IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 34312/10

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

11/12/2018

In the matter between:

MINERAL-LOY (PTY) LTD — Plaintiff

and

HIGHVELD STEEL & VANADIUM — First Defendant

TRANSALLOYS (PTY) LTD — Second Defendant

JUDGMENT

VAN DER WESTHUIZEN, J

[1] The second defendant has applied in terms of the provisions of Rule 35(3) of the Uniform Rules of Court that the plaintiff be compelled to

make further and better discovery in respect of certain specified documents. The plaintiff opposes that application.

[2] The main action between the parties has already turned in court on issues separated in terms of the provisions of Rule 33(4). That matter came before Bertelsmann, J., and the issues were decided in favour of the plaintiff. The balance of the issues in dispute were postponed. Those issues are to be decided at the hearing scheduled for 28 January 2019. This application is in anticipation of the next hearing of the main action.

[3] At some stage, the plaintiff and the first defendant came to a settlement of their dispute. Accordingly, the first defendant is no longer a party to the main action and this application.

[4] Further in this regard, it will be prudent to give some background in respect of the relationship between the plaintiff and the first defendant, and subsequently the plaintiff and the second defendant. During or about 1985, the plaintiff and the first defendant entered into a partly oral and partly written agreement, as found by Bertelsmann, J., in terms whereof the plaintiff was appointed as the sole distributor, within the Republic of South Africa, of the first respondent in respect of the latter's medium carbon ferromanganese. Certain defined clients were excluded from the said agreement with whom the first defendant would exclusively deal with in respect of sales of medium carbon ferromanganese. The said agreement was later amended to include silico-manganese produced by the first respondent. Bertelsmann, J., found in his judgment what the terms of the said agreement were and it is not necessary to restate those terms again. Those terms are *res iudicata* between the parties. During or about 2007, the first defendant concluded a written agreement with the second defendant in terms whereof the first respondent sold its business of its Transalloys division to the second defendant. The agreement between the plaintiff and the first defendant was transferred to the second defendant and the plaintiff

and the second defendant consequently assumed the reciprocal obligations of the agreement in respect of one another. It appears that the plaintiff was initially unaware of the sale of the first defendant's Transalloys division and continued to comply with its contractual obligations towards the first defendant. On being notified of the transfer of the business of the Transalloys Division during or about 2008, the plaintiff interacted with the second defendant in terms of the said distribution agreement. A dispute arose, and the plaintiff instituted an action against the first and second defendants, the main action. In particular, the sale by the second defendant of its stock pile to an entity identified as "AMT" is at the centre of the dispute between the plaintiff and the second defendant.

[5] Following on the judgment of Bertelsmann, J., the plaintiff amended its particulars of claim. The second defendant responded with its consequential amendment to its special plea and plea on the merits. A consequential amended replication was filed by the plaintiff.

[6] In its notice in terms of Rule 35(3), the second defendant has listed 10 items which it seeks the plaintiff to make available for inspection. The period covering the requested documents as stipulated in the notice is lengthy, dating back to 1991, 1994 and in particular the period 1996 to 2010. The plaintiff filed an answer to the second defendant's notice.

[7] The plaintiff's response was either that the documents were destroyed, if such existed, or are not relevant to any issue of the remaining disputes. Some documents that do still exist, were made available.

[8] It appears that the second defendant accepted the plaintiff's response to the Rule 35(3) notice in respect of items 1, 2, 3 and 6. In respect of the plaintiff's response in respect of items 4, 5, 7, 8, 9 and 10, the second defendant launched this application. The plaintiff filed an answering affidavit and subsequently a belated supplementary affidavit

in further answer was filed. I shall deal with that supplementary answer in due course.

