



**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

[REPORTABLE]

Case No:**4366/2016**

Before the Hon. Ms Justice Slingers

Hearing: **3 June 2020**

Judgment Delivered: **24 June 2020**

In the matter between:

A J

Applicant

and

J J

First Respondent

J J N.O.

**in his capacity as Trustee for the time being of the
Tafika Trust**

Second Respondent

**CHRISTEL SADLER N.O. in her capacity as
Trustee for the time being of the Tafika Trust**

Third Respondent

THE MASTER OF THE HIGH COURT,

WESTERN CAPE DIVISION

Fourth Respondent

L C ABELHEIM LIMITED

**(in his capacity as the Mauritian Trustee of the
Tafika Trust, Mauritius)**

Fifth Respondent

JUDGMENT

SLINGERS J

INTRODUCTION

- [1] On 6 December 1980 the applicant and the first respondent were married to each other, out of community of property and the marriage still subsists. On 14 March 2016 the applicant instituted divorce proceedings wherein she pleaded *inter alia* that the assets of The Tafika Trust registered with the Master of the High Court under IT number 5317/2007 (**“the Tafika trust”**) and the Tafika Trust Mauritius, (herein after collectively referred to as **“the trusts”**) are beneficially owned and controlled by the first respondent, do not constitute assets owned by the trusts and form part of the first respondent’s estate. Furthermore, the applicant pleads that the trusts are the alter ego of the first respondent who abused the trust’s form by utilising the trusts as vehicles to accumulate personal wealth.
- [2] In pleading to the particulars of claim, the first respondent admits that he financed the acquisition of certain assets of the trusts, caused the growth in value of certain of the assets of the trusts and assisted in the maintenance and running costs of certain of the assets of the trusts. The first respondent denies that the trusts were beneficially owned and controlled by him or that they form part of his estate. Furthermore, the first respondent denies that he was utilising the trusts as vehicles to accumulate personal wealth.
- [3] It is evident from the pleadings in the divorce action that the disputed issues include whether or not it would be just and equitable for the first respondent to be directed, in terms of section 7(3) of the Divorce Act 70 of 1979, as amended (**“the Divorce Act”**), to transfer to and in favour of the applicant an amount

equal to fifty percent of the difference between the net value of the assets of the parties respective estates. Related hereto is the disputed issue of whether or not the net value of the trusts' assets held by the trustees at the time of the dissolution of the parties' marriage should be added to the net value of the first respondent's personal estate for the purposes of determining the applicant's claim in terms of section 7(3) of the Divorce Act read with subsections 7(5)(a) and (d) thereof.

[4] To this end the applicant seeks the following relief in the divorce action:

- i) an order declaring that the assets of the trusts are held and controlled by the first respondent in his personal capacity and for his personal benefit;
- ii) an order in terms of section 7(3) of the Divorce Act directing the first respondent to pay to the applicant an amount equal to fifty percent of the difference between the net value of the assets (including those of the trusts) in the parties respective estates;
- iii) as against the second to fourth respondents and, subject to the recognition of any order granted by the court against the fifth respondent in Mauritius, and in the event that the first respondent holds insufficient assets in his personal capacity to satisfy the applicant's claim in terms of section 7(3) of the Divorce Act an order:
 - a) directing the second to the fourth respondents and the fifth respondent within 60 days of the granting of the relief sought to transfer to the first respondent, in his personal capacity and at their costs, the assets held by them in their names; and

- b) directing the respondents to sign all documents and take all steps which may be necessary to give effect to prayer (iii)(a) and in the event of the respondents failing to do so within 14 days of written demand, an order authorising the Registrar of the court to sign all necessary documents on their behalf; and
- c) in respect of the fifth respondent and upon recognition of the order by the Mauritian courts, an order directing the registrar of that court or his equivalent to sign all such documentation on its behalf.

[5] The applicant seeks the production of various documents from the first respondent which she alleges are material to the quantification of her claim in terms of section 7(3) of the Divorce Act. Consequently, she instituted this interlocutory application in accordance with the provisions of Uniform Rule 35(11) for the production of the following categories of documents:

- i) statements in respect of offshore banking and investment accounts held by the first respondent for the period 1 January 2011 or the date of opening of such account or investment, until date of reply;
- ii) statements in respect of offshore banking and investment accounts held by the Tafika Trust for the period 1 January 2011 or the date of opening of such account or investment, until date of reply;
- iii) statements in respect of offshore banking and investment accounts held by the Tafika Trust Mauritius for the period 1 January 2011 or the date of opening of such account or investment, until date of reply;

- iv) statements in respect of offshore banking and investment accounts held by the entities set out on annexure **A** to annexure **Y (“the entities”)**¹ for the period 1 January 2011 or the date of opening of such account or investment, until date of reply;
- v) documentation submitted on behalf of the first respondent, the trusts or the entities to the South African Reserve Bank (**“SARS”**), the Financial Services Department or the South African Revenue Service in respect of any foreign exchange transactions during the period 1 January 2011 to date of reply, such documentation to include applications and documents submitted by any bank or other financial institution, correspondence relating to the transactions and documentation reflecting the outcome of any such applications;
- vi) credit finance applications submitted by the first respondent, the trusts or the entities to any financial institution to secure credit whether as principal debtor or surety in respect of any credit finance liability secured outside of the jurisdiction of the South African High Court;
- vii) documentation, other than as requested above, reflecting any offshore investments held by the first respondent, the trusts or the entities during the period 1 January 2011 to date of reply;
- viii) documentation relating to the Tafika Trust Mauritius;
- ix) documentation submitted for or on behalf of the first respondent or the trusts or entities in respect of compliance requirements in any jurisdiction pursuant to the OECD Common Reporting Standards (or Standard for

¹ A copy whereof is attached hereto as **“A”**.

