



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable

Case no: 959/2025

In the matter between:

MB. M

APPLICANT

and

SA. M

RESPONDENT

In Re

SA. M

APPLICANT

and

MB. M

RESPONDENT

Neutral Citation: *MB.M v SA.M In Re SA.M v MB.M* (959/2025) [2026]

ZAFSHC 1 (5 January 2026)

Coram: OPPERMAN J

Heard: 9 October 2025

Delivered: The judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for the hand-down is deemed to be 5 January 2026 at 15h00.



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Summary: Family Law – contested divorce – discovery – rule 35(3) of the Uniform Rules of Court – redistribution of assets – s 7(3) of the Divorce Act 70 of 1979 – maintenance of minor child – piecing the corporate and trust veil.

ORDER

1 The respondent is ordered to comply with the applicant's notice in terms of rule 35(3) by making the documents listed therein available for inspection as contemplated in rule 35(6), within 10 days of the order of this Court.

2 The respondent shall pay the costs of this application, costs to be taxed on scale B.

JUDGMENT

Opperman J

Introduction

[1] This is an application for discovery in terms of rule 35(7) to compel discovery under rule 35(3)¹ of the Uniform Rules of Court. Rule 35(7), reads:

'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.'

[2] The atmosphere of the adjudication of the application lies in the maxim that litigation pursues judicial truth; determined by fair process, honest input,

¹ Rule 35(3), reads: '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 sub-rule (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.'

and admissible evidence. The goal is to achieve justice. Justice lies in the ethos of the Constitution of the Republic of South Africa, 1996 (the Constitution).

[3] Litigation is not a game, and procedural rules exist to facilitate, not obstruct, the discovery of truth. The object of the rules of court is to secure the efficient, inexpensive and expeditious completion of litigation before the courts. Rampai J² is correct in that the rules are not an end in themselves. They are designed to ensure the fair, orderly and inexpensive resolution of disputes; not to trip litigants up or to obstruct the proper ventilation of real issues. Rules must be applied purposively and sensibly, not mechanically.

[4] A court retains a wide discretion to condone non-compliance where justice so requires. The goal is always the effective adjudication of real issues, not rigid technicality.

‘[18] ... The rules of engagement, must, therefore, be obeyed by the litigants. However, dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard or violation. Dogmatic adherence, just like flagrant violation, defeats the purpose for which the court rules were made. *The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of enhancing the civil justice system. The court rules are not an end in themselves.*’³ (Accentuation added.)

[5] Parties are required to plead with honesty and completeness, ensuring that no material facts are withheld. The discovery process serves to streamline litigation by mandating the disclosure of relevant documents. All participants owe a duty of candour to the court. Full and frank disclosure of relevant information is not optional.

² *Louw v Grobler and Another* (3074/2016) [2016] ZAFSHC 206 (15 December 2016) (*Louw*) paras 18 and 40.

³ *Ibid Louw*.

[6] Three vital issues arose in this application and the legal requirements on it will cause context to the adjudication of the disclosure. These are:

- (a) Section 34 of the Constitution.
- (b) Section 28 of the Constitution and the right of minor children to maintenance.
- (c) Redistribution of assets at divorce as regulated by s 7 of the Divorce Act 70 of 1979 (Divorce Act) read with the case of *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others*.⁴

[7] The central issue is whether the court can conduct the two-stage inquiry⁵ under s 7 of the Divorce Act without knowing the full financial history and status relevant to the division of the assets of both the applicant and respondent. The maintenance law relevant to the minor in *casu* presents a comparable dilemma.

[8] The parties are required to provide scrupulous, thorough and transparent disclosure, in strict accordance with the applicable laws governing disclosure on the issues relevant to this application. The facts of the case will create the context and guidance for adjudication.

⁴ *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* (CCT 364/21; CCT 158/22) [2023] ZACC 32; 2024 (1) BCLR 16 (CC); 2024 (2) SA 1 CC.

⁵ The respondent described this aptly in their heads of argument.

‘The Two-Stage Nature of Redistribution Claims

67. A claim for redistribution under section 7(3) of the Divorce Act 70 of 1979 involves two distinct stages, each governed by different subsections and each requiring different types of evidence.

68. Stage 1 is governed by section 7(4), which provides: "An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner."

69. This is the liability or threshold stage. The question at this stage is: did the claimant contribute to the maintenance or increase of the other party's estate? The burden of proof rests on the claimant to establish this contribution.

