NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE No. 14355/2010

DATE:08/06/2012

In the matters between:-

FRITS STEFANUS VISSER	First Plaintiff
FREDERICK BARNARD	Second Plaintiff
SAIDEX MARKETING (PTY) LTD	Third Plaintiff
and	
VARDAKOS ATTORNEYS	First Defendant
VASILIOS BASIL VARDAKOS	Second Defendant
NIC JAGGA	Third Respondent

JUDGMENT

Van der Byl. AJ:-

[1] This is an interlocutory application by the Plaintiffs seeking an order in terms of which -

(a) the First, Second and Third Defendants are directed to make available for inspection and copying the documents listed in paragraphs 1 to 16 of the Plaintiffs' notice in terms of Rule 35(3) dated 1 June 2011.

(b) the First, Second and Third Defendants are directed to pay the costs of this application, such costs to include the costs consequent upon the employment of senior counsel.

[2] It is common cause -

(a) that on or about 1 June 2011 the Plaintiffs' attorneys of record caused a notice in terms of Rule 35(3) to be served on the Defendants' attorneys of record in which the First, Second and Third Defendants are called upon to make available certain documents, specified in paragraphs 1 to 15 of that notice, for inspection, alternatively, to state under oath that such documents are not in their possession in which case they were required to state, if known to any of them, the whereabouts of such documentation; and

(b) that the Defendants have to date failed to respond to that Notice.

[3] The Plaintiffs in their founding affidavit merely referred to the fact that the Defendants were in terms of a notice served in terms of Rule 35(3) called upon to make the documents so specified available for inspection and that the Defendants failed to respond to their notice.

[4] The Defendants, thereupon, in their opposing affidavit raised the following issues, namely -

(a) that, bearing in mind that the cause of action in the pending litigation relates to an oral agreement between the parties in respect of an application for Bingo licences in the Limpopo Province, the documents in respect of which the Plaintiffs seek discovery are unrelated to the action between the parties in so far as the documents so sought relate to applications for Bingo licences in the North West Province;

(b) that the Plaintiffs seek discovery of documentation which goes to the core of the dispute between the parties and to which they would only be entitled only when the Court makes an adverse finding on what constitutes an agreed fee and, more importantly, whether the

Plaintiffs prematurely cancelled the agreement;
(c) that the Plaintiffs did not set out in their founding affidavit any basis why they require discovery in respect of the unrelated documents.

[5] In response to the contentions raised in the opposing affidavit, the Plaintiffs in their replying affidavit pointed out -

(a) that the Defendants have until now made discovery of 8 items, but the trial bundle prepared by the Plaintiffs consists of no less than 48 items, amongst which are correspondence exchanged between the parties which have not been discovered by the Defendants, which seemingly shows the inadequate discovery made by the Defendants;
(b) that being the reason why further and better discovery was requested by the Plaintiffs in the notice served on 1 June 2011;
(c) that the matter was enrolled for hearing on 18 July 2011 on the occasion of which the Defendants handed up an opposing affidavit, whereupon, the presiding Judge was not prepared to hear the matter;
(d) that the application was then set to be argued at the commencement of the trial, but a day or two before the allocated date it was agreed that the matter be postponed and the Defendants be ordered to pay the Defendants' costs;
(e) that at the time the Defendants' legal representative indicated that the Defendants were reconsidering the Rule 35(3) notice and that they are likely to file a supplementary affidavit in which they would be disclosing a number of the further documents, but to date no further discovery has been effected;
(f) that the action has now been enrolled for hearing on 6 August 2012 and that in order to ensure timeous and full discovery it is now necessary to pursue this application;

(g) that the fact that the Plaintiffs' Particulars of Claim only relate to the application for Bingo licences for the Limpopo Province does not necessarily mean that the applications for Bingo licences to the North West Province are irrelevant.

[6] In particular the Plaintiffs deal with the relevancy of each of the documents called for in each of the 15 items specified in the Notice to which I will return below.

[7] I can now turn to deal with the three disputes raised in the opposing affidavit.

[8] I find it convenient and necessary to first deal with the contention that the Plaintiffs failed to set out in their founding affidavit the basis on which they require discovery of the documents referred to in the Rule 35(3) notice.

[9] The argument seems to be that in terms of Rule 35(3) the documentation called for must be relevant and the fact that the Defendants failed to respond to the Rule 35(3) notice (which they were, so it was contended, not obliged to do) does not detract from the Plaintiffs' duty to have shown in their founding papers that the documentation called for are relevant to the issues between the parties. This is in my view an unnecessary technical and obstructive approach to the issues involved in this application. The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available so that the issues by the parties are narrowed and the debate of points which are incontrovertible is eliminated (Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1083) In terms of Rule 35(3) a party is in effect called upon to state in response to a notice in terms of that Rule under oath that the documents referred to in the notice are irrelevant to the issues in the action or that they are privileged from disclosure. The Defendants for some undisclosed

reason failed to do so. In having filed the notice in question under the Rule, it follows in my view that the Plaintiffs believe, in the words of the Rule, "that there are, in addition to the documents.... disclosed...., other documents.... which maybe relevant to any matter in question in possession of ant party thereto" It was, thereupon, for the Defendants to show, as they attempted to do in their answering affidavit, that the documents called for are not relevant to the issues involved in the litigation between the parties. In the absence of any response from the Defendants in response to the Rule 35(3) notice, the Plaintiffs were obviously unable to deal with any ground on which the Defendants may object against discovery of the documents called for, be that relevance, privilege, vagueness of the notice and so forth. In any event the issue of relevance has now been raised and duly ventilated by the parties in the papers and I can see no reason why the application should now be dismissed merely on the alleged lack of particularity in the founding affidavit.