Automatic Exchange of Financial Account Information) and related legislation and regulations or regulatory requirements in the relevant jurisdiction;

- x) documentation relating to the entities;
- xi) documentation, to the extent that any of the entities are not incorporated but rather investment funds; and
- xii) documentation in respect of the immovable property in respect of which the first respondent is a co-owner and which is situated at [...], Florida, United States.

[6] As can be seen from the categories of documents listed above, the applicant seeks the production of documents, including credit finance applications, submitted on behalf of and by the trusts and documentation reflecting offshore investments held by the trusts and documents relating specifically to the Tafika Trust Mauritius. Although the trustees of the trusts are cited as parties in the main divorce action no relief is sought against them in this application. The applicant seeks an order directing only the first respondent to produce, under oath, the requested documents as well as a costs order against him on the scale as between attorney and client.

[7] The first respondent opposes the application and avers that it is an abuse of the court process that stands to be dismissed with costs. In opposing the application the first respondent states that *'numerous documents sought by the applicant*

*either do not exist or are not in my possession or under my control, or are in her possession and...*²

RULE 35(11)

[8] Rule 35(11) reads as follows:

'The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in his power or control relating to any matter in question in such proceedings as the court may think meet, and the court may deal with such documents or tape recordings, when produced, as it thinks meet.'

[9] As can be seen from the nature of the first respondent's opposition and the wording of Rule 35(11), the concept of *'in his power or control'* is central to the determination of this application. If it is found that the documents sought are under the first respondent's power or in his control, then he may be directed, in accordance with the provisions of Rule 35(11), to produce same.

[10] American courts have long grappled with this notion of being *in control* of documents and have adopted three main standards to determine whether or not a party controls documents and is therefore obliged to produce them for purposes of litigation. These are (i) the legal right standard, (ii) the legal right plus notification standard and (iii) the practical ability standard.³

² In opposing this application the first respondent has not disputed the relevancy of the requested documents. Consequently, it is unnecessary in this judgment to determine whether or not the requested documents should be disclosed based on relevancy.

³ *'Possession, Custody and Control' Tackled by the Sedona Conference*, August 29, 2016

- [11] In terms of the legal right standard a party is deemed to be in possession, custody or control of documents if he/she is in actual possession, custody or control thereof or has a legal right to obtain the documents.⁴
- [12] In terms of the legal right plus notification standard, a party is deemed to be in possession, custody or control of the documents if he/she has possession, custody or control of the documents to which he/she has a legal right. If a party does not have a legal right to obtain the documents requested in discovery, but knows a third party possess them he/she must advise the requesting party that the third party has the documents.⁵ This position is similar to the position set out in Rule 35(3) where a party believes that there are, in addition to the documents disclosed, other documents which may be relevant to any matter in question in the possession of the other party thereto and gives notice to such party to make same available. In accordance with the provisions of Rule 35(3), in those instances where the documents are not in a party's possession or custody, that party is then obliged to state the whereabouts of such documents, if known.
- [13] In terms of the practical ability standard, a party is deemed to be in control of the documents and is obliged to discover same if he/she has the practical ability to obtain them.⁶ During the hearing of the application Advocate Buikman SC, for the applicant, argued that the respondent has demonstrated an ability in the past to produce documents pertaining to the Tafika Trust Mauritius and as such he should be legally obliged to produce documents pertaining thereto in terms of Rule 35(11). This argument clearly favours the practical ability standard.

⁴ *Kickapoo Tribe of Indians v Nemaha Brown Watershed Joint Dist. No. 7*, 294 F.R.D. 610, 613 (D Kan.2013)

⁵ *Lynn v Monarch Recovery Mgmt.*, 285 F.R.D. 350 (D.Mol.2012)

⁶ *Tomlinson v El Paso Corp.*, 245 F.R.D. 474 (D.Colo.2007)

[14] The issue of whether or not a party is in control of documents and therefore obliged to disclose same during litigation is also encountered in England and Wales. Civil Procedure Rule 31.8 for England and Wales sets out the duty of a party to disclose documents which are or have been in a party's control and reads as follows:

'31.8

- (1) *A party's duty to disclose documents is limited to documents which are or have been in his control.*
- (2) *For this purpose a party has or has had a document in his control if –*
 - (a) *It is or was in his physical possession;*
 - (b) *He has or has had a right to possession of it; or*
 - (c) *He has or has had a right to inspect or take copies of it.'*

[15] In the matter of *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 (18 January 2012) (**"North Shore"**), the Court of Appeal (Civil Division) for England and Wales comprehensively set out the law pertaining to the issue of control.

[16] *North Shore* revisited the old rules of discovery in terms whereof a party was required to discover if the documents were in his/her possession, custody or power. It went on to quote Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd* 1980 1 WLR 627 at 635 who interpreted power as being '*a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else.*'

[17] Furthermore, *North Shore* approved of Shaw LJ's observation that a document can be said to be in the power of a party for the purposes of disclosure only if, at the time and in the situation which obtains at the date of discovery, that party is, on the factual realities of the case virtually in possession or otherwise had a

present indefeasible legal right to demand possession from the person in whose possession or control it is at that time.

- [18] Whether or not a party's ability to obtain documents could translate into that party being obliged to disclose same for discovery purposes was also considered by *North Shore* which quoted Floyd J in *Schlumberger Holdings Limited v Electromagnetic Geoservices AS*⁷ who reasoned that:

"I accept that the mere fact that a party to litigation may be able to obtain documents by seeking the consent of a third party will not of its own be sufficient to make that party's documents discloseable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant."

- [19] Thus, the ability of a party to obtain documents does not necessarily render that party in control of the documents and consequently obliged to discover same during litigation. However, each case has to be evaluated on its own facts to determine whether or not a party is in control of the documents. In determining whether or not the requested documents are in the physical possession or in a litigant's control, the court may have regard to the true nature of the relationship between the third party and the litigant as it may be that the third party in possession of documents is for all practical purposes the agent of the litigant, in

⁷ [2008] EWHC 56 (Pat)

which circumstances it can be accepted that the litigant is in control of that document and have to make it available for discovery.⁸

[20] The general position in England and Wales closely resembles the legal right standard set out above. However, it allows for each case to be evaluated on its own facts to establish whether or not a party can be said to be in control of the requested documents.