70. Stage 2 is governed by sections 7(3) and 7(5), which require the court to determine whether it would be "just and equitable" to order redistribution and, if so, to consider factors including "the existing means and obligations of the parties" in determining what assets should be transferred.

71. This is the quantum stage. The questions at this stage are: assuming contribution is proven, would redistribution be just and equitable in the circumstances? And if so, how much should be redistributed?

The facts and the rule 35(3) notice

[9] The parties are MB.M (the applicant/wife), a medical doctor in practise. SA.M (the respondent/husband) is the plaintiff in the divorce action, and he is also a medical doctor and self-employed. The application is resultant to what is evolving into an acrimonious divorce. The parties agree that the marriage has irretrievably broken down. It seems that there is a reasonable belief in the existence of the documents that is the subject of the application and that they are in the respondent's possession. The respondent did not deny this on oath as is permitted by the rules.⁶

[10] The parties were married to each other out of community of property without the accrual system, on 30 January 2010. The respondent seeks a decree of divorce and an order in terms of said antenuptial contract entered into and dated 26 January 2010.

[11] Together with her plea, the applicant filed a counterclaim wherein, in addition to a decree of divorce, she seeks an order for the redistribution of assets on the basis that during the subsistence of the parties' marriage, she contributed directly or indirectly to the growth of the respondent's estate.

[12] The respondent acknowledged, appropriately so, that given the minor child's needs and expenses, as well as the parties respective financial positions, means, income and earning capacity, it would be fair, reasonable, just and equitable that both parties contribute equally to the minor child's maintenance and upbringing.

⁶ *Tracklot General Trading (Pty) Ltd v Sethole and Another* (7406/2015) [2016] ZAGPPHC 214 (23 March 2016) paras 28 to 29.

[13] In his particulars of claim in the main action, the respondent seeks an order that he pays maintenance in the amount of R2 500.00 for their minor child and gives an undertaking to pay the child's school fees and related expenses, as well as medical and related expenses. The applicant, on the other hand, claims maintenance in respect of the minor child in the amount of R15 000.00 and that the respondent should still pay the minor child's medical and related expenses.

[14] The applicant claims that she has worked throughout the 15-year marriage, using her income for household needs, supporting their child, and enhancing their shared home, thereby reducing the respondent's expenses.

[15] The applicant took care of the majority of the household duties without assistance. She later employed a domestic worker whose salary was paid by her. The domestic worker assisted the applicant two days a week. The respondent was spared some expenses that he otherwise would have had to incur. Since 2017 to date, according to the applicant, and at the respondent's behest, the applicant has contributed significant funds to the Modupi Family Trust. The applicant is listed as a capital beneficiary and the respondent is both a capital and income beneficiary, as well as chairman and executive trustee with control of the trust. The trust owns the property Erf 2683, Bloemfontein, valued at R1 850 000.00 (Deed of Transfer TA 25/2024).

[16] It is the case for the applicant that during or about January 2021, the parties agreed to purchase immovable property that was to be registered in both their names and serve as their new communal home. With full knowledge of this arrangement, the respondent proceeded to unilaterally enter into a deed of sale with Baruk Wildlife Estate (Pty) Ltd for the purchase of Portion 7 of the Farm Radnor no. 2114, district Bloemfontein, Free State Province to the value

of R1 499 900.00. At all relevant times, prior to the receipt of the summons, the applicant was unaware that she did not feature as a party to the principal agreement concluded with Baruk Wildlife Estate (Pty) Ltd (Baruk). To accommodate the purchase of the immovable property, the applicant made contributory payments towards the purchase price through the vehicle of the trust and in some instances directly to Baruk and/or its nominated conveyancer, namely Van Wyk & Preller Attorneys.

[17] She entertained business colleagues at the parties' common home, acted as a hostess for the respondent's business associates, and accompanied the respondent to social functions with business associates. In this manner she assisted in his business enterprises. In para 5.4 of her counterclaim the applicant lists the assets in the respondent's estate known to her.

[18] In his plea to the counterclaim, the respondent, *inter alia*, denies that he holds any immovable property registered in his personal name; that the applicant made any financial contributions or provided any form of assistance towards the payment of home loans, transfer costs, or maintenance expenses in relation to the immovable property; that the applicant's conduct, as pleaded in the counterclaim, contributed directly or indirectly to the growth and/or increase of his estate.