[9] The items in dispute are the following:

(a) Item 4: A list of all the plaintiff's employees and/or a description of each such employees job titles for the period 1996 until 2010;

(b) Item 5: Copies of the plaintiff's employees' employment contract relating to those employees who were employed by the plaintiff during the period 1996 until 2010;

(c) Item 7: Copies of the plaintiff's stock holding inventory and/or stock ledger for MCFeMn and SiMn detailed from 1996 to 2010;

(d) Item 8: Copies of the plaintiff's marketing materials, invoices, sales and related document in respect of the second defendant and its product including, *inter alia*, any reports, memoranda, documents, schedules, time sheets, records of site visits, diaries and diary entries, handwritten notes, minutes of meetings, correspondence, presentations and computer records demonstrating, *inter alia*, that the plaintiff was a distributor of the second defendant's products (and its efforts in that regard);

(e) Item 9: The written contract concluded with M.S. & A Chronium referred to in a letter dated 6 August 1991. Although the second defendant deals with this item in its founding affidavit, it is not included in the prayers contained in the notice of motion;

(f) Item 10: All contracts (including local distribution and/or agency contracts) concluded by the plaintiff with its customers including, *inter alia*, for the distribution and/or supply of the second defendant's products to such customers (excluding Impala Platinum; Richards Bay Iron and Titanium; Metallurgical Process; M.S. & A Chronium; Tissand) for the period 1984 to 2010 (inclusive).

[10] Why the extended period from 1996 to 2010 is stipulated is not explained. The second defendant only arrived on the scene during 2007/2008. The second defendant has not explained the relevance of that extended period. None of the remaining issues in the main action cover the extended period, at least not in respect of the period prior to the second defendant's entry on the scene during 2007/2008.

[11] The second defendant predicates the relevance of the documents requested in its Rule 35(3) application upon the following:

(a) Items 4 and 5: The plaintiff alleges in claims 1.1, 1.2 and 2 of its particulars of claim that it would have made the sales to AMT and/or the plaintiff's customers and customers not on the excluded list including new products. The second defendant alleges that in order to have achieved that, the plaintiff would have been required to increase its workforce which in turn is directly relevant to whether the plaintiff would have in fact made such sales at all. The second defendant alleges further that the plaintiff's work force is also directly relevant to issues of waiver and estoppel pleaded by the second defendant;

(b) Item 7: The plaintiff contends that in view of the fact that it was appointed the sole distributor in terms of the said agreement, it only could have sold to customers that were not on the excluded list. The second defendant thus

contends that in order to have been able to do so, the plaintiff would have been required to have the requested documents of this item in place. The second defendant further contends that the stockholding ledger and/or stock ledger is directly relevant to the issues of waiver and estoppel pleaded by the second defendant;

(c) Item 8: The second defendant contends that the plaintiff's claim that it would have sold the second defendant's stockpile and new products to customers not on the excluded list, and including to AMT, the plaintiff would have been required to have a commensurate increase of its marketing and technical assistance efforts and costs all of which are directly relevant to the profit margin that the plaintiff alleges it would have earned on such sales. The second defendant further contends that it is also directly relevant to the issue of waiver and estoppel pleaded by the second defendant;

(d) Items 9 and 10: Although the second defendant dealt with item 9 in the founding affidavit, it does not seek an order in that regard in the notice of motion. However, I shall deal with that item. The second defendant contends on the premise that claims 1.1 and 1.2 of the plaintiff's particulars of claim are approximately twenty five million rand more that the sales that the plaintiff did, in fact, make. It is then contended by the second defendant that logically the contracts with plaintiff's customers are directly relevant to the issue whether the plaintiff would have been able to make sales in the increased amount it claims to its customers and whether it would have had the capacity to make the further sales and to undertake the other obligations it had in terms of the said agreement. It is further contended by the second defendant that the contracts are also relevant to the issues of waiver and estoppel pleaded by the second defendant.