[21] In South Africa, the concept of *in his/her power or control* as used in Rule 35(11) is not defined generally in the Uniform Rules of Court nor in Rule 35 itself.

[22] In *Ramakarane v Centlec (Pty) Ltd*⁹ the court was called upon to widen the meaning of the word '*possession*' as used in Rule 35(3) to include those situations where a party is not in actual physical possession of the documents, but which, according to the applicant, is readily available to the respondent from relevant third parties. Therefore, the court was called upon to widen the concept of *possession* to include the ability to obtain the requested documents. After a thorough analysis of Rule 35 that included the application of the legal principle of interpretation as encapsulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁰ the court decided against widening the meaning of *possession* as used in Rule 35. It reasoned that the purpose of Rule 35, and the intention of the legislator, was not to oblige a party to search for and obtain documents that were previously in his or her possession in order to disclose and make same available for inspection. All that is required of a party is for that party to specify when the documents were last in his/her possession or power, and what has become of those documents and in whose possession they are.

⁸ *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 (18 January 2012) at paragraph 40

⁹(4907/2006) [2016] ZAFSHC 47 (18 Feb 2016)

¹⁰ 2012 (4) SA 593 (SCA) at para 18

- [23] In *Loureiro and Others v Invula Quality Protection (Pty) Ltd*¹¹ the court was called upon to consider whether or not a party, under the rules of discovery, could be required to approach SARS to obtain his tax assessments and tax returns in order to make them available to the requesting party. Furthermore, it had to consider whether or not the fact that a party could procure his tax assessments and returns from SARS rendered them under his control or in his power even if he was no longer in physical possession of them.
- [24] In determining this issue, the court analysed the words *control* and *power* and found them to have a wide connotation. It found that *control* meant something different to possession and that *power* suggests an even wider scope than *control* which includes the function or power of directing. It also found that *power* includes the ability to effect something.
- [25] After having regard to the provisions of section 69(6) of the Tax Administration Act 28 of 2011, the court held that as a taxpayer is not only empowered to request his/her tax information from SARS but is also able to authorise SARS to make the information available to another person, the information is within his/her power.
- [26] As the taxpayer had a legal right to his tax information and could direct SARS to make it available to another party, it was found that the tax returns and assessments remained within his power. The approach adopted in *Loureiro and Others v Invula Quality Protection* strongly resembles the legal right standard and the approach adopted in England and Wales.
- [27] Having regard to:

¹¹ (15228/2009) [2016] ZAGPJHC 396 (8 July 2016)

- i) the reasoning by the court in *Ramakarane* which resulted in the court's refusal to widen the meaning of the concept of *possession* as used in Rule 35;
- ii) the analysis of the concepts of *power* and *control* by the court in *Loureiro*;
- iii) the caution against converting an ability to obtain documents into a legal obligation to disclose same in *North Shore*¹²; and
- iv) the fact that ordering a party to disclose documents which he/she may or may not be able to obtain could result in an order possibly being *de facto* impossible to implement and could expose not only the offending party to contempt proceedings but could also expose the court order to ridicule¹³,

I am of the view that the phrase '*in his/her power or control*', as used in Rule 35(11), refers to documents which are physically in a party's possession and/or to which a party has a legally enforceable right to access. Furthermore, the phrase '*in his/her power or control*' does not include a party's ability to obtain same without a legally enforceable right thereto. It follows that if a party is physically in possession of the requested documents he can direct how the documents can be used as well as have the power or control to direct who is given access thereto. Furthermore, if a party has a legally enforceable right to access the documents then it follows that not only can that party direct that the documents be made available to him/her but that he/she can also direct and/or authorise that the documents be made available to a third party. However, where a party is not in physical possession of the documents and/or has no legally enforceable right thereto, he/she will not be able to direct how the

¹² by quoting Floyd J in *Schlumberger Holdings Limited v Electromagnetic Geoservices AS*

¹³ *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ)

documents are used nor would he/she have the power to direct or authorise that the documents be made available to a third party.

THE REQUESTED DOCUMENTS

[28] I turn now to examine whether or not the documents requested fall within the first respondent's control or are in his power either by being in his physical possession or are documents which he has a legally enforceable right to access. Should the first respondent be in control of or have in his power the requested documents, he may be directed to produce same in accordance with the provisions of Rule 35(11).

[29] The applicant requests the production of statements in respect of offshore banking and investment accounts held by the first respondent for the period 1 January 2011 or the date of opening of such account or investment, until date of reply. In response to this request the first respondent states that he has discovered all the statements in his possession. Furthermore, to the extent that such further documentation exists, same can be obtained from the relevant banks. As the account holder of any offshore banking and investment accounts, the first respondent would have a legally enforceable right to obtain such statements and therefore, these statements would be in his power or under his control for the purposes of Rule 35(11). Consequently, it is inadequate for the first respondent to state that to the extent that further documentation as requested exists same can be obtained from the relevant banks as this would not constitute compliance with the provisions of Rule 35(11). Therefore, save for such statements already discovered by the first respondent, he is directed to produce, under oath, statements in respect of offshore banking and investment

accounts held by him for the period 1 January 2011 or the date of opening such account or investment, until the date of reply.

[30] The second category of documents requested is statements in respect of offshore banking and investment accounts held by the Tafika Trust for the period 1 January 2011 or the date of opening of such account or investment, until date of reply. In accordance with the provisions of section 10 of the Trust Administration Act 57 of 1988, whenever a person receives money in his/her capacity as trustee, he/she is obliged to deposit such money in a separate trust account at a banking institution or building society. It follows that the trustee, as the person operating the banking and/or investment account on behalf of the trust, would be the person legally entitled to the statement in respect thereof.

