is purportedly one in terms of the provisions of Rule 35 (7) and was, according to her, prompted by an order of this court dated 10 March 2025. The order concerned confirms a postponement of the trial to a date that was required to be arranged with the Registrar against the contingency that the applicant would pursue her present application to compel discovery on terms directed by the court. This included a preferential enrolment of the application itself. The intention was that this court should hastily determine the interlocutory application before the next hearing of the divorce action on 18 November 2025.¹

[3] It is common cause that the parties are married out of community of property with the inclusion of the accrual system and that an accrual claim is in contention in the divorce proceedings.

[4] The respondent's stance in the action is that his estate has shown no accrual, alternatively a smaller accrual, than the estate of the applicant.

[5] The applicant alleges the converse, but the parties accept that it falls to be determined upon trial which of their estates has shown the lesser or no accrual. This will establish the entitlement on the part of that spouse to claim from the other one half of the difference between the accruals of their respective estates.²

¹ As it turns out the parties agreed to postpone the trial again pending the determination of this and another interlocutory application.

² Sections 3 and 4 of the Matrimonial Property Act, No. 88 of 1984 ("MPA"), read together with sections 5 and 6.

[6] The terms of the parties' antenuptial contract are fairly standard. It indicates the starting values of their respective estates. The applicant declared the nett value of her estate at the commencement of the marriage, on 9 September 2005, to be in the sum of R400 000.00, and the respondent, his to be in the sum of R800 000.00.

[7] The only assets to be excluded from the accrual calculation, according to the parties' antenuptial contract, are those statutorily enjoined to be so excluded, namely any inheritances, legacies or donation which have accrued to either of them, as well as any other asset acquired by virtue of their possession or further possession of such inheritances, legacies or donations; and any donations made by either one of them, one to the other during the subsistence of the marriage.

[8] The respondent amended his particulars of claim in March 2024 to make provision for the appointment of a receiver to determine the accruals of his and the applicant's respective estates, which process is no doubt intended to extra-curially determine the beneficiary spouse's entitlement³ on the basis provided for in Chapter 1 of the Matrimonial Property Act, No. 88 of 1984 ("MPA").

[9] The applicant has not pleaded consequentially to this amendment, consciously so it seems, since in her reply she complains that the amendment was in the nature of a stratagem to avoid complying with her "*directive to discover*" that underlies the present application to compel.⁴

³ This was a term coined by Sutherland J in *JA v DA* 2014 (6) SA 233 (GJ) at [6]. The other spouse was referred to as "*the alienator spouse*" to distinguish the relative interests of the litigating spouses in a divorce action. The descriptions are useful.

⁴ This is because the notice to amend was delivered after her notice to request better discovery under consideration in the present application. She related this development to be one that is "*shocking and out of context*". Hence, so she alleges, she did not object to or even acknowledge the amended particulars of claim. (I was informed that the applicant has reserved the right and that it is so recorded in the parties' pre-trial minutes, that she will consequentially amend her plea once the respondent has fully discovered.)

[10] Whilst the pleadings have self-evidently closed, on the basis of the provisions of Rule 29 (1)(b), the applicant has reserved her right to plead consequentially to the plaintiff's particulars of claim subject to being given the documents highlighted in the notice of the present application.

[11] In addition to the question raised in the pleadings whether any accrual entitlement exists, and the calculation thereanent, the respondent has also ringfenced the acquisition of certain immovable property owned jointly and severally by the parties, which ownership he seeks a more favourable division of than 50%.⁵ The applicant herself refers to a trust established by the respondent in which she claims he has vested all his assets. She asks (by implication because there is no prayer in this respect) that these divested assets be counted as assets in his personal estate. Also at the centre of a controversy regarding the accounting of assets is a Chevrolet Captiva motor vehicle which the applicant says the respondent gifted to her and to which she substantially contributed. She seeks to be reimbursed for this. Finally there is the issue of the respondent's "*Pension Fund*" which she claims she is entitled to share in as if a joint estate existed (*sic*).⁶

[12] These assets and their supposed relevance to the accrual calculation will naturally take centre stage at the divorce hearing and the documentation evidencing their existence or import have either been exchanged, or were sought to be exchanged, in the lead up to the trial preparations.