[19] Alternatively, the respondent asserts that if the court determines the applicant's actions contributed to the growth of his estate and this should be considered in redistribution, then he likewise contributed to the growth of the applicant's estate. He paid off the applicant's medical school study loan, which was about R100 000.00, and supported the applicant both financially and emotionally throughout her studies. His contributions included, among other

things, examination and registration fees, costs for attending congresses, purchasing study materials, and annual HPCSA registration expenses.

[20] The applicant seeks extensive discovery of financial documents from three distinct categories of sources: The respondent's personal financial records; the Modupi Family Trust IT000745/2017(B); and four separate companies. The respondent challenges the application on several points, with the primary argument being that the requested documents do not pertain to any matters appropriately identified in the pleadings. Relevance is the key issue. The respondent's specific points of objection will be detailed hereunder.

[21] The rule 35(3) notice issued on 17 June 2025 states as follows:

'BE PLEASED TO TAKE NOTICE that the Defendant believes that there are, in addition to the documents discovered by the Plaintiff in his discovery affidavit, other documents and tape recordings (including copies thereof) which may be relevant to any matter in question in the aforesaid action, in the possession of the Plaintiff, which documentation, is more fully referred to hereunder:

1. Statement relating to any account held by any financial institution whatsoever in the name of the Plaintiff, including but not limited to the Plaintiff's current accounts, saving accounts and credit card accounts for the preceding 3 years.
2. Statements relating to any accounts held by any financial institution whatsoever in the name of the Plaintiff's companies and/or the Plaintiffs nominee and/or any Trust to which Plaintiff is a member or beneficiary, including but not limited to the current accounts, saving accounts; cheque accounts, investments, accounts, petrol card accounts and credit card accounts referred to above for the preceding 3 years.
3. Any and all documentation relating to the Plaintiff's income, from whatever source whatsoever, for the preceding 3 years, including copies of the Plaintiffs IRP5 submissions for the preceding 5 years:
4. Any and all documentation relating to the Plaintiff's monthly expenditure for the preceding 12 months;
5. Any and all documentation relating to the purchase of the following movable and immovable property, including but not limited to:

- 5.1. Any and all documentation relating to the purchase and/or sale of any motor vehicles owned by the Plaintiff;
 - 5.2 Any and all documentation relating to the purchase and/or sale of any immovable property in the name of the Plaintiff.
 6. Any and all documentation relating to the Plaintiff's life insurance, endowment, retirement annuities and short-term policies held by any insurance company in the name of the Plaintiff and/or the Plaintiff's practice and/or the Plaintiff's nominee, including but not limited to a certificate issued by such company indicating the value of the Plaintiff's right, title and interest in insurance policies;
 7. Financial statements for the following natural persons, trust and/or juristic persons for the previous 5 years:
 - 7.1 The Plaintiff;
 - 7.2. DR MODUPI company registration number 2020/084114/21.
 - 7.3 MODUPI MEDICAL company registration number 2015/191902/07.
 - 7.4 MVB AND PARTNERS company registration number 2020/041543/21.
 - 7.5 TANK OCCUHEALTH company registration number 2019/264410/07.
 - 7.6 MODUPI FAMILY TRUST with registration number IT000745/2017(B).
 8. Any and all documentation pertaining to any licences held in the name of the Plaintiff or any firearms, including but not limited to a copy of the Plaintiff's identity document.
 9. Any and all application forms completed by the Plaintiff for any overdraft facilities, bond facilities, lease facilities or hire purchase facilities held in the name of the Plaintiff and/or the Plaintiff's practice and/or Plaintiff's companies and/or the Plaintiff's nominee, and which application forms were submitted to any financial institution whatsoever.
- BE PLEASED TO TAKE NOTICE FURTHER that the Defendant requests the Plaintiff to deliver to the Defendant, within (5) FIVE DAYS from date of service of this Notice, a Notice stating a time when the abovementioned documents may be inspected by the Plaintiff. In the alternative, the Defendant calls on the Plaintiff to state under oath within (10) TEN DAYS, that such documents are not in the Plaintiff's possession, in which event the Plaintiff shall state the whereabouts, if known to the Plaintiff.'