[31] The applicant does not seek relief against the first respondent in his capacity as a trustee of the Tafika Trust and only seeks an order against him in his personal capacity. However, it is trite that formalism in the application of the rules of court are to be discouraged in favour of a spirit that would facilitate the work of the courts and which would enable litigants to resolve their dispute in as speedy and inexpensive a manner as possible.¹⁴ In my view, it would be overly formalistic to disregard the fact that the first respondent is a trustee of the Tafika Trust and has been cited in the main action in such capacity when determining this application, more so as there can be no prejudice to the first respondent in his capacity as a trustee of the Tafika Trust.

[32] In his response to the request for this category of documents, the first respondent states that *to the best of his knowledge* Tafika Trust has no offshore banking and investment accounts and that he has no such documentation in his possession

¹⁴ *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A); *Ncoweni v Bezuidenhout* 1927 CPD 130

and that he does not believe that any such documentation exists. As a trustee of the Tafika Trust, the first respondent should know whether or not the trust has any offshore banking and investment accounts as he could easily ascertain same. If regard is had to the purpose of discovery which is to assist the parties as well as the court in determining the truth and to arrive at a just determination of the matter, it is insufficient to state that to the *best of his knowledge* no such offshore and investment accounts exist.

[33] As a trustee of the Tafika Trust, the first respondent would be legally entitled to statements in respect of any offshore banking and investment accounts held in the name of the Tafika Trust. Consequently, these statements would be in his power and under his control for the purposes of Rule 35(11) and he may be directed to disclose same. Therefore, the first respondent is directed to produce, under oath, statements in respect of offshore banking and investment accounts held by the Tafika Trust for the period 1 January 2011 or the date of opening of such account or investment, until date of reply, alternatively, the first respondent is directed to state under oath that, as a trustee of the Tafika Trust, he as definitively ascertained that no offshore and/or investments accounts are held by Tafika Trust.

[34] The third category of documents requested is statements in respect of offshore banking and investment accounts held by the Tafika Trust Mauritius for the period 1 January 2011 or the date of opening of such account or investment, until date of reply. It is common cause that the first respondent is not a trustee of the Tafika Trust Mauritius and that the fifth respondent, against whom no relief is sought in this application, is a trustee thereof. During the hearing of the application it was argued that the first respondent had previously obtained

documentation pertaining to the Tafika Trust Mauritius and therefore, he could be directed to produce the requested documents in terms of Rule 35(11). However, as set out above, an ability to obtain documents does not translate into a legal obligation to discover same.

[35] In his answering affidavit to the Rule 35(11) application, the first respondent states the following:

17.1 *I have already disclosed all documents in my possession, or under my control, in respect of the Tafika Trust, Mauritius. I refer specifically to what I have stated in my reply to the Applicant's Annexure "X", particularly at paragraphs 3, 7 and 8 thereof.*

17.2 *There is no possible reason why I would be a party to any strategy to deprive the Applicant of information relevant to the assets in the Tafika Trust, Mauritius. I am desperate that the matter be resolved.*

17.3 *Any further documentation in respect of the Tafika Trust, Mauritius are in the possession or under the control of the trustee, the Fifth Respondent herein.*

17.4 *On 14 October 2019, Mr Greenbaum provided a schedule of documentation that he required from the Tafika Trust, Mauritius.*

17.5 *On 17 October 2019, my attorneys addressed a letter to the Fifth Respondent requesting that the trustee provide the Applicant with that schedule of documentation requested by Mr Greenbaum. A copy of my attorney's letter is annexed hereto marked "H3".*

17.6 *On 1 November 2019, my attorneys addressed an urgent follow up letter for the documentation, a copy of which is annexed hereto marked "H4".*

17.7 *In my trial particulars and in previous discovery I have provided various schedules of the assets and liabilities of the Tafika Trust Mauritius, with whatever supporting documentation I have had in my possession or under my control. From such documentation, the Applicant is well aware that there is insignificant, if any, value in the Tafika Trust, Mauritius."*

[36] In replying to the above, the applicant states:

'44. Ad Paragraphs 17.1 to 17.6 thereof

44.1 *I deny that First Respondent has produced all of the documentation in his possession or under his control relating to Tafika Trust, Mauritius. I have dealt with this hereinbefore.*

44.2 *That First Respondent has deliberately deprived me of information and documentation regarding his true financial position and of the Trusts is evident from my founding affidavit and this affidavit.*

44.3 *I have demonstrated that First Respondent is **able to secure information and documentation relating to the affairs of Tafika Trust Mauritius** and its underlying assets, directly from the trust, and via Skybound Capital as he has in the past, by simply asking for it. (my emphasis)*

44.4 *I note that First Respondent asserts that his attorneys have requested documentation from the trustees of the trust. I note that he does not detail whether any response was received. It is extraordinary in circumstances where the trustees have previously responded to requests for documentation that they are conveniently silent and have ignored my attorney's request for documentation. This is particularly extraordinary in circumstances where First Respondent is, according to the trust's*

documents, the settlor of the trust, a beneficiary and the ultimate beneficial owner of the trust's assets.

[37] The fact that the first applicant has in the past been able to secure information and documentation relating to the affairs of Tafika Trust Mauritius does not necessarily translate into an enforceable legal right entitling him thereto, thereby rendering the documents under his control or in his power. In accordance with the general rule of he/she who asserts must prove¹⁵, it would fall to the party who alleges that the documents are under the control of the requested party to establish same. In doing so regard may be had, *inter alia* to the true nature of the relationship between the third party and the litigant. On the papers before me the applicant has not established that the first applicant is in control of or has in his power documentation pertaining to the Tafika Trust Mauritius. Therefore, the first respondent cannot be directed to produce documentation pertaining to the Tafika Trust Mauritius in terms of Rule 35(11).