[13] It is important to emphasize the nature of the issues to be determined upon trial, as I have done above, because the test as to whether or not a

⁵ A separate application has ostensibly been issued in the meantime in which the respondent prays for the division of the assets which are jointly owned by the parties. It appears from correspondence in which the last postponement of the divorce hearing was justified that the applicant regards that as a "*pending application*", together with the present matter, that need to be dealt with first before the divorce action can proceed upon trial.

⁶ See generally the approach adopted by the court in *DECB v JMB* [2005] JOL 69903 (GJ). Whilst the respondent's pension interest is a notional benefit that accrues to him as a member upon divorce, the applicant does not enjoy an automatic right to have a half portion thereof paid to her upon divorce.

document should be discovered (given that the applicant has framed her application as one in terms of Rule 35 (7)), is one of *relevance*, having regard to the issues defined in the pleadings.⁷ The pleadings in *casu* have at their core a dissolution of the marriage subject to the accrual system.

[14] The legal regime applicable to marriages subject to the accrual system and how it is given practical effect to is set out comprehensively in Chapter 1 of the MPA, the relevant contents of which are repeated below for convenience:

“2. Marriages subject to accrual system

Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract.

3. Accrual system

- (1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.
- (2) Subject to the provisions of section 8(1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.

4. Accrual of estate

- (1) (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.

⁷ *Rellams (Pty) Ltd v James Brown & Hamer* 1983 (1) SA 556 N at 563H – 564A. The test for determining relevancy is given a wider interpretation in the context of a document “*relating to any matter in question in the action*”. A document may for example indirectly lead “*to a train of enquiry*” which has the consequence of either advancing a case or damaging the case of an adversary. Such a document too would thus “*relate to a matter in question in the action*”. See also *Erasmus, Superior Court Practice*, regarding the discussion of Rule 35, and especially footnote 28 (at D1, Rule 35 – 7) citing the relevant authorities on the subject of the test for relevancy.

(b) In the determination of the accrual of the estate of a spouse—

- (i) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is left out of account;
- (ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;
- (iii) the net value of that estate at the commencement of his marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the *Gazette* serves as *prima facie* proof of any change in the value of money.

(2)

5. Inheritances, legacies and donations excluded from accrual

- (1) An inheritance, a legacy or a donation which accrues to a spouse during the subsistence of his marriage, as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his estate, except in so far as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise.
- (2) In the determination of the accrual of the estate of a spouse a donation between spouses, other than a donation *mortis causa*, is not taken into account either as part of the estate of the donor or as part of the estate of the donee.

6. Proof of commencement value of estate

- (1) Where a party to an intended marriage does not for the purpose of proof of the net value of his estate at the commencement of his marriage declare that value in the antenuptial contract concerned, he may for such purpose declare that value before the marriage is entered into or within six months thereafter in a statement, which shall be signed by the other party, and cause the statement to be attested by a notary and filed with the copy of the antenuptial contract of the parties in the protocol of the notary before whom the antenuptial contract was executed.
- (2) A notary attesting such a statement shall furnish the parties with a certified copy thereof on which he shall certify that the original is kept in his protocol together with the copy of the antenuptial contract of the parties or, if he is not the notary before whom the antenuptial contract was executed, he shall send the original statement by registered post to the notary in whose protocol the antenuptial

contract is kept, or to the custodian of his protocol, as the case may be, and the last-mentioned notary or that custodian, shall keep the original statement together with the copy of the antenuptial contract of the parties in his protocol.

