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

Reportable

CASE NO: 22440/2014

In the matter between:

LEONARD CHARLES KATZ	Plaintiff
and	
MARTIN SYLVESTER WELZ	First Defendant
CHAUCER PUBLICATIONS (PROPRIETARY) LIMITED	Second Defendant

JUDGMENT: 07 November 2017

DAVIS J

Introduction

[1] The present application raises an interesting question concerning discovery pursuant to a defamation action. The problem can be illustrated with the following hypothetical: A publishes an article about B. B is able to prove that the words employed in the article are defamatory of him or her in the judgment of a reasonable person; that is the article can be linked to the person according to the judgment of the reasonable person and is indeed defamatory of him or her. A is now put on his or her proof; that is to prove the existence of a ground of justification (for example, privilege, truth and public benefit, fair comment or, in the case of media, that the report constituted the reasonable publication of false or untrue

defamatory statements. See for a recent exposition of the defence of reasonable publication *Media 24 Ltd v Du Plessis* [2017] ZASCA 33)

[2] B, pursuant to a discovery application, seeks a range of material from A which may well assist in supporting his or her case for justification. A complains that B should surely have had a clear basis for the publication of defamatory material prior to publication and should not *ex post facto* seek A's assistance in order to justify B's defamatory comments.

[3] In essence, this is the opposition which has been raised in the present dispute by the respondent (plaintiff in the main action). I shall refer to plaintiff and defendant and second defendant in this judgment for ease of reference.

The factual background

[4] Plaintiff issued summons against the defendants claiming damages in the amount of R 1 million on the basis that he had been defamed by defendants in a written publication. The action arises from a publication in Noseweek during July 2014. In that publication there were two articles which were the subject matter of this action.

[5] In the first the plaintiff is accused of "aggressive fee charging and disregard for his victims and the law". The article continues: 'one after the other this law firms victims report how they have tried protesting the frauds to judges, to masters of the high court, to the law society, to the police, to the public protector, to government leaders all to no avail. All these institutions are by now, it seems, either too corrupt themselves, or morally to weak and cowardly to take them on'.

[6] The article continues: 'you want what you can't legally be done? Agree to pay Lenny an extra million or three and he will pull it off by hook or by crook'.

[7] The second article relates exclusively to proceedings which were instituted in the Kwa-Zulu Natal Local Division of the High Court in Durban. The proceedings involved an application by one Brakspear, who based on these papers, was described as an associate of second defendant. In this case the article in Noseweek claims that the plaintiff fraudulently manipulated court proceedings and faked a court order. In terms of a judgment by Kgomo J, sitting in the Durban High Court, which judgment formed part of the papers, all of these allegations were found to have no substance.

[8] The present judgment does not concern the merits of the defamation action and I have merely set out as much of the background as is necessary to dispose of this application. The following however is also relevant. In the pleadings, plaintiff alleges that the publication was per se wrongful and defamatory of him in that it was intended and was understood by readers of Noseweek to mean that he was acting fraudulently and/or fraudulently manufactured a debt in order to liquidate a company, is a dishonest person generally, conducts himself in an unprofessional manner, is unfit to practice as an attorney, deliberately misled the court and subverted the cause of justice as an attorney, has no integrity and has acted without scruples, is corrupt, has acted in a criminal manner and in disregard for the law and has charged fees which are unjustified and/or unconscionable and/or to which he was not entitled and rendered false invoices for his fees.

[9] First defendant, who is the sole director and corporate controller of second defendant, pleaded that the publication contains matter that was substantially true

and that was published in the public interest, amounted to fair comment premised on substantially true facts, published on a privilege occasion and that defendants had a 'moral or social duty' to generate the publication which was made to people who had a right to receive the information and was published reasonably in the circumstances in that the reports 'which the aforesaid cover image and teaser phrase invite the reader to read was substantially based on or are a reasonable response to documents, statements and court records that are quoted in the Noseweek reports'. According to defendant's documents, statements and court records had been either generated by the plaintiff himself 'or with his knowledge or at his behest of being known to plaintiff.' While second defendant appears to rely almost exclusively on established justification grounds, first defendant also pleads that the material published is not *per se* defamatory.