[10] This brings me to the following area of dispute, namely, whether the Plaintiffs are entitled to seek discovery of documentation to which they will only be entitled once the Court has in the action made an adverse finding against the Defendants on what constitutes an agreed fee and whether the Plaintiffs prematurely cancelled the agreement.

It is not clear to me to what documents this submission relates. I have in any event been referred to the decision in Continental Ore Corp v Highveld Steel and Vanadium Corp Ltd 1971 (4) SA 589 (W) in which Margo J was faced with an application in terms of Rule 35(3) for the discovery an inspection of documents relating to the price of vanadium-bearing slag which was dependent on the existence of an oral agreement allgedly concluded between the parties. The conclusion of such an agreement was in dispute.

In this regard Margo J held at 593G as follows;

"The documents are prima facie directly related to one aspect of the case, namely, the price of slag sold by the defendant on the North American continent in 1970, but that aspect will only be reached if the plaintiff first succeeds on the main issue by establishing the alleged oral agreement at Luxembourg. Does relevance to this ultimate aspect of the case suffice to entitle the plaintiff to discovery of these documents at this stage, or must the plaintiff show relevance in relation to the main issues if it wishes to have discovery of such documents now?

Surprisingly, there appears to be little direct authority on this point in South Africa.

In England this question has been regulated by Rule of Court. Halsbury 3rd ed., vol. 12, p. 22, para. 28, refers to R.S.C. Ord. 31. Rule 20 (1), whereby, if the right to discovery or inspection depends on the determination of any issue or question in the matter, or if for any other reason it is desirable that any issue or question should be determined before deciding on the right to discovery or inspection, the Court may order that the issue or question be determined first and may reserve the question as to that discovery or inspection. These provisions have since been re-enacted in Ord. 24, Rule 4 (1), and, furthermore, under the present Ord. 24, Rule 8, it is provided, inter alia, that, on the hearing of an application for an order to make discovery, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application. Halsbury, supra loc. cit, has called examples from the cases and from illustrations given in the cases decided under the earlier Rules. For instance, says Halsbury, an action by a principal against an agent where agency is denied, the parties would not be put to the trouble and expense of producing accounts which, unless the agency is established, will never be necessary at all. So, also, discovery bearing only on the question of damages or accounts, and not on the question of

the defendant's liability, where it is possible to deal separately with the questions of liability and of the amount of damages, will sometimes be postponed until the question of liability is determined".

The learned Judge then, having indicated that there is no Rule here corresponding with the English Rules and having held that the Court in any event has a discretion to refuse

In my view, once it is accepted that under Rule 35 (7) the Court has a discretion whether or not to enforce discovery or inspection, then there is good reason for applying, in a proper case, the same considerations of logic and of justice as are illustrated in the English cases of deferment of discovery of documents relative to a contingent issue. In those cases the justification for deferment has been recognised in an order for which the English Rules specifically provide. In our Courts justification for deferment may, in a proper case, be recognised in an order permitted by the discretion conferred by Rule 35 (7).

Obviously deferment will only be justified in the exceptional case, where the Court will not oblige the defendant to contest the issue on which the discovery is claimed until the plaintiff has succeeded on the primary issue".

that this letter is a letter in the possession of the Defendants, it is a letter that has indeed been discovered by the Plaintiffs. There, furthermore, appears no basis on which it can be contended that items 5, 7, 8, 15 and 16 refer to documents that are irrelevant to the issues between the parties.

In relation to items 1, 2, 6, 9, 10, 11, 12, 13 and 14 the objection is that they call for documents relating partially or wholly to Bingo licences in respect of the North West Province. Save for submitting that these documents so relate to Bingo licences in the North West Province, no further substantiation is contained in the opposing papers to show that such documents are irrelevant for purposes of the issues involved in the action.

On the other hand, the Plaintiffs have shown (paras 12.1 to 12.8) the respects in which the documents referred to therein may be so relevant.

I have no reason to reject the Plaintiffs' contentions in this regard. In any event the relevancy of the documents can more efficiently be addressed at the hearing of the trial and more particularly when the documents are sought to be introduced into the evidence. There is, relevancy being the only issue, no reason why the Plaintiffs are not entitled to inspect the documents in order to satisfy themselves whether or not the documents are indeed relevant.

In the result I make the following order:-

1. THAT the First, Second and Third Defendants be directed to make available for inspection and copying the documents listed in paragraphs 1 to 16 of the Plaintiffs' notice in terms of Rule 35(3) dated 1 June 2011.
2. THAT the First, Second and Third Defendants be directed to pay, jointly and severally, the one paying the other to be absolved, the costs of this application, such costs to include the costs consequent upon the employment of senior counsel.

P C VAN DER BYL

ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF PLAINTIFFS ADV. R STOCKWELL SC

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DATE OF HEARING:4 June 2012

JUDGMENT DELIVERED:7 June 2012