- (3) An antenuptial contract contemplated in subsection (1) or a certified copy thereof, or a statement signed and attested in terms of subsection (1) or a certified copy thereof contemplated in subsection (2), serves as *prima facie* proof of the net value of the estate of the spouse concerned at the commencement of his marriage.
- (4) The net value of the estate of a spouse at the commencement of his marriage is deemed to be nil if—
 - (a) the liabilities of that spouse exceed his assets at such commencement;
 - (b) that value was not declared in his antenuptial contract or in a statement in terms of subsection (1) and the contrary is not proved.

7. Obligation to furnish particulars of value of estate

When 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.

8. Power of court to order division of accrual

...

9. Forfeiture of right to accrual sharing

The right to share in the accrual of the estate of a spouse in terms of this Chapter is a patrimonial benefit which may on divorce be declared forfeit, either wholly or in part.

10. Deferment of satisfaction of accrual claim

A court may on the application of a person against whom an accrual claim lies, order that satisfaction of the claim be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified, assets, as the court may deem just.”

[15] Whilst it is a trite principle that the right of the beneficiary spouse contending for an accrual entitlement comes into existence only upon the

dissolution of the marriage,⁸ it is established practice that a spouse may insist on being furnished with financial particulars *during the course of divorce proceedings* where the accrual system is applicable.

[16] In *JA v DA*⁹ the court noted that despite the inviolable rule that the date of the dissolution of a parties' marriage is the only date upon which to calculate the respective estates, a party can sue for an accrual computation in the same divorce action even though the contingency upon which such a right exists only comes into being upon the divorce order being granted. In this respect the court held that:

“[20] Without challenging the correctness of the finding that enforceability must await the date of dissolution, it does not seem to me inappropriate to sue for both a divorce and an order pursuant to s 3 of the MPA in a single action, in which the accrual order is made dependent upon the granting of a divorce order. For policy reasons, if no other, and the obvious saving of costs and avoidance of delay, the double-barrelled approach is preferable, a view shared by Olivier J but which he reluctantly disavowed because of what, in his view, would be infidelity to the provisions of s 3. The pleading of circumspect prayers could probably overcome that danger of infidelity. Practical factors alone ought to determine whether any post-dissolution revisions to provisional calculations become necessary.¹⁰ However, it is plain that there cannot be any basis to calculate the value of the estates at a moment earlier than the dissolution.”

[17] The Supreme Court of Appeal in *AB v JB*¹¹ endorsed the view of Sutherland J expressed in *JA v DA* that it would not be inappropriate to sue for both a divorce and an order pursuant to section 3 of the MPA in a single action

⁸ *AB v JB* 2016 (5) SA 211 (SCA) at [16]. *Brookstein v Brookstein* [2016] ZASCA 40; 2016 (5) SA 210 (SCA) at [16] and [19].

⁹ *Supra* at para [17] and [19].

¹⁰ In this context, the reservation by the applicant of her right to plead consequentially to the respondent's amended particulars of claim, or to amend her own pleadings once the respondent has adequately discovered, is not an unreasonable notion.

¹¹ 2016 (5) SA 211 (SCA at [16].

in which the accrual order is made dependent upon the grant of a divorce order.¹²

[18] The question then is how to establish the value of the other party's estate in a scenario where both a divorce and an accrual claim are pursued in the same action.

[19] Section 7 of the MPA is the essential machinery by which the relevant information to make the necessary computation can be marshalled. The section indeed places a "*clear duty*" on a spouse to make "*full disclosure*" of relevant information when requested to do so by the other spouse.¹³

[20] The onus is on a spouse seeking to establish an entitlement to share in an accrual to prove the other spouse's assets and their value.¹⁴

[21] The spouse contending for the exclusion of an asset bears an onus to prove such a contingency in conformity with both the established principle that our law generally does not require a party to prove a negative and the further consideration that a defendant whose defence amounts to a confession and avoidance accepts an onus in that respect.¹⁵

[22] The answer to the question *when* a spouse can request particulars in terms of section 7 logically seems to be the moment "*when it is necessary to determine the accrual of the estate of a spouse*", which advent may coincidentally precede the juncture when the close of pleadings is reached and discovery is imminent. Since it is not improper for a party to claim an order for a divorce and a determination of accrual in the same proceedings, a spouse

¹² *Supra* at para [20]. See also *Dikgale v Dikgale* [2020] JOL 49132 (GJ) at [17].