The present application

[10] It is common cause that the parties discovered in terms of Rule 35 (1) of the Uniform Rules of the High Court. Second defendant thereafter issued a notice in terms of Rule 35 (3) and (6) on 11 August 2016. In response plaintiff refused to provide any further information as sought in paragraphs 1 and 2 of the Rule 35 (3) and (6) notice on the basis of it "being irrelevant". Defendants contend that the information and/or documentation set out therein is 'both necessary and relevant to the overall conduct of the matter and ultimately and in furtherance of defences to respondent's allegations and claim for damages'. The Rule 35 (3) notice seeks the following:

'Details of all liquidation and sequestration applications brought by and/or on behalf of the plaintiff and his representatives in all South African High Court Divisions for the last 5 years, with specific details of:

1.1 the case numbers;

1.2 the name of the parties;

1.3 the date and result

of each application.

Complete statements of account rendered by the plaintiff and his representatives in each of those applications requested above, how much was either allowed on taxation or by the trustees/liquidator, including all and any disbursements which would include all counsel's accounts.

All and any correspondence exchanged between the plaintiff and his representatives and Brakspear, either on behalf of Nedbank or on his own behalf.'

I should add that the correspondence relating to the Brakspear manner (para 3 of the notice) is no longer in issue.

Plaintiff's case

[11] Mr Woodland, on behalf of the plaintiff, submitted that it was difficult to understand the relevance of the documents sought since no defence was particularised in the pleadings to justify the defamatory material, save for a bald assertion that the defamatory material is true and in the public interest. He contended that it was not permissible for defendants to now seek the production of hundreds of thousands of pages of documents in the hope that some useful material "may turn up". He characterised this application as a fishing expedition; that is a desperate attempt to seek some kind of justification necessary to defend a palpably defamatory publication, the basis of which justification was not in the

possession of the defendants prior to publication. In other words, defendants were attempting to 'fish" to find evidence that might *ex post facto* justify their defence as pleaded.

[12] With regard to paragraph to 2 of the notice, Mr Woodland contended that, while it was true the defamatory material referred to alleged "aggressive fee charging by the plaintiff and specifically to fees charged in the Brakspear matter, this was an incidental reference in the defamatory material where the primary thrust was the alleged perpetration by plaintiff of a fraud on the court. Accordingly the question of the plaintiff's fees and accounts rendered to clients was not a defined issue in the action. Hence these documents were irrelevant to the issues in dispute. Furthermore, fee documents are highly confidential and there is no reason for this kind of information to be ventilated in public or for that matter in Noseweek when no real relevance is apparent from the pleadings.

The purpose of discovery

[13] It is established and indeed trite law that all documents relevant to any matter in question in litigation must be discovered. As Tredgold J stated in *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083:

> 'A party is required to discover every document relating to the matters in question, and that means relevant to any aspect of the case. This obligation to discover is in very wide terms. Even if a party may lawfully object to producing a document, he must still discover it. The whole object of discovery is 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. It is easy to envisage circumstances in which a party

might possess a document which utterly destroyed his opponent's case, and which might yet be withheld from discovery on the interpretation which it is sought to place upon the rules. To withhold a document under such circumstances would be contrary to the spirit of modern practice, which encourages frankness and the avoidance of unnecessary litigation.'

[14] The key question in this case concerns the determination of "what may be relevant to any matter in question in the present litigation". A party may of course only obtain inspection of documents relevant to the issues on the pleadings. See *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 311.

[15] The requirement of relevance was defined in *Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) SA 556 (N) at 564 A where it was held that:

'After remarking that it was desirable to give a wide interpretation to the words a document relating to any matter in question in the action", Brett 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. I have put in the words 'either directly or indirectly' because as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences." '

See also *Swissborough Diamond Mines, supra* at 316. Thus 'relevance' is given a broad meaning and it is to be sourced in any issue raised on the pleadings. *Swissborough Diamond Mines, supra* at 317 A and the authorities cited therein.