Section 34 of the Constitution

[22] Section 34 states that:

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

[23] Section 34 is a foundational procedural right underpinning the rule of law. *It prohibits self-help and arbitrary decision-making.* Section 34 gives the applicant the right to bring the matters of redistribution of assets and maintenance to court. The right to have disputes of distribution of assets and maintenance resolved by a fair public court hearing *belongs to the applicant and in the main action, not in this application.* This Court’s role is to determine whether the requested information meets legal disclosure requirements. These issues will be addressed further hereunder.

Maintenance law⁷

[24] Section 28 of the Constitution outlines the rights of children and constitutes a foundational element in the domains of family law, child justice, maintenance, and the care and protection of minors. Section 28 overrides competing interests and applies across all areas of law:

‘A child’s best interests are of paramount importance in every matter concerning the child.’

[25] Relevant to this case is that the respondent must declare his financial means in total and unconditionally for maintenance purposes. The issue to be determined is whether the relevant means of the parties should be considered as those from the past, present or future, or as a combination thereof. The matter at hand also concerns the definition of ‘financial means’ in relation to maintenance obligations. *Crucial is that maintenance claims can only really be determined once the division of assets have been settled.*

⁷ B Clark *Persons and Family, Handbook of the South African Law of Maintenance*, Part A: Maintenance, Chapter 1 Support systems, 1.2 Support systems, Last Updated: Fifth Edition 2024. PART B. LexisNexis electronic version 2025.

[26] Financial means refer to a person's financial resources. It includes not only capital assets but also income from employment and other sources as well as other sources to which a person has access which is not in his or her possession. Clark⁸ described the duty to disclosure and relevant means with reference to case law as follows:

'During a maintenance enquiry, there should be full disclosure of the financial position of the parties. Once legal liability to pay maintenance is established, a person can be compelled to give evidence on her or his means so that the amount of maintenance can be established. Both parties can and should be questioned about their assets, earnings and expenses and, when relevant, about their needs and those of their children and *can be compelled to lay documentary proof of these matters before the court.*' (Accentuation added.)

[27] In *K v K*⁹ it was ruled that a spouse's means include more than just cash; it covers assets (like a home that could generate income), earning capacity, and other access to funds. Courts have wide discretion under s 7(2) of the Divorce Act to decide on maintenance, focusing on fairness for each unique case. Determining maintenance can be challenging before assets are divided, as division affects potential income, so these factors often intertwine. While conduct is not the focus of divorce itself, actions affecting finances remain relevant for maintenance. A holistic view of spouses' financial situations, moving beyond simple income to encompass all potential financial resources is vital to ensure equitable outcomes in divorce matters.

[28] Maintenance inquiries are inquisitorial and courts may actively investigate all finances.

[29] The Maintenance Act 99 of 1998 (Maintenance Act) gives practical effect to the constitutional right. The key principles are that both parents have

⁸ Clark at 6.2.6.

⁹ *K v K* 1986 (4) SA 616 (E) at 630B.

a duty to maintain a child. A court or maintenance officer considers actual and potential resources, not only current income.

[30] The list of what defines means or income is extensive and consequently, must the disclosure be extensive. There is no *numerus clausus*, but it entails:

- (a) Firstly, income such as salary and wages, bonuses, commissions, overtime, business income, rental income, dividends and interest.
- (b) Secondly, assets such as property, vehicles, investments, savings and trust benefits.
- (c) Thirdly, earning capacity such as qualifications and skills, employment history, voluntary unemployment or underemployment.
- (d) Fourthly, reasonable and necessary expenses and liabilities such as housing and utilities, transport, medical aid, existing maintenance obligations and debt repayments. Luxury or non-essential expenses are usually disallowed when weighed against a child's needs.
- (e) Fifthly, the standard of living principle. A child is entitled to share in the standard of living of both parents, not merely to subsistence support. Higher-earning parents may be ordered to contribute more; the child's lifestyle should, as far as possible, reflect that of the parents.

[31] Parents have a duty of disclosure. Parents must make full and frank disclosure of their financial circumstances. Failure may result in adverse inferences, adjusted maintenance upwards, cost orders and contempt proceedings. The Maintenance Act is unambiguous on so-called maintenance investigations and disclosure.¹⁰

¹⁰ Clark at Part B: Enforcement of duty to support.

