

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case No: 1124/06

Delivered: 02/03/2007

**GERALD LESLIE PATRICK BOSMAN
VERNON DIAMONDS (PTY) LTD
TRIFECT DIAMONDS (PTY) LTD**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT**

versus

**MELLVILLE MITCHELL VAN WYK
MICHAEL VICTOR DAVIS
VAUGH-LEIGH KEVIN JACOBS
MINISTER OF MINERALS &
ENERGY
REGIONAL MANAGER,
NORTHERN CAPE REGION,
DEPARTMENT OF MINERALS &
ENERGY**

**FIRST RESPONDENT
SECOND RESPONDENT**

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

JUDGMENT

MOKGOHLOA AJ

1. The first applicant Gerald Leslie Patrick Bosman, is a businessman in Warrenton and the only shareholder and director of Vernon Diamonds (Pty) Ltd (Second Applicant). Trifect Diamonds (Pty) Ltd (Third Applicant) is a company with its principal place of business at

Brooklyn Gauteng, which is in the process of acquiring shares in the second applicant.

2. The first, second and third respondents are businessmen who entered into a shareholders agreement with the first applicant to purchase certain shares in the second applicant on condition that the second applicant obtain a mining right from the Minister of Minerals and Energy (Fourth Respondent) on the recommendation of the Regional Manager of the Department of Minerals and Energy, Northern Cape Region (Fifth Respondent). This agreement was, according to the first applicant, subsequently cancelled by the first, second and third respondents.
3. The first, second and third respondents brought an application on 26 January 2007 for an order to compel the applicants and the fourth and fifth respondents to make certain documents available in terms of Rule 35 of the Uniform Rules of Court. On 9 February 2007 I granted the application and ordered that the costs be reserved for determination by the Court hearing the main application. I reserved the reasons for my decision. This judgment serves to convey to the parties such reasons.

4. On 14 September 2006 the applicants instituted proceedings by way of motion (main application) wherein they asked the Court to grant an order **interalia** declaring:

“ 1.3 that the second applicant has duly complied with the conditions under which the mining rights in terms of section 23 of Act 28 of 2002 was granted to it and that the second applicant is entitled to execution of the mining right, alternatively that the second applicant shall be so entitled upon the submission of the shareholders’ agreement between the first and the third applicant, as well as submission of the CV’s of the second applicant’s management team”

5. On 16 October 2006 the first, second and third respondents delivered a notice of intention to oppose the application. On 27 October 2006 the three respondents delivered a notice in terms of Rule 35(14) requesting the applicants as well as the fourth and fifth respondents to make the following documents available: the entire application by second applicant for a mining right lodged with the fifth respondent; the recommendations and submissions by the fifth respondent to the fourth respondent; the power of attorney by the fourth respondent to execute the mining right; and the commentary by the employees of the fifth respondent in the process of

considering and recommending the application.

6. The fourth and fifth respondents did not respond to this notice. The applicants responded and refused to make available the requested documents. The first, second and third respondents then brought this interlocutory application before me seeking an order directing the applicants as well as the fourth and fifth respondents to make those documents available for inspection.
7. Counsel for the applicants argued that Rule 35 is not applicable in motion proceedings. He submitted that there exist no exceptional circumstances that will persuade me to grant discovery in motion proceedings. He submitted further that the requested documents are not necessary for the purpose of pleading; they are not clearly specified; not all requested documents are in possession of the applicants; and that those documents are not relevant to any reasonably anticipated issue in the proceedings.
8. Rule 35(14) provides as follows:
“After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within 5 days a clearly specified document or tape recording in his possession which is relevant to

a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

Rule 35(13) on the other hand provides that the provisions of the rule relating to discovery can only apply to applications if ordered by the Court and only in exceptional circumstances. See **Saunders ValueCo Ltd v Insamcor(Pty)Ltd 1985(1)SA 146(T)**

9. The provisions of Rule 35(14) have been considered in **Cullinan Holdings Ltd v Mamelodi Stadsraad 1992(1) SA 645 (T)** and **QuaysideFishSuppliers**

CC v Irvin & Johnson Ltd 2000(2) SA 529 (C) 532 I. The requirements therefore can be summed up as follows:

9.1 Exceptional circumstances must exist before the rule can be applied in motion proceedings;

9.2 the documents must be necessary for the purposes of pleading;

9.3 the documents must be clearly specified;

9.4 the documents must be in possession of the party who is required to discover;

9.5 the documents must be relevant to a reasonably anticipated issue in the proceedings.