[12] Items 9 and 10 can be dealt with reference to the belated supplementary answer of the plaintiff. No real protestation was forthcoming from the second defendant in respect of the lateness of the supplementary answer. It is thus accepted into evidence. The second defendant has not filed a reply to the initial answer, and did not seek an opportunity to respond to the supplementary answer. The supplementary answer is dispositive of the request in respect of item 10 of the second defendant's Rule 35(3) notice. The plaintiff's supplementary answer is clear. It had no written agreement with any of its clients and furthermore, orders would be placed orally. Resourcing of the order would also be done orally. The relevance of the contract requested in item 9 is not explained, in particular with reference to the alleged date thereof, i.e. 1991. That date pre-dates the second defendant's arrival on the scene.

[13] In my view, none of the documents relating to a period prior to the second defendant's arrival on the scene are irrelevant to any of the issues raised by the second defendant. Neither do they have a bearing on the claims of the plaintiff. It follows that the second defendant would not be entitled to discovery thereof.

[14] From the pleadings, and in particular the consequential adjusted replication, it is gleaned that there are certain issues raised in the second defendant's plea that appear to be no longer in dispute, it being *res iudicata* between the parties. In support of the plaintiff's contention that those issues are *res iudicata*, the plaintiff relies upon two judgments, one of this court per Janse van Nieuwenhuizen, J., and one of the Supreme Court of Appeal which pronounced upon the judgment of Janse van Nieuwenhuizen, J. Unfortunately, neither of the parties deemed it fit to include either or both of those judgments in the present application. However, sufficient detail of the judgments are contained

in the consequential adjusted replication to have regard to the two judgments.

[15] Further in this regard, the second defendant's contention that the documents requested may be relevant to the issue of waiver, is without merit. This court, per Janse van Nieuwenhuizen, J., dismissed the second defendant's plea of waiver. That judgment was upheld by the Supreme Court of Appeal and the appeal was dismissed. Consequently, the issue of waiver appears to be *res iudicata* between the parties.

[16] In that event, namely that the issue of waiver is no longer in issue, the second defendant's contention of the relevance of the requested documents in respect of the issue of waiver, is of no moment.

[17] The issue of estoppel can be dealt with in similar vein. The second defendant's contention in respect of the issue of estoppel is premised upon an alleged representation on the part of the plaintiff that the distribution agreement was to be conducted in accordance with its terms, as amended by a memorandum dated 21 December 2006. That memorandum also formed the basis of the defence of waiver. In view thereof that the Supreme Court of Appeal held against the second defendant in respect of the issue of waiver with reference to the memorandum, the issue of estoppel is also of no moment. Bertelsmann, J., clearly found that the memorandum was of no consequence and had not amended the terms of the agreement as pleaded by the plaintiff. Those terms were held to be that of the agreement. The Supreme Court of Appeal having found against the second defendant on the issue of waiver, the second defendant's contention in respect of the relevance of the requested documents relating to the issue of estoppel stands to be dismissed.

[18] It is trite law that relevance of documents sought to be discovered is a matter for the court to decide.[1]

[19] Furthermore, the courts are loathe to go beyond a discovery affidavit which is *prima facie* regarded as conclusive, save where it can be shown, either form the discovery affidavit itself, or from the documents referred to in the discovery affidavit, or from the pleadings in the action, or from any admission made by the party making the discovery affidavit, or from the nature of the case or the documents in issue, that there are reasonable grounds that the party has or had other relevant documents in his possession or power, or has misconceived the principles upon which the affidavit should be made.[2]

[20] It was held in *Marais v Lombard*[3]

> "*... when a party making discovery has sworn an affidavit as to the irrelevancy of certain document, the Court will not reject that affidavit unless a probability is shown that the deponent is either mistaken or false in his assertion.*"

[21] The test for relevance as laid down in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co*[4] has been accepted by the courts.[5] The test is whether it is reasonable to suppose that the document contains information which may either directly or indirectly enable a party requiring it either to advance his own case or to damage the case of his adversary. Furthermore, the meaning of relevance is circumscribed by the requirements of both rules 35(1) and 35(3) in that it relates to or may be relevant to any matter in question. The matter in question is determined from the pleadings.[6]