¹³ *ST v CT* 2018 (5) SA 479 (SCA) at [33] – [36].

¹⁴ *ST v CT*, *Supra* at [39].

¹⁵ *ST v CT*, *Supra* at [39], [40], [61] and [65].

should be able to insist on being furnished with financial particulars *during the course of the proceedings* where accrual is applicable.¹⁶

[23] Once such a demand has been made, a respondent has no reasonable basis to refuse to make disclosure on the basis provided for in section 7 of the MPA (which notably does not dictate the form of the response to the request) especially once a court is satisfied that it is objectively necessary for a spouse to comply with the section's provisions to determine the accrual of his/her estate.¹⁷ In other words, once a spouse needs the information to prepare for a trial in which an accrual calculation will have to be made, the jurisdictional requirement is triggered.¹⁸

[24] A court would however retain the discretion to refuse to compel a spouse to comply with a section 7 notice in appropriate circumstances.¹⁹ This hardly appears to be such a situation, however, given that the parties are litigating at “*full stretch*”²⁰ concerning a claimed accrual entitlement.

[25] Whilst a party in a trial action considers the other party to have failed to make proper discovery of documentation conducing towards the proof of that parties' estate where an accrual claim is applicable, such a party might either invoke the provisions of Rule 30A to compel the other party to comply with

¹⁶ *DM v DM* [2025] 2 All SA 398 (GJ) at [4] and [5]. See also *DEV v MGB* [2014] Jul 32339 (SCA) at [5].

¹⁷ *DM, Supra* at [8].

¹⁸ *DM, Supra* at [21] – [22].

¹⁹ *DM, Supra* at [23]. Thus it was stated in *DM* that the facts of a particular situation might suggest that it would be impractical, premature, or prejudicial, for a spouse to be compelled to furnish particulars of his/her estate at the time when the spouse demands compliance with section 7. This would accord with a court's inherent power to protect its own process enabling it to decline to require compliance with a section 7 demand at any given stage.

²⁰ *M V Urgup : Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 531 I.

Rule 35, alternatively the provisions of Rule 35 (7) itself, which provide for a unique two stage process to compel discovery.²¹

[26] The court in *DM*²² observed that there is no provision analogous to Rule 30A to compel the furnishing of particulars demanded in terms of section 7 of the MPA.²³ However, it is well accepted that our courts are empowered to issue mandamuses to compel compliance with statutory obligations.²⁴

[27] Courts would generally incline towards granting compliance, unless there is a pressing reason to refuse the application to compel.²⁵

[28] The utility of section 7 of the MPA is by appreciation of the value of the discovery machinery provided for in Rule 35 not the standalone means by which a beneficiary spouse can garner information relevant to the accrual determination. It is obvious that where the exchange of information takes part in the context of a trial, each party to the action is under a duty to give discovery of documents in his/her possession bearing upon the issues to be determined upon trial at the moment of the close of pleadings.²⁶

²¹ A notice in terms of Rule 30A (1) does not override but gives way to the special provisions of Rule 35 (7) relating to an application to compel discovery. (See *Erasmus, Supra*, under the discussion of Rule 35 (7). Either avenue may be employed in the pursuit of compelling discovery.

²² *Supra*.

²³ Indeed a Rule 30A provides a general remedy in a scenario where a party has failed to comply with the Uniform Rules or a request made or notice given *pursuant to the rules*. A request made in terms of section 7 of the MPA would not be a request made in terms of the rules of court.

²⁴ At [25].