[32] A refusal to disclose income from corporations and trusts may be regarded as an attempt to hide said income and it is not necessary for an ‘alter ego’ to be pleaded. In *Badenhorst v Badenhorst*¹¹ (*Badenhorst*) the Supreme Court of Appeal (SCA) made it clear that where a spouse controls entities such as trusts or companies and fails to make full disclosure, the court is entitled to look beyond the formal structure. *The respondent’s failure to give a full account of the trust’s affairs justifies the inference that the trust was used to hold assets which in reality formed part of his estate.* Non-disclosure itself may justify the conclusion that assets or income are being concealed. This is even without a pleaded alter ego claim.¹² In essence the *Badenhorst* case applied ss 7(3) – (5) of the Divorce Act, rather than any remedy for abuse of the trust form.

[33] The applicant and the respondent will have to declare their income and disclose it completely and from all sources before the divorce trial commences.

¹¹ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) paras 9, 13 and 15-16.

¹² B Smith Driving divorce: ‘Navigating trusts as a vehicle for matrimonial asset division’ *De Rebus* in 2024 (June) DR 16 <https://www.derebus.org.za/driving-divorce-navigating-trusts-as-a-vehicle-for-matrimonial-asset-division/> on 28 December 2025. See also B Smith ‘The “leading case” that continues to confound: *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) and the need, in response to Justice Binns-Ward, for a nuanced approach to piercing the veneer of abused trusts at divorce (part 2)’ *TSAR*.

Section 7 of the Divorce Act¹³

[34] The right to apply for redistribution in terms of s 34 of the Constitution is a reality. The appropriateness to the divorce in *casu* is for the court in the main action to decide. The right does however exist. Sobantu¹⁴ said it best and I align with her conclusion that the Constitutional Court's suspension of the

¹³ 7. Division of assets and maintenance of parties. —

(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

(3) A court granting a decree of divorce in respect of a marriage out of community of property—

(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;

(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988; or

(c) entered into in terms of any law applicable in a former homeland, without entering into an antenuptial contract or agreement in terms of such law, may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party.

(3A) A court granting a decree of divorce in respect of a Muslim marriage, may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party.

(4) An order under subsection (3) or (3A) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) or (3A), the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account—

(a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3) (b) of this section may have in terms of section 22 (7) of the Black Administration Act, 1927 (Act No. 38 of 1927);

(aA) any contract or agreement between the parties in a Muslim marriage, where the husband is a spouse in more than one Muslim marriage;

(b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;

(c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and

(d) any other factor which should in the opinion of the court be taken into account.⁷

¹⁴ V Sobantu 'One small step for women, one giant leap towards equality: The application of the *EB v ER* judgment' (2025) *De Rebus* at DR 44.

offending clauses in s 7(3) of the Divorce Act meant that the remedy would be open to adjudication in divorce proceedings which have not been finalised until Parliament enacts legislation to bring the redistribution of assets proviso in line with the Constitution. This is what she surmised and, correctly so, with reference to *H.C.C v C.C.*¹⁵

‘On 10 October 2023, the Constitutional Court delivered a landmark judgment declaring s 7(3) of the Divorce Act 70 of 1979 to be unconstitutional, violating the right to equality on the grounds of gender and marital status and the right to dignity. The court noted that in the *EB v ER NO and Others and a Similar Matter* 2024 (2) SA 1 (CC) judgment, it was held that s 7(3) of the Divorce Act should include spouses who entered into a marriage out of community of property without accrual to request redistribution of assets where a spouse has contributed to the growth of the other spouse’s estate.

This judgment did not mean that all spouses who are less financially secure in divorce proceedings are now automatically entitled to a redistribution of their wealthier spouse’s assets, but rather affords a remedy to those marriages where the accrual system was excluded from applying to the marital regime, and spouse A (usually the woman) has contributed to the growth of spouse B’s estate. The spouse will still have to prove the contribution before the court in the divorce proceedings in order for the court to make a just and equitable order.’

[35] The Full Bench of this division, in *R.V.B. v J.V.B.*,¹⁶ confirmed that the interim ‘strike-out’ order by the Constitutional Court applies to all marriages out of community of property without the accrual system not terminated by divorce prior to 10 October 2023.

[36] For a court to determine the contributions of the parties, it is essential to disclose the changes in their financial status; the growth or not and not just the physical payments are relevant. The contributions are tangible and intangible. Expert testimony may be required to accurately determine these contributions.

¹⁵ *H.C.C v C.C.* (7225/2022) [2024] ZAGPPHC 758; 2025 (1) SA 426 (GP) (31 July 2024).