10. It is clear that there must be good reasons to justify the application

of Rule 35 in motion proceedings. In **Saunders Value Co Ltd v Insamcor (Pty) Ltd (supra) at 149 B-H, Goldstone J** stated as follows:

“The presence of exceptional circumstances arises by reason of the fact that an interdict of a permanent nature is being sought in these proceedings on motion. That itself is unusual, especially in relation to a copyright matter where drawings are relied upon which go back over almost half a century of time. In motion proceedings the

affidavits constitute both the pleadings and the evidence. If this matter had proceeded by action, pleadings would have been filed and the applicant would have had to have alleged, in those pleadings, both originality in respect of the drawings upon which it relies for its claims of infringement and also ownership of the copyright in question. It would have been open to the respondent (which would have been a

defendant in such proceedings) to have joined issue on those two matters and, after the close of pleadings, the present application would be required to make discovery. At that stage the respondent would have been entitled to have its experts investigate the question of originality and ownership and so prepare for trial. On the basis of those investigations it would have decided what evidence should be led in answer to the applicant’s claims.

Because of the fact that motion proceedings have been instituted,

*the respondent is called upon now, not only to plead to the claim as set out in the founding affidavits and the notice of motion, but also to place before the Court its evidence. In my opinion, having regard to the circumstances to which I have referred, the respondent would be prejudiced if discovery were not to be made at this stage and so give the respondent the opportunity of deciding what evidence should be placed before the Court in answer to the matters upon which the **onus** will ultimately rest upon the applicant. It follows too, in my judgment, that it would be unfairly prejudicial to the respondent if it were called upon to file answering affidavits prior to such discovery having been made by the applicant. I would add too that this is obviously a matter where technical evidence may well be vital. The evidence which the respondent wishes to obtain will, no doubt, include matters of a technical nature which will of necessity relate to documents which should properly be discovered by the applicant."*

11. Applying the principles as set out in the three cases above, I am of the view that this is a case where the rules of discovery should apply. My conclusion is based on the following factors:

- 11.1 I do not regard the fact that the applicants are seeking a final order as the only factor that renders exceptional circumstances to exist in this case, but also that it would be fair and equitable for the applicants to be open and

transparent towards the respondents.

11.2 The documents requested are not of a general nature they are clearly defined and specified.

11.3 These documents are relevant in that the dispute can be resolved by the production thereof.

11.4 For the Court to grant a declaratory order in the main application it must certainly be proved that the applicants have complied with the conditions under which the mining right was granted. In particular, conditions as they appear in annexure "M" of the main application.

12. I now turn to the issue of costs. I am of the view that the Court which ultimately deals with the merits of the main application will be in a better position to deal with the question of costs. In particular whether the first, second and third respondents reasonably required the discovery of those documents before filing answering affidavits, in that case then, the Court hearing the application would be moved to grant those costs against the applicants and/or against the fourth and fifth respondents or whatever costs order it deems just.

The following order is made:

ORDER

1. It is directed that the provisions of Rule 35(13) of the Uniform Rules apply to this matter.
2. The first, second and third respondents are granted extension of time to file their answering affidavit/s, such affidavit/s to be filed within 15 days after compliance by the first, second and third applicants and fourth and fifth respondents with the terms of paragraph 3 hereof.
3. That the first, second and third applicants as well as fourth and fifth respondents are directed to make discovery of all documents in their possession requested by the first, second and third respondents in their notice of motion dated 19 December 2006 in terms of Rule 35 and within 5 days of the date of this order.
4. The costs of this application are reserved for determination by the Court hearing the main application.

**FE MOKGOHLOA
ACTING JUDGE
NORTHERN CAPE DIVISION**

For the 1st, 2nd + 3rd Applicants: Adv J.G. van Niekerk

Instructed by: Duncan & Rothman

For the 1st, 2nd and 3rd Respondents: Adv. Danzfuss
Hay Attorneys

Instructed by: Elliott, Maris, Wilmans &

For the 4th and 5th Respondents: State Attorney