

SOUTH AFRICA / JUDGMENT

ED Advisory Services (Pty) Ltd and Others v Marsay (8994/2021) [2023] ZAGPJHC 802 (21 July 2023) [2023] ZAGPJHC 802

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

8994/2021

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IN THE HIGH

COURT OF SOUTH AFRICA

(GAUTENG DIVISION,
JOHANNESBURG)

Case

No. 8994/2021

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

21.07.23

In

the matter between:

ED
ADVISORY SERVICES (PTY) LTD
First
Applicant
ECONOMIC
DEVELOPMENT MANAGEMENT AND
ADMINISTRATION
SERVICES (PTY) LTD
Second
Applicant
ED
REPORTING SERVICES (PTY) LTD
Third
Applicant

And
NICOLAS
MARSAY
Respondent

JUDGMENT

WILSON J:

1 The applicants, to whom I shall refer collectively as the ED Group, retained the respondent, Mr. Marsay, as a consultant providing

economic development advisory services on their behalf. Mr. Marsay was remunerated substantially by way of commission. That commission

was equal to 5% of the revenue generated from clients of the ED Group that Mr. Marsay sourced. Mr. Marsay's commission was set out in a contract between the ED Group and Mr. Marsay, which the parties described as a "commission agreement".

2 It was a condition of the commission agreement that Mr. Marsay would not solicit work for his own account from any of the ED Group's

clients. One of the ED Group's clients could, however, approach and retain Mr. Marsay independently of the ED Group if it confirmed in writing that it had approached Mr. Marsay, and he had not approached it; that it had obtained a quote for the same work from the ED Group; and that it was aware of Mr. Marsay's fees. In that event, Mr. Marsay could accept the work provided that he charged a fee calculated in a manner prescribed in the commission agreement, and if he paid 5% of his total fee for the work over to the ED Group.

3 The ED Group alleges that Mr. Marsay has accepted and performed work for its clients in breach of the commission agreement. It has instituted an action for damages arising from this alleged breach of contract. The ED Group now applies for an order compelling

Mr. Marsay to produce for inspection various documents evidencing his relationship with clients it says Mr. Marsay serviced in breach of the commission agreement. Mr. Marsay resists such an order. He also applies to strike out allegations raised for the first time in the ED Group's replying affidavit.

4 On 19 July 2023, I granted an order dismissing Mr. Marsay's application to strike out, and compelling him to make the documents

identified by the ED Group available for inspection. I indicated that I would give my reasons in due course. These are my reasons.

The application to strike out

5 In its particulars of claim, the ED Group alleges that Mr. Marsay had provided economic development advisory services to an entity it called “Wartsila Corporation”, and to an unknown number of its “other prospective clients”. Mr. Marsay disclosed bank statements that appear to show payments from Wartsila to “Orchestrator Management Services”, which is

a company he controls. But, beyond two quotations and one other precontractual communication, Mr. Marsay did not disclose material

relating to work with any entities that might fall into the category of “other prospective clients”. In his affidavit in answer to the ED Group’s application to compel, he stated that this material could not be disclosed because it did not exist.

6 In reply, the ED Group produced material that suggested that Mr. Marsay had in fact provided services to a number of other companies in breach of the commission agreement. These, the ED Group says, were the “other prospective clients” referred to in

its particulars of claim. The material the ED Group produced in reply consisted of references to Mr. Marsay’s services in those companies’ annual reports and other public documents. The ED Group says that the material also tends to show that those services probably involved the provision of economic development advice.

7 In what he called a “rejoinder affidavit”, filed to plead over in the event that his application to strike out was dismissed, Mr. Marsay admitted that he had dealings with these companies, but said that his dealings did not encompass the provision of economic development advisory services. That placed them beyond the scope of the commission agreement.

8 Mr van Nieuwenhuizen, who appeared for Mr. Marsay before me, argued that the ED Group produced the new material in its replying affidavit to embarrass Mr. Marsay, and to create the impression that he had sought hide his other clients. This was misleading, Mr. Nieuwenhuizen argued, because Mr. Marsay’s relationship with his other clients had nothing to do with the provision of economic development advisory services. Mr. Nieuwenhuizen suggested that the ED Group probably had the information evidencing Mr. Marsay’s other work all along, but had produced it in reply with the sole purpose of ambushing him.

9 Material produced for the first time in reply will generally be struck out. But a court has a discretion, in exceptional circumstances, to allow the introduction of new material in reply. That discretion must be exercised having regard to “(i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the

determination

of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs” (Mostert v Firststrand Bank Ltd t/a RMB Private Bank 2018 (4) SA 443 (SCA), paragraph 13).