[16] One qualification should be noted, namely that it is not open for a party, such as first and second defendants, to couch demands for documents with "inordinate breadth" and thus to determine relevancy on the basis of extraneous considerations. *Swissborough Diamond Mines, supra* at 310 – 311.

[17] A further relevant consideration in this case concerns the question of privilege. A party may validly object to producing documents if they are privileged although the grounds of privilege must be stated with sufficient clarity for a court to determine whether the documents fall within the grounds of privilege.

[18] In this case the second paragraph of the notice, which requires the disclosure 'of complete statements of account', raises the question of privilege.

[19] In *A Company and Two Others v CSARS* (unreported decision of the WCC: 17 March 2014) Binns-Ward J with his customary care provided an exhaustive analysis of the scope of legal professional privilege, particularly where it relates to fee notes generated by attorneys to their clients. After examining both English and New Zealand authority, the learned judge concluded that, applying the most recent English authority in a principled manner to South Africa;

> 'would impel the conclusion that attorneys fee notes are not amenable to any blank rule that would characterise them as privileged communications per se. Feenotes are not created for the purpose of the giving of advice and are not ordinarily of a character that would justify its being said of them that they were directly related to

> the performance of the attorney's professional duties as a legal advisor to the client. They are rather communications by a lawyer to his or her client for the purpose of obtaining payment for professional services rendered: they relate to recoupment for the performance of professional mandates already completed rather than to the exercise of the mandates themselves.' para 30

Binns-Ward J then set out a qualification, that is that portion of the document may be privileged:

> 'Thus, in a case in which parts of a feenote set out the substance of the privileged communications in respect of the seeking or giving of legal advice, or contain sufficient particularity of their substance to constitute secondary evidence thereof, those parts, but not the document as a whole would be amenable to the privilege. The privilege should be asserted in such cases in precisely the manner that the applicants have sought to do in the current matter – that is by redacting the information so as to disclose those parts of the document that are not subject to the privilege and covering up those that are.' para 34

Application of the law to the present dispute

[20] While much of the material upon which this case is predicated on the Brakspear case, the pleadings indicate that the plaintiff has sued on the basis that the two articles published by the defendants was intended and understood by readers of the publication to mean that he had acted fraudulently and/or devised fraudulent schemes, was a dishonest person generally, guilty of unprofessional conduct, charged fees which were unjustified and/or unconscionable. Although it is difficult to understand the precise nature of first defendant's plea relating to the

claim of *per se* defamation, the defences appears to rest, in the main, on the defences of fair comment and reasonable publication.

[21] An examination of the latter defence reveals a difficulty inherent in a case such as the present which is foreshadowed in the introduction to this judgment. When the defence of reasonable publication was developed by Hefer JA in *National Media Ltd and another v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212 the court noted that, in considering the reasonableness of the publication, account must be taken of the nature, extent and tone of the allegations, the nature of the information on which the allegations are based and the reliability of their source as well as the steps taken to verify the information. Significantly, Hefer JA went on to say:

> 'Ultimately there can be no justification for the publication of untruths and members of the press should not be left with the impression that they have a license to lower the standards of care which have been observed before defamatory matter is published in the newspaper.'

This defence has been held to be compatible with the right to freedom of expression enshrined in s 16 of the Republic of South Africa Constitution Act 108 of 1996. See *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) at para 43.

[22] In short, the defence of reasonable publication cannot be based on matter which is only available to the defendant subsequent to discovery, although this material may well prove relevant to the other defences which have been raised.

[23] It is for this latter reason therefore, that it cannot be said that the request for details of the applications of liquidations/sequestrations (the area of law in which plaintiff practices) brought by and on behalf of plaintiff, being the case numbers, the

names of the parties, the date and the result of the cases is irrelevant to the pleadings and hence the issues in dispute in this action for defamation. However, there was some debate about the loose use of language employed in the notice namely, "the plaintiff and his representatives". What is permissible on a sensible reading thereof is that any application for sequestration or liquidation which the plaintiff brought or which were brought under his supervision by members of his firm fall within the request falls within the scope of the notice.