---

[1] *Helen Suzman Foundation v Judicial Service Commission* 2018(4) SA 1 (CC) at [26]
[2] *Swissbrorough Diamond Mines (Pty) Ltd et al v Government of the Republic of South Africa et al* 19992 SA 279 at 317E-G
[3] 1958(4) SA 224 (E) at 227G
[4] (1982) 11 QBD 55
[5] See *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983(1) SA 556 (N) at 564A
[6] *Schlesinger v Donaldson* 1929 WLD 54 at 57

[22] In the plaintiff's particulars of claim three claims are pleaded. The third claim is not relevant to the present instance and the second defendant's request only relates to claims 1 and 2 in the plaintiff's particulars of claim.

[23] Claim 1 has an alternative and can be summarised as follows:

> "*1.1 The plaintiff's claim is for R11 556 621.00 being for alleged loss of a 5% gross profit on the sale of the stockpile by the second defendant to AMT as actually invoiced and should have been sold by the plaintiff, as sole local distributor, to AMT and new production/sales to local customers for the 24-month notice period after the second defendant's repudiation of the distribution agreement;*
>
> *1.2 The alternative claim to claim 1.1 is for R10 632 282.00 premised on a finding that AMT is an alter ego of the second defendant and thus a simulated transaction to be set aside or disregarded by the court and being the sale of the stockpile and new production/sales by the plaintiff to local customers for the 24-notice period after the second defendant's repudiation of the distribution agreement."*

[24] Claim 1 is premised upon the alleged sale of the second defendant's entire stockpile resulting in the alleged loss of the opportunity by the plaintiff to exercise its rights in respect of the stockpile as envisaged by the distribution agreement. It is the loss of the alleged opportunity to make the sales and earnings of commission and not the capability of the plaintiff to effect the sales that lies at the heart of claim 1.

[25] Claim 2 in the plaintiff's particulars of claim can be summarised being in respect of an amount of R15 009 335.00 on the premises that the second defendant, for a period of 15 months from 1 July 2007 to 30

November 2008, breached the distribution agreement by selling to customers not on the excluded list and failing to disclose all sales of the relevant products to customers on the excluded list to which the plaintiff was allegedly entitled to earn a commission on such sales.

[26] The basis of claim 2 is the alleged breach of the terms of the distribution agreement and not the plaintiff's capability to make the relevant sales.

[27] On the pleadings, it follows, in my view, that items 4, 5, 7 and 8 have no bearing on the loss of the opportunity to make the sales or to earn commission thereon as claimed in claims 1 and 2 of the particulars of claim. Further in my view, the second defendant has not shown that on the issues as pleaded, there is a probability that the plaintiff is mistaken or false in its assertion as to the relevance of the documents in items 4, 5, 7 and 8.

[28] As recorded earlier in respect of the issues of waiver and estoppel, and to the extent that those issues may still be alive, the second applicant has not shown, with regard to the pleadings, that there is a probability that the plaintiff is mistaken or false in its assertion in respect of the relevance of the documents of items 9 and 10.

[29] Furthermore, Bertelsmann, J., found that the plaintiff had complied with its obligations in terms of the said distribution agreement. That finding, in my view, puts paid to the second defendant's contention in respect of the alleged incapability of the plaintiff to have complied with its obligations in terms of the said distribution agreement.

[30] it follows that the second defendant has not shown why this court should reject the plaintiff's affidavit in respect of the issue of relevance and to go beyond the affidavit. In my view, the plaintiff's answer in respect of relevance is to be accepted in view of all of the foregoing.

[31] It further follows that the second defendant's application to compel further and better discovery cannot succeed.

I grant the following order:

The application is dismissed with costs, such costs to include the costs consequent upon the employ of two counsel.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Second Defendant:	J Daniels SC C T Vetter
Instructed by:	MERVYN TABACS INC.
On behalf of Plaintiff:	G Kairinos SC A Schluep
Instructed by:	ANDREW DUFF ATTORNEYS