



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

**DATE: 18/03/2015
CASE NO. 19322/2012**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES / NO

DATE

SIGNATURE

In the matter between:

ONSITE WASTE MANAGEMENT

Plaintiff

And

WASTESERVE WASTE MANAGEMENT

1st Defendant

NTUMELENI PAULUS MOYANA

2nd Defendant

JUDGEMENT

DE VOS J:

[1] This is an application to compel the first and second defendants to make better and adequate discovery. On 14 March 2014 the plaintiff served upon the defendants a notice calling for better and adequate discovery as provided for in terms of rules 35(3) and 35(12). The defendants have the documents called for in their possession and object to their discovery on the grounds of relevance. The court is asked to consider the principles applicable to both rules 35(3) and 35(12) and to decide whether the defendants are obliged to make the documents asked for in the plaintiff's notice of motion available for the inspection and copying thereof.

[2] It is common cause that at all relevant times to the action the second defendant was a member of the plaintiff and owed a fiduciary duty to the plaintiff. The second defendant, on behalf of the plaintiff, was responsible for dealing with the first defendant and the company known as Helberg Guss. The plaintiff and the first defendant concluded an agreement. This agreement, as well as its terms, and the plaintiff's compliance with the agreement is common cause between the parties and was made in the following terms:

- 2.1 The plaintiff would collect and dispose of the waste of Helberg Guss at designated disposal and landfill sites;
- 2.2 The plaintiff will transport and dispose of the waste using its large skip truck and smaller tipper truck;
- 2.3 The first defendant would pay the plaintiff R6 600, 00 for each trip of waste collected and disposed of by its large skip truck and R220,00 per ton for each ton of waste collected and disposed of by the smaller tipper truck.

[3] The case of the plaintiff as set out in the pleadings is as follows:

- 3.1 The plaintiff was not paid for the work done by its large skip truck and its smaller tipper truck;
- 3.2 The second defendant used the vehicles of the first defendant to defraud the plaintiff;
- 3.3 The second defendant manipulated invoices by issuing incorrect invoices and/or not issuing invoices and in doing so earned secret commissions.

[4] The party upon whom the notice in terms of rule 35(3) is served may object to making the documents asked for available for inspection on the basis that the documents are not relevant. The defendants aver that none of the documents,

being the agreement entered into between the first defendant and Helberg Guss, the bank statements, correspondence and invoices, requested in this application are relevant to any dispute or anticipated dispute between the parties.

- [5] The defendants submit that the plaintiff's claim is, firstly, based on a failure by the first defendant to make payment to the plaintiff in respect of invoices issued by the plaintiff to the first defendant. Secondly, the defendants submit that the plaintiff's claim is based on the fact that the second defendant should be liable for the aforesaid payment as a result of the fact that the second defendant used the first defendant as his alter ego. The defendants further submit that the plaintiff's claim is also based on the fact that the second defendant made a secret profit due to the fact that he did not disclose to the plaintiff that he was a member of the first defendant.
- [6] It is contended by the defendants that on a proper reconciliation of the invoices and statements in Claim A, being the invoices delivered to the first defendant, it appears that all the said invoices had been paid by the first defendant. As a result of the aforesaid, the debt which is claimed in the first claim of the plaintiff's particulars of claim is extinguished and, as a result thereof it follows that the second claim should also be extinguished. Therefore, the only remaining claim, according to the defendants, is the third claim that the second defendant has made a secret profit by not disclosing the fact that he was a member of the first defendant. It is contended that the second defendant has, throughout, stated that the remaining members of the plaintiff had been informed thereof that he was a member of the first defendant. Furthermore, the plaintiff has chosen to make serious allegations against the second defendant and as a result thereof it has to prove that the second defendant

has indeed made a secret profit. The defendants hold that if one has regard to the context of the notice in terms of rule 35(3), it is clear that the plaintiff is on a fishing expedition in order to obtain some form of proof that the second defendant has made a secret profit. If this is the case, the plaintiff chose to institute the action on this basis without there being any proof of the allegations made against the second defendant. It is therefore contended that if this Court is to find that the plaintiff is indeed on a fishing expedition for information, the said request is irrelevant for purposes of this action and should be refused.

- [7] The test for relevance, as laid down by BRED LJ in ***Compagnie Financiere et Commerciale du Picifique v Peruvian Guano Co (1882) 11 QBD 55***, has often been accepted and applied. In ***Rellams (Pty) Ltd v James Brown and Hammer Ltd 1983(1) SA 556 (N) at 564 A*** it was held as follows:

'After remarking that it was desirable to give a wide interpretation to the words of a document relating to any matter in question in the action, BRED LJ stated the principle as follows:

"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary".

It is obvious that the Court will go beyond the discovery affidavit if it is satisfied that from the nature of the case or the documents in issue it is necessary to order that all and proper discovery is made.

- [8] I have no doubt in my mind that this is one of those matters, similar to liquidation proceedings, where the corporate veil should be pierced in order to determine

exactly what the financial positions of the parties were at the time when the agreement was executed. The second defendant cannot be allowed to refuse to disclose information in his sole possession. Neither can the first defendant do so. It is clear that all the paperwork was in the possession of either the first or second defendants. The plaintiffs are totally unaware of what transpired behind their backs, especially between the two defendants. The applicant is entitled to scrutinise all the documents pertaining to the business done with the first and second defendants in order to enable him to formulate his claim in order to strengthen it and/or to confirm the correctness thereof and/or to damage the opposition to his claim.

[23] I am therefore satisfied that on a balance of probabilities the plaintiff made out a proper case and it is entitled to an order as set out in the notice of motion. I accordingly make the following order:

- a) Prayers 1(including 1.1, 1.2, 1.3, 1.4, 1.5, 1.6 and 1.7) and 2 of the notice motion are granted;
- b) The first and second defendants are ordered to pay the cost of this application.

DE VOS J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