²⁵ *DM, Supra* at [28]

²⁶ The differences between the two mechanisms are however immediately obvious, firstly with regard to the timing, and, secondly with regard to what can be expected to be demanded. The manner in which the information or documentation must be provided is also different as are the remedies that are available to a party who fails to cooperate in the giving. Section 7 is focused on *particulars*. The demand may be met by an attorney, for example, stating on the alienator spouse's behalf what the present day value of his spouse's estate is having regard to specifics of the calculation indicated by Chapter 1 of the MPA and that may be perfectly acceptable to the beneficiary spouse. Discovery however targets the production of *documents* or recordings in the other spouse's *possession* (or under his/her control) through which source documents evidencing the particulars contemplated by section 7 of the MPA are expected to be discovered and produced for inspection and copying. Relevance and purpose will find their context under Chapter 1 of the MPA where a section 7 request is concerned, whereas discovery has objectives and purposes of its own. Together they are a formidable tool and should in proceedings such as the present work to the advantage of divorce litigants in tandem rather than as severable concepts. Conceivably a party seeking to enhance the utility of section 7 of the MPA during the course of divorce proceedings may approach a judge in chambers in terms of Rule 35 (1) for leave to request discovery

[29] Rule 35 (1) provides as follows in this respect:

“35 Discovery, Inspection and Production of Documents

(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 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.”

[30] A beneficiary spouse’s entitlement to share in an accrual is a “*matter in question*” within the meaning envisaged in Rule 35 (1) in such proceedings where both a divorce and actual claim are in contention.

[31] The object of discovery is to ensure that before trial both parties are made aware of all the *documentary evidence* that is available. By this process, the issues can be narrowed.²⁷

[32] Discovery is regarded as a valuable, devastating tool of trial, ranking with cross-examination as “*one of the mightiest engines for the exposure of truth*”.²⁸

[33] The expectation is that a party in possession of or custody of documents is supposed to know their nature (and to appreciate their advantage for that party’s purposes of advancing his/her own case, or to damage the case of his/her adversary) and thus carries the duty not only to disclose, but also to put those

before the close of pleadings, and the provisions of Rule 35 (14) may also avail such a party to gain access to specified discoverable documents in the other spouse’s possession bearing upon an accrual claim for purposes of pleading.

²⁷ *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR). See also *Investec Bank Ltd v O’Shea N.O.* (unreported), WCC case number 100038/2024 dated 16 November 2022 at [14].

²⁸ *M V Urgup, Supra* at 513 G - H; *Democratic Alliance v Mkhwebana* 2021 (3) SA 403 (SCA) at [23]. It is this aspect of the value of discovery that appeals to the senses of the applicant who perceives that the respondent is withholding information and/or concealing assets from her.

documents in proper order for both the benefit of his adversary and the court upon trial.²⁹

[34] Discovery is done on affidavit “*as near as it may be in accordance with Form 11 of the First Schedule ...*”.³⁰

[35] Once discovery has been made, the discovered documents must also be produced for inspection and copying by the other party.³¹

[36] A party who is concerned that inadequate discovery has been given is not without remedy. Rule 35 (3) provides in this regard that:

“(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 such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party’s possession, in which event the party making the disclosure shall state their whereabouts, if known.”

[37] The response to such a notice is also required to be on affidavit³² and the result of the “*better discovery*” being added to the discovered documentation also requires that the further documents disclosed similarly be offered for inspection and copying.

[38] A party who fails to give discovery in response to either a notice in terms of Rule 35 (1) or (3), or to allow inspection of documents that the other party is

²⁹ *Erasmus, Supra* D1 Rules 35-1 to 35-9 thereof including the cases cited therein.

³⁰ The provisions of this sub-rule are peremptory. Self-evidently no similar duty is placed upon a spouse to provide details of his/her estate under oath in terms of Section 7 of the MPA.

³¹ Rule 35 (6).

³² *Rellams, Supra* at 559 C.

entitled to have access to, may apply to court to order compliance with any provisions of Rule 35 and, failing such compliance, to have the claim dismissed or the defence struck out as the case may be. The remedy indicated is by implication to address a party's contempt by not complying with the provisions of Rule 35 generally, and, in substance, by not giving discovery as envisaged by Rule 35.

[39] Sub-rule (7) provides in this regard as follows:

- (7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.”