¹⁶ *R.V.B. v J.V.B.* [2024] ZAFSHC 378; 2025 (4) SA 297 (FB) para 23. In *M.S v E.S.* (3091/2021) [2025] ZAMPMBHC 96 (23 September 2025) paras 36-41, it became clear that whether the applicant will ultimately succeed with her claim is irrelevant for the purpose of discovery.

This falls within the ambit of the first s 7–stage already. The purpose of the application for discovery is basically to determine the respondent’s financial capacity and how the contribution of the applicant affected it. Disclosure is relevant to both stages.

[37] The respondent filed a notice of objection on 26 June 2025 and refuses to make the information available. I will deal with this hereunder in detail.

The law on discovery and objections

Introduction

[38] In broad strokes the respondent accuses the applicant of putting ‘the cart before the horse’—demanding extensive discovery to build a case with *no bona fide* prospects of success rather than investigating a viable claim.

(a) The applicant, according to him, does not have a prospect of success on the claim of redistribution of assets and ‘courts should take an “eye-view” of whether redistribution has realistic prospects before granting extensive discovery’.

(b) It is his case that courts will only intervene in nuptial contracts to prevent ‘seriously unfair’ or ‘unconscionable’ outcomes. The applicant’s substantial wealth, professional independence, and beneficial trust interest negate any unfair imbalance.

(c) Where both parties worked and maintained separate finances throughout the marriage, the financial outcomes of their separate estates remain equitable without judicial intervention. The parties’ respective ‘means’ strongly favour maintaining the contractual separation given both parties’ professional independence.

(d) Discretion of the court: The Court has discretion whether to enforce discovery, predicated on relevance and prevention of abuse.

- (e) Anti-torment principle: The Court must guard against discovery used as ‘torment’ to pressure the other party.
- (f) Contractual choice protection: Discovery should not be granted to achieve what the wealthier party deliberately excluded by contract.
- (g) Good faith requirement: Discovery must serve legitimate litigation purposes and not circumvent discovery obligations. The s 7(3) factors, properly applied, support respecting the deliberate contractual choice between financially independent professionals.

General

[39] Erasmus¹⁷ explains the core of discovery in his commentary. He wrote with reference to case law and legislation that:

- (a) The object of discovery was stated in *Durbach v Fairway Hotel Ltd* to be ‘to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated’.
- (b) Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for, it can be and often is a devastating tool.
- (c) The underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries the duty to put those documents in proper order for both the benefit of his adversary and the court in anticipation of the trial action.
- (d) Discovery assists the parties and the court in discovering the truth and, by doing so, helps towards a just determination of the case. It also saves costs.

¹⁷ D E van Loggerenberg and E Bertelsman, *Erasmus Superior Court Practice* Vol 2 at D1-458 RS 22, 2023 to RS 22, 2023, D1 Rule 35-3 specifically D1 Rule 35-1 (Juta electronic version, 2025). Also see D Harms *Civil Procedure in the Superior Courts* (electronic version, 2025, SI-50) at B23.2.

- (e) But it must not be abused or called in aid lightly in situations for which it was not designed, or it will lose its edge and become debased.
- (f) The employment of discovery should be confined to cases where parties are properly before the court and are litigating 'at full stretch'. The essential feature of discovery is that the person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established.
- (g) Discovery is not intended to be used as a sniping weapon in preliminary skirmishes.
- (h) Discovery under rule 35 is a procedure whereby a party to an action can:
 - i Require his opponent to specify on oath the documents and tape recordings in his possession or under his control which relate to the action (subrule (1)); and
 - ii Inspect and copy such documents and tape recordings (subrule (6)).

Relevance

[40] *Relevance as an issue in discovery is not determined on one party's view of the other's prospect of success.* It is defined on the dispute that flows from the pleadings. The test is wide:

'The requirement of relevance has been dealt with in several judgments. It is not necessary for the party relying on rule 35(3) to prove that the additional documents are relevant, but only that these may be relevant to any matter in dispute. The documents required by an applicant to be discovered and/or produced may, as authority has it, lead to a so-called 'train of enquiry' in order to establish the truth.'¹⁸

¹⁸ *Jonker v Land and Agricultural Development Bank of South Africa* (2683/2020) [2024] ZAFSHC 196 (19 June 2024) para 16.