[38] In the applicant's heads of argument it is stated that:

'The effect of LC Abelheim's failure to file any opposition to the action is that the applicant is unable to request discovery from the trustee and cannot request information in the form of trial particulars or admissions. Correspondence directed to LC Abelheim by the applicant's attorneys is simply ignored.'

This is not an accurate statement of the law. Rule 35(11) clearly states that the court may order the production by **any party** to the proceedings under oath of such documents in his power or control relating to any matter in question in such proceedings as the court may think meet. Therefore, there is no legal reason

¹⁵*Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape* (085/2014) [2014] ZASCA 182 (25 November 2014)

why the applicant cannot invoke the provisions of Rule 35(11) against the fifth respondent.

[39] The applicant also seeks the production of offshore banking and investment accounts held by the entities set out on annexure **A** for the period 1 January 2011 or the date of opening of such account or investment, until date of reply. The first respondent would only be in control of or in power of these statements if he had a legally enforceable right thereto or if he was in physical possession thereof.

[40] The applicant lists 45 entities on annexure **A**. It is not disputed that the first respondent is a director of the following 6 of the 45 entities:

- (i) Piorex (Pty) Limited;
- (ii) Proxivax (Pty) Limited;
- (iii) AmaLocker (Pty) Limited;
- (iv) Lerosign (Pty) Limited;
- (v) Domestly; and
- (vi) K2 Design Group Inc.

[41] In the founding affidavit it is alleged that the first respondent is a director of the entity operating as Pempera Investments Limited (**“Pempera”**). In his answering affidavit, the first respondent states that he has never been a shareholder nor director of Pempera Investments Limited. This denial stands uncontested in the applicant’s replying affidavit. Therefore, it can be accepted that the first respondent is not a director nor a shareholder of Pempera. In the circumstances,

it has not been established that the first respondent is in control of or has under his power any documentation pertaining to Pempera and the provisions of Rule 35(11) cannot be utilised to direct him to produce any documentation in relation thereto.

[42] Similarly, it is alleged in the founding affidavit that the first respondent is a shareholder of the entity known as WMSA2012 Ltd. In his answering affidavit the first respondent states that he has never been a director nor a shareholder of WMSA2012 Ltd. In her replying affidavit, the applicant challenges the truth of this averment and attaches annexure “**AR 32**” in support hereof. “**AR 32**” is undated correspondence addressed to the directors of WMSA2012 Ltd by the first applicant. The subject line of the correspondence reads *‘Transfer of 100% of my personal shareholding of the WMSA2012 Ltd’* and requests the directors to *‘transfer the entire shareholding of the above named company to L C Abelheim Ltd as the Tafika Trust Mauritius.’*¹⁶ It is evident from annexure “**AR 32**” that at some stage the first respondent was a shareholder of WMSA2012 Ltd. As annexure **AR32** is undated the court does not know when the first respondent ceased being a shareholder of WMSA2012 Ltd. Furthermore, it is not disputed that the applicant has been placed in receipt of the latest financial statements for the year ending 30 June 2018 for WMSA2012 Ltd. On the papers before me, it has not been established that the first respondent is currently in control of or has under his power any further documentation pertaining to WMSA2012 Ltd.

[43] The applicant also alleged that the first respondent was a shareholder of 440.NG and 88MPGH, which was denied by the first respondent. In her replying affidavit

¹⁶ Annexure **AR7** records that the first respondent purchased 833 shares in WMSA2012 Ltd on 12 June 2013.

the applicant does not take issue with this denial.¹⁷ Therefore, it has not been established that the first respondent is in control of or has in his power any documentation relating to these entities.

[44] In respect of the entity, Nomanini the applicant alleged that the first respondent has been appointed to the board thereof. This was denied by the first respondent in his answering affidavit. This denial was not challenged by the applicant in her replying affidavit. Therefore, it has not been established that the first respondent is in control of or has in his power any documentation relating to Nomanini.

[45] On the papers it has not been established that the first respondent is in control of or has in his power any documents relating to the remaining 34 entities set out on annexure **A**. Therefore, it follows that the provisions of Rule 35(11) cannot be used to direct the first respondent to produce any documents pertaining to thereto.

[46] I turn now to the request for statements in respect of offshore banking and investment accounts held by the 6 entities of which the first respondent is a director.

46.1 Piorex (Pty) Limited: the first respondent states that *to his best of his knowledge* the company has no bank or investment accounts and that he discovered all the documents pertaining thereto. As stated above, it is insufficient to state that to the *best of his knowledge* no such bank or investment accounts exist. Therefore, the first respondent is directed to produce, under oath, statements in respect of offshore banking and

¹⁷ Paragraph 17.9 of the answering affidavit, page 238 of the record read with paragraph 46 of the replying affidavit, page 364 of the record.

investment accounts held by Piorex (Pty) Limited for the period 1 January 2011 or the date of opening of such account or investment, until date of reply, alternatively, the first respondent is directed to state under oath that, as a director of Piorex (Pty) Limited, he as definitively ascertained that no offshore and/or investments accounts are held by Piorex (Pty) Limited;

46.2 Proxivax (Pty) Limited: the first respondent stated that the company had no offshore bank or investment accounts whilst he was involved with the company. It is trite that the contents of a discovery affidavit are deemed *prima facie* conclusive with regard to the existence of the requested documents and a court is slow to go behind the affidavit,¹⁸ requiring a sufficient degree of certainty that the documents do exist before doing so.¹⁹ In the present instance no such degree of certainty has been provided;

46.3 Amal Locker (Pty) Limited: in his answering affidavit, the first respondent states that this entity ceased operating in 2016, was deregistered in April 2019 and that he has discovered all the documents in his possession or in his control. The applicant does not take issue with this response in her replying affidavit. Consequently, it is accepted that the first respondent has discovered all the documents that are in his possession or under his control in respect of this entity;