[40] The respondent invoked the provisions of Section 7 of the MPA by way of a formal notice to the applicant's attorneys to garner particulars of the value of the applicant's estate. He has not complained of any lack of co-operation in this respect by the applicant.

[41] The applicant, rather than filing such a notice or request in the first place, sought initially to be advised concerning the full particulars of the respondent's estate through the regular mill of the discovery processes.

[42] In the lead up to this application the following events ensued.

[43] The parties routinely called upon the other to discover after the close of pleadings.

[44] The file evinces a discovery affidavit filed by each of them.

[45] The applicant thereupon filed a notice in terms of Rule 35 (3) in which she sought three genera of documents, namely: bank statements, financial statements and tax returns.

[46] The applicant avers that it became plain to her during the discovery process that there were documents necessary for the calculation of the accrual that had not been provided. In her opinion, the respondent's wealth has "*significantly grown*" between the years of their marriage to date, but she believed that he was, and is still, concealing information that will conduce to the proof of her accrual claim

[47] Some of the documents under the genera specifically requested by her were discovered in part, but in the applicant's perception *other* bank accounts exist which the respondent has not disclosed. The applicant also considered that there were gaps in the series of First National Bank statements provided by the respondent in respect of his main bank account. Financial statements had been provided. but only in respect of the period 2015 – 2019.

[48] This led her to compile the notice in terms of Rule 35 (3) which was delivered on 29 February 2024 in compliance with a case flow management order dated 2 February 2024 directing her to file her notice within ten days. During these processes it became clear that the applicant did not consider the action trial ready for so long as the documents outlined in her Rule 35 (3) notice had not been provided to her so that the accrual of the respondent's estate could be made. What the provision of the requested documents is likely to reveal, so she contends, will also, in her view, impact the question of the exact issues

required to be determined at trial, the question of which remain imponderables for now.³³

[49] The respondent says that he reacted to the notice by delivering in excess of 800 pages worth of documents. Those documents were filed of record under separate indexed bundles delivered on 28 May 2024. They ostensibly comprise of the respondents ITR 12 returns from 2017 to 2023 and ITA 34 assessments from 2005 – 2023.

[50] The court record also reveals that the respondent filed a bundle of First National Bank statements from the inception of the First National Bank account in 2017 until 30 April under cover of a notice of filing dated 10 May 2024, and a series of Nedbank statements (in respect of account number 1[...]), from March 2017 to December 2021 under cover of a notice of filing dated 14 June 2024.

[51] On 11 October 2024, months after delivery of the applicant’s Rule 35 (3) notice, the applicant’s attorneys sent a letter pursuant to which a comprehensive list of further and additional documents were sought. The letter comprises five pages.³⁴ It explains in great depth why “*further discovery*” of each item is necessary and proceeds from the premise of the applicant’s entitlement to expect a greater standard of transparency from the respondent in respect of his obligation to make full disclosure of the value of his estate. Whilst she equates the absence of his meeting the required standard of disclosure to a failure “*to make full and proper discovery*”, the letter warns that, absent a remediation of the deficiency (or the provision of a consent to her the attorneys to access his

³³ See the reservation expressed by Sutherland J in *JA v DA*, *Supra* at [20] that revisions to provisional calculations may be necessary and that “*circumspect prayers*” will overcome any “*infidelity*” to the provisions of Section 3 of the MPA.

³⁴ The applicant does not reference the provisions of section 7 of the MPA in the letter at all. The header of the letter introduces the subject as: “*NOTICE TO COMPEL FURTHER AND BETTER DISCOVERY IN TERMS OF RULE 35 (3)*”.

financial affairs directly from South African Revenue Services and other financial institutions instead), she would proceed to apply for an order compelling him to furnish the necessary information/documentation and consent at his cost. The warning enjoins him to give “*satisfactory discovery*” within ten days³⁵ failing which the application to compel would ensue, and concludes with the hopeful sentiment that he will comply with his “*discovery obligations*” so as to avoid unnecessary legal proceedings and costs. The present application is in response to that gauntlet laid down by her.