[41] In the depiction of his defence the respondent relies heavily on relevance. Counsel refers to the ‘may be relevant’ and the ‘prohibition against fishing’. In the instance the financial status of the parties and the manner it was accrued is directly relevant. The battle lines have been drawn and there is not any return. The court requires the information to come to a just and equitable solution. It is not an issue of may be relevant or even fishing anymore. The claims in the main action are clear. It is now a question of evidence for adjudication; evidence that can cause the case to go in favour of any of the parties.

[42] The trial in the main action must not be conflated with the application for disclosure. It is not for this Court to decide if the evidence required to be disclosed is admissible; it must be relevant in the least.

[43] Navsa ADP (Dlodlo and Nicholls JJA, Carelse and Rogers AJJA concurring) in *Democratic Alliance and Others v Mkhwebane and Another*¹⁹ did a thorough depiction of the law on discovery and specific relevance and concluded at para 41:

(a) It appears to be clear that documents in respect of which there is a direct or indirect reference in an affidavit or its annexures, that are relevant, and which are not privileged, and are in the possession of that party, must be produced.

(b) The basis for assessment is of aspects or issues that might arise in relation to what has thus far been stated in the pleadings or affidavits and possible grounds of opposition or defences that might be raised.

(c) The question to be addressed is whether the documents sought might have evidentiary value and might assist the litigants in their defence to the relief claimed in the main case.

¹⁹ *Democratic Alliance and Others v Mkhwebane and Another* (1370/2019) [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) (11 March 2021).

(d) Supposition or speculation about the existence of documents or tape recordings to compel production will not suffice. In *casu*, the respondent does apparently have the information listed in the applicant's rule 35(3) notice. Had he not possessed it, he would have stated so under oath, as allowed by the subrule. He did not assert anything of that sort. He did not rely on any privilege.

(e) Where it is relevant, it must be produced.

(f) A court will not only order discovery in application proceedings in exceptional circumstances.

Confidentiality

[44] Confidentiality is not a basis to avoid discovery. Discovery in litigation trumps confidentiality and there is an evidentiary burden on a litigant claiming confidentiality to prove same. Confidentiality must not be commingled with the corporate and trust veil-principle.

[45] In *Crown Cork & Seal Co Inc & Another v Rheem South Africa (Pty) Ltd & Others*,²⁰ Schutz AJ stated, in relation to confidentiality issues in the context of discovery of documents, as follows:

'In my view it is open to a South African Court to adopt the English practice. Nothing has been pointed out that persuades me that the English practice is based upon any provision in the English Rules that is not contained in ours. *Then, our Courts have a discretion in enforcing Rule 35(7).* The crux of the matter is the reasons which underlie the practice. *No less in South Africa than in England does the conflict arise between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halts.* And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to *impose appropriate limits* when satisfied that there is a real danger that if this is not done an unlawful

²⁰ *Crown Cork & Seal Co Inc & Another v Rheem South Africa (Pty) Ltd & Others* 1980 (3) SA 1093 (W) 1099H-1100C.

appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. *But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part.*' (Accentuation added.)

[46] Further, in *City of Cape Town v South African National Roads Authority and Others*,²¹ the SCA stated as follows:

'Discovery impinges upon the right to privacy of the party required to make discovery. According to Lord Denning MR [in Riddick v Thames Board Mills Ltd 1977, 3 All ER 677 (CA) at 678] "compulsion is an invasion of a private right to keep one's documents private". But while there is an interest in protecting privacy there is also the public interest in discovering the truth. Litigants must accordingly be encouraged to make full discovery on the assurance that their information will only be used for the purpose of the litigation and not for any other purpose. In that sense ... the interests of the proper administration of justice require that there should be no disincentive to full and frank discovery.' (Accentuation added.)

Discovery and piercing the veil²²

[47] Discovery and veil-piercing-relief is often conflated in redistribution of assets and maintenance cases. A disclosure (or discovery) application is procedural and interlocutory. Its purpose is to enable a party to identify the true extent of the respondent's estate and properly formulate or prove a s 7(3) redistribution claim.

[48] At the disclosure stage, an applicant is not required to establish alter ego or veil-piercing; only the potential relevance of the information is necessary rather than definitive proof. Courts tend to emphasise fairness over procedural

²¹ *City of Cape Town v South African National Roads Authority Limited and Others* (20786/2014) [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA); 2015 (5) BCLR 560 (SCA) (30 March 2015) para 37.