46.4 Lerosign (Pty) Limited: the first respondent states that the company never had an offshore bank or investment account. As stated above, the court will be reluctant to go behind the discovery affidavit which states that documents

¹⁸ *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at para 16

¹⁹ *Continental Ore Construction v Highveld Steel & Vanadium Corp Ltd* 1971 (4) SA 589 (W); *Federal Wine and Brandy Co Ltd v Kanto* 1958 (4) SA 735 (E)

do not exist. In the present instance, no basis has been established for the court to do so;

46.5 Domestly: the first respondent states that he does not know if this entity has offshore bank or investment accounts. As director, the first respondent can ascertain whether or not this entity holds any offshore bank or investment accounts and his response is inadequate to comply with the provisions of Rule 35(11). Therefore, the first respondent is directed to produce, under oath, statements in respect of offshore banking and investment accounts held by the Domestly for the period 1 January 2011 or the date of opening of such account or investment, until date of reply, alternatively, the first respondent is directed to state under oath that, as a director of Domestly, he has definitively ascertained that no offshore and/or investments accounts are held by Domestly;

46.6 K2 Design Group Inc.: the first respondent is silent on whether or not this entity has any offshore bank or investment accounts. As a director of this entity the first respondent would have a legally enforceable right to statements pertaining to any offshore bank or investment accounts held by it. Therefore, he is directed to produce, under oath, statements in respect of offshore banking and investment accounts held by the K2 Design Group Inc for the period 1 January 2011 or the date of opening of such account or investment, until date of reply.

[47] As demonstrated above, it has not been established that the first respondent is in control of or has in his power documentation pertaining to the Tafika Trust Mauritius and the 34 entities listed on annexure **A** to annexure **Y**. Therefore, the provisions of Rule 35(11) cannot be utilised to direct the first respondent to

produce any documentation pertaining to either the 34 entities nor to the Tafika Trust Mauritius.

[48] The next category of documents requested was for documentation submitted by the first respondent, the Tafika Trust or the entities²⁰ to the South African Reserve Bank, the Financial Services Department or the South African Revenue Service in respect of any foreign exchange transactions during the period 1 January 2011 to the date of reply. In responding to this request, the first respondent states that he has no such documentation in his possession and is not aware that any such applications were ever submitted. The first respondent in his personal capacity, his capacity as a trustee of the Tafika Trust and as a director of the 6 entities listed above can ascertain whether or not such documentation exists and his response of not being aware whether or not it does is inadequate for the purposes of complying with the provisions of Rule 35(11). Therefore, he is directed to produce documentation submitted by him, the Tafika Trust or the entities to the South African Reserve Bank, the Financial Services Department or the South African Revenue Service in respect of any foreign exchange transactions during the period 1 January 2011 to the date of reply, alternatively he is directed to state under oath that he has definitively ascertained that no such documentation exist.

[49] The next category of documents requested was for credit finance applications submitted by the first respondent, the Tafika Trust or the entities to any financial institution to secure credit whether as principal debtor or as surety in respect of any credit finance liability secure outside of the jurisdiction of the South African High Court. In response hereto the first respondent vaguely states that he is not

²⁰ Any reference to the entities should be read as a reference to the 6 entities of which the first respondent is a director.

aware whether the trusts or any of the entities have made such applications. As stated above, it is inadequate for the first respondent to simply state that he is not aware whether or not the Tafika Trust or the entities have made such applications and he is directed to produce any credit finance applications submitted by the Tafika Trust or the entities, alternatively he is to state under oath that he has definitively ascertained that no such applications were submitted.

[50] In responding hereto in his personal capacity, the first respondent states that he has already discovered the finance application submitted by him to enable KaCee Keegan to purchase a home and that he has no further documentation as requested. However, it is evident from the replying affidavit and annexure **"AR25"** that the document discovered was a closing disclosure which reflected the loan terms and closing costs. It was not the finance application which preceded the closing disclosure. Furthermore, annexure **"AR26"**, also attached to the replying affidavit, shows that the first respondent had to have submitted a finance application to secure the approval of a loan in the amount of \$410 000 extended over a period of 10 years granted to him and Ms Jenny Provost. In light of annexures **"AR25"** and **"AR26"** the court is entitled to go beyond the discovery affidavit pertaining to the existence of documents pertaining to credit finance applications submitted by the first respondent and he is directed to produce the credit finance applications that preceded the closing disclosure in respect of the finance application submitted by him to enable KaCee Keegan to purchase a home and the credit finance application pertaining to the loan extended over 10 years to the first respondent and to Jenny L Provost.

[51] The applicant also requested the production of documentation reflecting any offshore investments held by the first respondent, the Tafika Trust or the entities. In response hereto the first respondent answered that:

51.1 he has previously discovered all documentation in his possession in respect of share options and shares that he obtained as part of his employment with Visa Inc and ACI as well as his shareholding in K2 Design Group Limited and his Sanlam Endowment policies. Furthermore, that he has no further documentation in his possession and to the extent that such further documentation exists, it would be in the possession of Visa Inc, ACI, K2 Design Group Limited and Sanlam. Rule 35(11) seeks the production of documents which are under the power or in the control of the first respondent and is not limited to documents in his possession. As the first respondent would be in control of and in power of documents reflecting the investments held by him, there is no reason why it should not be disclosed and he is directed to discover the documentation reflecting any offshore investments held by him, other than what already discovered;

51.2 In respect of Tafika Trust, the first respondent stated *inter alia* that he has no documentation other than the documentation previously discovered in his possession and he does not believe that any further documentation exists. As a trustee, the first respondent could ascertain whether or not any further documents exists and his response is inadequate to comply with the provisions of Rule 35(11).