[52] The respondent avers that he comprehensively replied to the letter, although in his view he was not obliged to, providing about eighty further pages of documents.³⁶

[53] The respondent complains that there was never any response to his disclosure made under cover of his attorney’s letter dated 19 November 2024, yet on 10 March 2025 the divorce trial was postponed enabling the applicant to bring the present application under the guise that he had failed to give full discovery.

[54] Having been given the opportunity to formally seek the intervention of the court arising upon the respondent’s supposed failure to have complied with her notice in terms of Rule 35 (3), the applicant confusingly claims she is entitled to have the respondent furnish “*by way of discovery*” in the present application the following documentation:

“Statements from First National Bank: Account number 6[...] from 2005- 2017 and May 2024- March 2025;

³⁵ This may suggest that the applicant had the provisions of Rule 30A in mind, which provides a general remedy for non-compliance with the rules of court.

³⁶ He claims that he complied in the hope that the divorce could finally start but not because he felt himself constrained to do so under the burden of discovery.

bank statements from all of the plaintiff's bank accounts for the period between 2004-2014 and the period between 2024 and 2025;

financial statements for the period between 2004- 2014 and 2020-2025 and;

tax returns from 2024 until 2025.

Complete policy information for Plaintiffs Policies held at Liberty Life, Discovery Life, Momentum, SPP and Sanlam;

Complete information concerning all shares bought by the respondent in various companies, including Afrocentric and their values.

Respondents' Complete wealth profile"

[55] Not surprisingly, since the applicant introduces new matter to be discovered not listed in her Rule 35 (3) notice before or naturally indicated by the specified genera of documents she had in mind (the last 4 items refer), the respondent opposes the application on four bases. Firstly he submits that the application is not competently launched because of (an alleged) non-compliance with the Rule 35 (3) notice. Secondly he contends that he has in fact complied with the notice. Thirdly, in good faith he claims that he went even further and provided the documents requested in the applicant's attorney's letter which he was not obliged to. Fourthly he argues that the application disregards the requirement of relevance in consideration of the issues as they are defined in the pleadings.

[56] As an aside both the old and new matter indicated in the notice of application would certainly be relevant to the central issue in the action for the reasons indicated above. Further, whilst I have no qualms with the respondent's good faith in having furnished the applicant with the documentation which he has thus far, it appears that he may be labouring under a misconception that he has no obligation to provide details of his estate to her, or that he is doing so only as a favour to her. A reality check of the situation and of the parties'

mutual obligations in this respect in terms of section 7 of the MPA may move the trial meaningfully forward.

[57] With reference to the amplified list of documents indicated in the notice of motion he asserts that these documents fall into one or more of the following categories: They are either non-existent, irrelevant, already delivered to the applicant, or constitute new documents requested after relevant documents had already been delivered to the applicant (such as updated bank statements), being a new request entirely.

[58] The respondent has purported to deal in his answering affidavit with the amplified list and to explain what documentation he can or can't provide, but what confounds this matter in my view is the fact that he has not responded to the applicant's request to give better discovery in the usual manner by way of affidavit.³⁷ It is against that affidavit, or notice in terms of Rule 35 (6), or further affidavit where applicable, that a court will usually determine the adequacy of a litigant's compliance with a notice in terms of Rule 35 (3). Instead this court has been expected to wade through pages of documentation to assess the respondent's claimed compliance in response to the notice.

[59] In *Rellams*,³⁸ the court observed that the plaintiff is at least entitled to be informed in proper form if the documents called for are in the defendant's possession and if their relevance is being disputed. *Erasmus, Superior Court Practice*, under the discussion of Rule 35, highlights the fact that a discovery affidavit entails the solemn execution of an important document. The good faith of a party tendering discovery is a vital part of the process and one expects that he will make disclosure mindful of the oath undertaken by him/her. The form of response required, in the context of the accrual claims especially, where

³⁷ Rule 35 (2). See *Rellams*, *Supra* at 559 C.