²² See the discussion above.

technicalities, so the absence of specific pleadings does not preclude disclosure when undisclosed assets are at stake. As this is an interlocutory discovery application, facts indicating control or benefit are sufficient—whether alter ego exists is determined at trial and not as a threshold for pleading. Refusing disclosure would compromise s 7(3) and may enable asset concealment. Allegations of control, benefit, or asset commingling are adequate at this stage; any finding of alter ego will follow upon disclosure. These principles equally apply to maintenance enquiries for comparable reasons.

Conclusion

[49] It makes legal sense that the applicant and respondent declare *bona fide* and accurate all information relevant to their personal financial status. The corporate veil and trust form becomes peripheral and remains intact.

[50] An unequivocal reality here in the application for disclosure is that it can never be a rehearsal of the main action. It is not for this Court to declare on the issues in the principal divorce action. This Court's obligation is to interpret disclosure laws and decide on the unique circumstances of this case, considering the relevance of the three previously mentioned factors namely access to courts, maintenance of children and redistribution of assets as it is interpreted by the Constitutional Court.

[51] Mini pre-trials intended to determine the legality of claims regarding the division of assets, as well as the method of asset distribution under s 7(3) of the Divorce Act, are not permitted.²³ Additionally, conducting a preliminary inquiry into maintenance matters is prohibited.

²³ In *M.S v E.S* (3091/2021) [2025] ZAMPMBHC 96 (23 September 2025) paras 30 to 32 it became clear that whether the applicant will ultimately succeed with her claim is irrelevant for the purpose of discovery.

[52] This interlocutory application aims to ensure a fair trial. The court cannot resolve the main issues without complete and honest disclosure of both parties' finances and the child's financial needs. Both parties must provide this information, and the respondent should be compelled to disclose it under rule 35(3), read with rule 35(6).²⁴

[53] Context is everything as is stated in the case of *Lutzen v Knysna Municipality*.²⁵

‘[20] Instead, the defendant emphasizes that courts are, as a general rule, reluctant to go behind a discovery affidavit which is regarded as conclusive. This is correct. However, context is everything. That general rule operates unless it can be shown from, amongst other things, the discovery affidavit, that there are reasonable grounds for supposing that the party has or has had other relevant documents or tape recordings in his possession or power, or has misconceived the principles upon which the affidavit should be made. The Notice in question here is in terms of Rule 35(3). It expressly states that the plaintiff believes that there are reasonable grounds for supposing that the defendant has additional documents in its possession not yet discovered. In that context, the general rule relied upon by the defendant cannot operate in its favour. In any event, the further context is that the purpose of Rule 35(3) is not delivery of a discovery affidavit - which the defendant now argues should be seen to be the end of its compliance - where the general rule implored by the defendant could be implored. That is another reason the general rule cannot assist the defendant here.

...

²⁴ Rule 35(6) reads: ‘Any party may at any time by notice in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of sub-rules (2) and (3). Such notice shall require the party to whom notice is given to deliver within five days, to the party requesting discovery, a notice in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of such party's attorney or, if such party is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude such party from using it at the trial, save where the court on good cause shown allows otherwise.’

²⁵ *Lutzen v Knysna Municipality* (695/2020) [2023] ZAWCHC 100 (8 May 2023) paras 20 and 22.

[22] Under the circumstances discussed above, the plaintiff is entitled to obtain an order enforcing compliance with the Rule. It does not assist the defendant to claim that any order will breed confusion or will be unenforceable. It is the defendant that has failed to meet the requirements of the Rules...'

[54] The final veil-piercing is an issue for the trial in the main action. It will be allowed for now and for discovery.

Costs

[55] Costs will follow the cause, and the respondent shall be responsible for the costs in this application.

[56] **Order**

1 The respondent is ordered to comply with the applicant's notice in terms of rule 35(3) by making the documents listed therein available for inspection as contemplated in rule 35(6), within 10 days of the order of this Court.

2 The respondent shall pay the costs of this application, costs to be taxed on scale B.

 
M OPPERMAN
JUDGE OF THE HIGH COURT

Appearances

For the applicant: M S Mazibuko

Instructed by: Armade & Company Incorporated,
Bloemfontein

For the respondent: L B J Moeng

Instructed by: Phatshoane Henney Attorneys,
Bloemfontein.