It is evident from the replying affidavit that further documents do exist and the first respondent is possibly mistaken in his belief. The replying

affidavit records that the most recent documents discovered by the Tafika Trust was on 14 March 2018 and augmented by a further reply on 1 November 2019. These documents included the RMB portfolio which was reflected as having a value of R2 002 719 and the Standard Bank Portfolio as having a value of R960 039. However, in the schedule provided by the first respondent on 14 November 2019 the RMB investments are indicated as having a value of R7 163 282, and an investment on the JSE with a value of R1 350 000. No documentation detailing the current values of these investments have been discovered. Therefore, the first respondent is directed to produce this documentation, save which has already been produced, reflecting any offshore investments held by the Tafika Trust;

51.3 In respect of the entities, the first respondent stated that he has discovered all the documentation pertaining to Piorex (Pty) Limited and that documentation pertaining to the companies in which Piorex (Pty) Limited has invested is available for inspection. He goes on to state that to the extent that any further documentation as requested exists, he believes same to be in the possession of the companies. As a director of the entities the first respondent would be in control of the documents and he is directed to discover the requested documentation, other than already discovered, reflecting any offshore investments held by the entities.

52. The applicant requested documentation submitted for or on behalf of the first respondent or the Tafika Trust or the entities in respect of compliance requirements in any jurisdiction pursuant to the OECD Common Reporting Standards (or Standard for Automatic Exchange of Financial Account Information) and related legislation and regulations or regulatory requirements in

the relevant jurisdiction. The first respondent does not answer this request directly or specifically. However, his general response is that he has discovered all the documentation in his possession but to the extent that such documentation as requested exists, he believes same to be in the possession of the entities. As a trustee and a director, the first respondent would be in control of and have in his power the requested documents pertaining to the Tafika Trust and to the entities. Therefore, he is directed to produce the requested documents submitted for or on behalf of the Tafika Trust and the entities. In his personal capacity, the first respondent is directed to produce the requested documents, other than what has already been discovered, alternatively he is to state under oath that no further documentation pertaining to documents submitted for him or on his behalf in respect of compliance requirements in any jurisdiction pursuant to the OECD Common Reporting Standards (or Standard for Automatic Exchange of Financial Account Information) and related legislation and regulations or regulatory requirements in the relevant jurisdiction exist.

53. The applicant seeks the production of the following documents in respect of the entities:

- (i) the share register;
- (ii) the shareholders' agreement and amendments thereto, save for the initial agreement signed by First Respondent in October 2016 in respect of K2 Design Group Ltd, but including amendments thereto;
- (iii) documentation confirming the incorporation and registration of the entities, founding documents, including the memorandum of incorporation /association agreement regulating the memorandum of incorporation

/association regulating the operations and administrations of the offshore companies;

- (iv) the financial statements of each of the entities since the incorporation of the entities, save for the financial year 2018 for Proxivax;
- (v) documentation reflecting any debit or credit loans held by the entities and the causa underlying such loan agreements;
- (vi) documentation detailing how the entities were initially funded, including the funding of incorporation and registration costs and capital funding;
- (vii) documentation, including correspondence, with the person or entity responsible for the incorporation and registration of the offshore companies;
- (viii) documentation reflecting any dividends paid by the entities since the incorporation of each entity; and
- (ix) resolutions and minutes of the directors and shareholder of the entities since inception.

In his answering affidavit the first respondent has not furnished any reasons or grounds why he would be unable to provide this documentation and he is accordingly directed to do so.

54. The applicant seeks the purchase agreement or agreement in terms whereof the first respondent acquired an interest in the immovable property situated at 13087 White Violet Drive, Naples, Florida, USA (**“the Florida property”**) and documentation reflecting the account which any share of his interest in the Florida property was financed, other than the mortgage bond account. This

particular request was not part of the relief sought when the Rule 35(11) application was instituted and is reflected in the amended prayers set out in the applicant's heads of argument. However, no objection thereto was raised by the first respondent. As co-owner of the Florida Property, the first respondent would have this documentation in his power or under his control and the first respondent is directed to produce same in terms of Rule 35(11).

55. In the notice of motion, the applicant sought to have the documents produced within 10 days of the granting of the order. Given the volume of the documentation to be produced and the number of entities involved, 10 days may be too short a period within which the first respondent would be able to comply with directions issued in terms of the court order. A failure to comply timeously with the directions issued in terms of this court order could result in the institution of contempt of court proceedings, which would increase the litigation, and the costs associated therewith, in an already litigious matter.
56. On 19 June 2020, the court was advised that the parties agreed to approach the Judge President for the allocation of a trial date at the beginning of September 2020.
57. In the circumstances, it is prudent to extend the time period within which the first respondent must comply with directions issued in terms of the court order to 20 court days.

COSTS

58. In addressing me on the issue of costs, Advocate Pincus SC for the first respondent submitted that, in the event that I was not with him, the issue of costs should stand over for later determination. Advocate Buikman SC submitted that

the applicant would be entitled to a favourable costs order as she was successful in locating assets in excess of R17 million which had previously not been disclosed.

59. Whether or not these recently discovered assets and the documentation sought in terms of this application are to be taken into account when determining the applicant's claim in terms of section 7(3) of the Divorce Act will be determined during the divorce action. As stated in the unreported matter of *JA McWilliam v GS McWilliams* Case No. 3145/2015 (ECD) it would be somewhat unfair that the first respondent should bear the costs of the Rule 35(11) application at this point as the question of whether or not this Rule 35(11) application was necessary or not can only be determined after the extent of the applicant's claim in terms of section 7(3) of the Divorce Act is determined.

CONCLUSION

60. In the circumstances, I make the following orders:

- (1) the first respondent is directed to, within 20 court days hereof:
 - (a) produce, under oath, statements in respect of offshore banking and investment accounts held by him for the period 1 January 2011 or the date of opening such account or investment, until the date of reply, save for such documents previously discovered;
 - (b) produce, under oath, statements in respect of offshore banking and investment accounts held by the Tafika Trust for the period 1 January 2011 or the date of opening of such account or investment, until date of reply, alternatively, the first respondent is directed to state under oath that,

as a trustee of the Tafika Trust, he as definitively ascertained that no offshore and/or investments accounts are held by Tafika Trust.