10 If I were satisfied that the new material was produced purely for the purposes of ambush, I would of course have struck it out. But

I was not so satisfied. ED Group has been clear all along that, other than the Wartsila Corporation, it does not know who Mr. Marsay’s

extra-contractual clients are. It was entitled to say that in its founding papers. It was also entitled to expect frank and honest

disclosure, in Mr. Marsay’s answering affidavit, not just of material related to what Mr. Marsay subjectively believed were

economic development advisory services, but of material that might reasonably be relevant to the pleaded issues in the main action (see, for example, ST v CT 2018 (5) SA 479 (SCA), at 488B and Santam v Segal 2010 (2) SA 160 (N), paragraph 10).

11 Mr. Marsay having effectively denied in his answering affidavit that he had any relationships other than his contract with Wartsila to disclose, the natural inference to be drawn from the papers is that the ED Group cast around for information that might confirm or contradict that version. That material was then produced in reply. In these circumstances, there was plainly no ambush.

12 The circumstances as I have outlined them seemed to me to be sufficiently exceptional to exercise my discretion in favour of allowing the material. There was no prejudice to Mr. Marsay, because he pleaded over, and sought admission of the “rejoinder affidavit”, to which the ED Group agreed, and which I allowed. That affidavit contained all the information necessary to assess the new material. What is more, the new material served to highlight and define what is likely to become one of the principal issues at trial: whether the commission agreement actually applies to the clients Mr. Marsay has taken on outside of its terms. In these circumstances, the new material had to be allowed, and the strike out application was dismissed.

The application to compel

13 The application to compel was initially resisted on two bases: first that the documents the ED Group sought were not relevant to the pleaded issues, and, secondly, that the documents were not in Mr. Marsay’s possession. Both objections rested on the same substrate: that the documents did not relate to the provision of economic development advisory services in breach of the commission

agreement.

14 At the outset of the argument before me, it was conceded that the documents the ED Group sought – documents related to the

provision of economic development advisory services to specified third parties – were in fact relevant to the pleaded issues. Mr Marsay’s case narrowed to the proposition that he simply had no such documents in his possession.

15 Mr. Marsay’s case involved no small degree of sophistry. Mr. Marsay did not deny that he had documents in his possession which

evidence a relationship with third parties to whom he provides consulting services beyond the scope of the commission agreement. He said only that any documents he had that concerned his relationship with the entities specified in the ED Group’s discovery notice did not concern the provision of economic development advisory services. Accordingly, so the argument went, he was not “in

possession” of the documents the ED Group sought. But, as I have already made clear, whether Mr. Marsay is actually providing

economic development advisory services to the relevant third parties is precisely what is in issue between the parties in the main action. Mr. Marsay’s duty is to disclose documents that might reasonably relate to the provision of such services, not simply

documents that he subjectively believes relate to those services.

16 The ED Group has produced sufficient material to suggest that documents evidencing Mr. Marsay’s relationship to the third parties specified in its notice may well relate to the provision of economic development advisory services. To take but one example,

there is an extract from the 2017 annual report of a company called Hulisani. The report boasts that Hulisani has “recently brought in the expertise of Nicolas Marsay a leading Economic Development Advisor . . . Nicolas will assist in optimising the existing

investments held by Hulisani and advising the business development team on potential efficiencies within the pipeline of future

acquisitions. The areas that Nicolas will focus on will be: sustainability, business strategy, organisational improvement, local

supply chain efficiency, local economic development and maximising job creation."

17 I cannot say whether Mr. Marsay’s functions, so described, amount to the provision of “economic development advisory services”. But nor can I say that they do not. It is enough that they might reasonably be so construed, even if it turns out that they actually relate to the provision of another type of service. It follows that documents of the nature specified in the ED Group’s discovery notice evidencing Mr. Marsay’s relationship with Hulisani are relevant and

discoverable. The same is to be said for any documents in Mr. Marsay's possession of the nature the ED Group specifies that relate to his relationships with the other entities to which the ED Group has established he is connected, or with entities to which he might reasonably be construed as having provided economic development advisory services during the period specified in the ED Group's discovery notice.

18 It was for these reasons that I dismissed Mr. Marsay's application to strike out, and granted the ED Group's application to compel the documents specified in its discovery notice.

S D J WILSON

Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 21 July 2023.

HEARD ON: 19 July 2023

DECIDED ON: 19 July 2023

REASONS: 21 July 2023

For the Applicants: L Hollander Instructed by Swartz Weil Van der Merwe Greenberg Inc For the Respondent: HP van Nieuwenhuizen Instructed by Nupen Staude de Vries Attorneys

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