[24] Given that the publication date of the two articles was in 2014, which is when the claims about plaintiff were made by defendants, it appears that the years 2015 to 2017 can hardly be relevant to the pleaded justification of the contents of the two articles which are the subject matter of this action. Accordingly, the case numbers, names and parties and the date and result of each liquidation and sequestration application brought by plaintiff or by lawyers acting under his supervision shall only be granted for the period July 2012 until July 2014 inclusive. It should be noted that only the bare details are required, hardy the 'thousands of pages' as claimed by Mr Woodland

[25] With regard to the question of the statements of account, there are two qualifications that have to be made in request of this request. In the first place the question of privilege, as I have outlined it, is relevant. While a fee note may not be privileged there may well be information contained in a fee note which is privileged and which the plaintiff is therefore entitled to redact before providing the relevant information. Secondly the disclosure of counsel's accounts are not relevant to this particular case, for they have little to do with the question of plaintiff's own charging

of fees and further the request implicates third parties who are not party to nor involved in these proceedings.

Conclusion

[26] Notwithstanding the difficulties to which I have alluded earlier in this judgment, it does appear to me that the following considerations are critical:

26.1 In his plea, defendants are not required to set out all of the sources and details thereof upon which he relied for the two articles.

26.2 As defendants claim that plaintiff is involved in "fraudulent schemes", that is that he fraudulently procured orders to which his clients were not entitled and further that he is guilty of excessive charging, the record of plaintiff's sequestration and applications are relevant to the disposition of this action.

26.3 Our courts have given a wide scope to discovery and to the test for relevance in relation to documents which may be discovered.

26.4 Subject to the qualifications of privilege and relevance, it cannot be said, on these papers, that I am entitled to go behind the discovery affidavit to conclude that the request is a 'fishing expedition' and that the only defences available to the defendants may emerge out of the discovered documents.

26.5 Cases in which plaintiff was involved and which were disposed of after publication or fees charged thereafter can hardly be relevant to the justification for an article published in 2014 and which makes such wide

ranging allegations. As the notice requests documents for the past five years, that is either from 2017 (date of this application) or 2016 (date of notice), only the period prior to the publication shall be allowed; that is for the two years, July 2012 to July 2014.

[27] For all of these reasons therefore, a limited order shall be granted in terms of the framework as I have outlined it. In granting the order, I have accepted plaintiff's submission that any disclosure is solely for the purposes of preparation for trial and not for publication in Noseweek.

Order

[28] Plaintiff is directed to comply with second defendant's request for discovery in terms of Rule 35 (3) dated 11 August 2016 within 30 days in terms of the following:

28.1 The documents which the plaintiff must discover are the following:

28.1.1 Details of all liquidation and sequestration applications brought by and on behalf of the plaintiff and/or lawyers working under his supervision at Edward Nathan and Sonnenbergs in all South African High Court Divisions for the years July 2012 to July 2014 only. These details are <u>only</u> the following:

28.1.1.1 the case numbers;

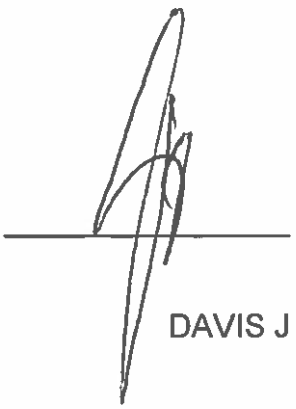
28.1.1.2 the names of the parties;

28.1.1.3 the date and result of each application.

28.2 Plaintiff is required to provide statements of account rendered by plaintiff and/or lawyers working under his supervision at Edward Nathan and Sonnenbergs in each of the applications referred to in paragraph 2, (that is from July 2012 to July 2014) including how much was allowed on taxation or by the trustees and or liquidators, including all and any disbursements, save for counsel's accounts subject to the following further condition. The statements can be redacted by plaintiff in order to exclude those parts of a statement which contain the substance of privileged communications in respect of the seeking or giving of legal advice or contain sufficient particularity of their substance to constitute privileged communication between plaintiff and his clients.

28.3 The discovered documents may only be used by defendants for the purposes of trial until such time that they are produced at the trial hearing.

28.4 Plaintiff is ordered to pay the costs of this application.



DAVIS J