³⁸ *Supra*.

there is a valid concern in the conduct of trial in these matters that they are run on a “*catch me if you can basis*”, is an essential tool at the disposal of a spouse to ensure that the duty to disclose in terms of section 7 of the MPA is honoured by the other spouse.³⁹

[60] The respondent has technically not complied with the provisions of Rule 35 (3), but the absence of an affidavit is not what the applicant currently complains about. I am also mindful that the respondent has belatedly said what he provided in response to the applicant’s notice in terms of Rule 35 (3) in the affidavit filed in the present application.

[61] That brings me to the question whether the present application was competently launched, aside from the respondent’s failure to have responded on affidavit.

[62] What the applicant seeks is clearly a mandamus compelling the respondent to furnish further additional documentation than what she initially asked for in the impugned notice. (During argument Ms Ncalo who appeared on her behalf indicated that the applicant would be happy if this court directed the respondent to “*discover*” his complete wealth profile.) It is however a fallacy on the applicant’s part that she can assert that right as one to “*better discovery*” under the mantle of the provisions of Rule 35 (7), rather than one based on the respondent’s obligation to co-operate in the furnishing of all relevant information that will enable her to assess if and to what extent his estate since the commencement of the marriage has grown or not.

[63] For an application in terms of Rule 35 (7) to succeed, the applicant must prove that the respondent has not complied with the Rule 35 (3) notice. By her own admission the respondent has amplified his discovery between the date of

³⁹ *ST v CT, Supra*, at [33] – [36].

the notice and the present application but the real bone of contention is that he has generally not met the high standard of disclosure envisaged in terms of the provisions of section 7 of the MPA. That is a different fight.

[64] Ms. Ncalo discounted the obligation on the applicant to have filed a further notice in terms of Rule 35 (3) to request specified documents, the existence of which have suggested themselves from the documents such as were provided under the constraints of the notice in terms of Rule 35 (3). Whilst such additional documents may pass the test of relevancy on the basis that in the train of enquiry, they were found to exist and also to relate to the applicant's cause of action, the respondent cannot be expected to divine that they resort under the genera of documents requested in the Rule 35 (3).

[65] For better or worse the applicant has framed her application on the basis provided for in terms of Rule 35 (7), on the pretext that the respondent has not complied with that notice. On her own admission the parties have long since moved past that position. On the respondent's version he has to the extent that he can properly responded to the notice. That is the end of the matter and cannot found an application to compel.

[66] Ms. Ncalo indicated during argument that she would produce a list of documents that the applicant believes exist and which are relevant to her claim and which she expects the respondent to still disclose. This was not provided at the time of delivery of this judgment.

[67] It is suggested that this be provided to the respondent so that further discussions may ensue in this respect to obviate the need for a further formal notice in terms of Rule 35 (3) to be filed. The respondent would be reminded that he is also under a duty to make a full and frank disclosure of his estate in terms of section 7 of the MPA and that it is in his interests to discover

documentation that will prove that assets he appears (in the perception of the applicant) to have an interest in, are to be excluded from the accrual calculation.

[68] Both parties would be reminded that obviously relevant documentation should not be provided last minute, and that either or both of them may, upon discovery, require to amend their pleadings to accommodate the fact that the claim for accrual that arises only upon divorce is conveniently being dealt with together with the claim for divorce.

[69] The applicant's application fails, but I am not inclined to dismiss it with costs given the respondent's failure to have complied with form at least. It appears to me to be equitable that each party pays their own costs of the application.

[70] I issue the following order:

1. The application is dismissed.
2. Each party is to pay their own costs of the application.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 16 October 2025
DATE OF JUDGMENT : 4 December 2025

Appearances:

For the applicants: Ms. Z Ncalo instructed by Odwa Bentswana Inc., c/o Siphokazi Tshiwula Inc., East London (ref. Ms Bentswana).

For the respondent/plaintiff: Mr. A Peters of Gravett Schoeman Inc., East London (ref. Peters/MP/Mat56550).