- (c) produce, under oath, statements in respect of offshore banking and investment accounts held by the Piorex (Pty) Limited for the period 1 January 2011 or the date of opening of such account or investment, until date of reply, alternatively, the first respondent is directed to state under oath that, as a director of Piorex (Pty) Limited, he as definitively ascertained that no offshore and/or investments accounts are held by Piorex (Pty) Limited;
- (d) produce, under oath, statements in respect of offshore banking and investment accounts held by the Domestly for the period 1 January 2011 or the date of opening of such account or investment, until date of reply, alternatively, the first respondent is directed to state under oath that, as a director of Domestly, he as definitively ascertained that no offshore and/or investments accounts are held by Domestly;
- (e) produce, under oath, statements in respect of offshore banking and investment accounts held by the K2 Design Group Inc for the period 1 January 2011 or the date of opening of such account or investment, until date of reply;
- (f) produce, under oath, documentation submitted by him, the Tafika Trust or the entities to the South African Reserve Bank, the Financial Services Department or the South African Revenue Service in respect of any foreign exchange transactions during the period 1 January 2011 to the date of reply, alternatively he is directed to state under oath that he has definitively ascertained that no such documentation were submitted;

- (g) produce, under oath, any credit finance applications submitted by the Tafika Trust or the entities, alternatively he is to state under oath that he has definitively ascertained that no such applications were submitted;
- (h) produce, under oath, the credit finance application that preceded the closing disclosure in respect of the finance application submitted by him to enable KaCee Keegan to purchase a home;
- (i) produce, under oath, the credit finance application that preceded the loan extended to him and Ms Provost in the amount of \$410 000;
- (j) produce, under oath, the documentation reflecting any offshore investments held by him, save for such documents previously discovered;
- (k) produce, under oath, documentation reflecting any offshore investments held by the Tafika Trust, save for such documents previously discovered;
- (l) produce, under oath, documentation reflecting any offshore investments held by the entities, save for such documents previously discovered;
- (m) produce, under oath, documentation submitted on his behalf in respect of compliance requirements in any jurisdiction pursuant to the OECD Common Reporting Standards (or Standard for Automatic Exchange of Financial Account Information) and related legislation and regulations or regulatory requirements in the relevant jurisdiction, alternatively he is directed to state under oath that no such documentation exists;
- (n) produce, under oath, documentation submitted on behalf of the Tafika Trust in respect of compliance requirements in any jurisdiction pursuant to the OECD Common Reporting Standards (or Standard for Automatic

Exchange of Financial Account Information) and related legislation and regulations or regulatory requirements in the relevant jurisdiction, alternatively he is directed to state under oath that no such documentation exists;

- (o) produce, under oath, documentation submitted on behalf of the entities in respect of compliance requirements in any jurisdiction pursuant to the OECD Common Reporting Standards (or Standard for Automatic Exchange of Financial Account Information) and related legislation and regulations or regulatory requirements in the relevant jurisdiction, alternatively he is directed to state under oath that no such documentation exists;
- (p) produce, under oath, the following documentation pertaining to the entities:
 - (i) the share register;
 - (ii) the shareholders' agreement and amendments thereto, save for the initial agreement signed by First Respondent in October 2016 in respect of K2 Design Group Ltd, but including amendments thereto;
 - (iii) documentation confirming the incorporation and registration of the entities, founding documents, including the memorandum of incorporation /association agreement regulating the memorandum of incorporation /association regulating the operations and administrations of the offshore companies;
 - (iv) the financial statements of each of the entities since the incorporation of the entities, save for the financial year 2018 for Proxivax;

- (v) documentation reflecting any debit or credit loans held by the entities and the causa underlying such loan agreements;
 - (vi) documentation detailing how the entities were initially funded, including the funding of incorporation and registration costs and capital funding;
 - (x) documentation, including correspondence, with the person or entity responsible for the incorporation and registration of the offshore companies;
 - (xi) documentation reflecting any dividends paid by the entities since the incorporation of each entity; and
 - (xii) resolutions and minutes of the directors and shareholder of the entities since inception; and
 - (q) produce, under oath, documentation pertaining to the purchase agreement or agreement in terms whereof the first respondent acquired an interest in the immovable property situated at [...], Florida, USA.
- (2) costs of this Rule 35(11) application are reserved for determination by the trial court.

ANNEXURE “A”**ENTITIES**

1. Pempera Investments Limited
2. Piorex (Pty) Limited
3. Proxivax (Pty) Limited
4. WMSA 2012 Limited
5. 88 mph Limited
6. 440.NG
7. 660.NG
8. AmaLocker (Pty) Limited
9. Lerosign (Pty) Limited
- 10.Domestly
- 11.Mobijobs
- 12.K2 Design Group Inc
- 13.Pan Africa Investments
- 14.Egcina (Pty) Ltd
- 15.Graphflow
- 16.Wabona
- 17.Apex Peak
- 18.8bit.co.za
- 19.Pet Heaven
- 20.Peach Payments
- 21.Ekaya
- 22.BabyGroup
- 23.Booknow

24. Adrenalin Hunter
25. Flexiclub
26. Solartech
27. Nomanini
28. Ivank Inc
29. Click Right Consult
30. Prayerbox

31. Gingerbox
32. Youngsoul
33. Taja
34. Ella Mathew Limited
35. Fuel Voucher
36. Obiwezy
37. Jay Osbie
38. Catch
39. Zapacab
40. Weaver
41. Mydoorhandle
42. The Massive
43. Near A Builder
44. Bite Money
45. CitiDoc