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| Reportable: Yes / No<br>Circulate to Judges: Yes /<br>No |
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Circulate to Magistrates: Yes / No

## **IN THE HIGH COURT OF SOUTH AFRICA**

(Northern Cape Division)

Case no: 667/2003

Date heard: 2003-09-05

Date delivered: 2003-09-12

In the matter of:

**De Beers Consolidated Mines Limited** Respondent/Applicant

*versus*

**Mondira Pula CC** Applicant/First Respondent

**The Director Mineral Development**

**Northern Cape** Second Respondent

**Sol Plaatje Municipality** Third Respondent

Coram: **MAJIEDT J**

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| <b>JUDGEMENT</b> |
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**MAJIEDTJ:**

1. This is an interlocutory application for the discovery of certain documents in terms of Uniform Rules of Court 35(12) and 35(14). The first respondent in the main application is the applicant herein while the applicant in the main application is the respondent. I shall refer to the parties in this judgement as they are depicted in the interlocutory application.
2. In the main application the respondent seeks an order as follows:
  - “1. That the forms and services provided for in the Court Rules be dispensed with and that this matter be disposed of as an urgent application.
  2. That the First Respondent is called upon to furnish reasons (if any) in this Court on FRIDAY the 15<sup>th</sup> of AUGUST 2003 AT

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10H00 why the following order should not be granted –

2.1 That the First Respondent is interdicted from entering upon the property known as

CERTAIN remainder of Erf 5045;

SITUATE in the City and District of Kimberley;

HELD under Deed of transfer No T.176/1941

or remove any mining tailings from the said property.

2.2 That the First Respondent is ordered to restore the Applicant's undisturbed possession of the said property;

2.3 That the First Respondent is ordered to remove the gates erected in the fence of the said property and to restore the said fence in its original position;

2.4 That the First Respondent (as well as any other Respondent opposing this Application) be ordered to pay the costs of this Application (in the case of more than one Respondent, jointly and severally).

3. That the order contained in paragraph 2.1 will have interim operation with immediate effect.

4. Further and/or alternative relief."

3. On the urgent application of the respondent an order was

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issued in chambers as per paragraphs 2.1, 2.2, 2.3, 2.4 and 3 as prayed in the Notice of Motion, *supra*.

4. I set out in full detail the relief sought in the Notice of Motion and the relief granted on an urgent interim basis, because it is of some importance, as will appear later herein.
5. The applicant herein filed a notice in terms of Rule 35(12) requesting the discovery of certain documents and also a discovery notice in terms of Rule 35(14) requesting the discovery of some other documents. The aforementioned notices had been preceded by correspondence between the attorneys of the parties.
6. At the commencement of the hearing of this matter, I indicated to Counsel that, since the respondent had complied to an extent with the notices, save and except

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insofar as four of the items requested under the notice in terms of Rule 35(14) is concerned, that the exercise has become largely academic. All that is left to consider at this stage is the four outstanding items requested under Rule 35(14) as well as the matter of costs. Argument was therefore largely restricted to these specific aspects. It is, however, necessary to deal with the documents requested and discovered under Rule 35(12) and the balance of Rule 35(14).

7. I deal firstly with the outstanding items requested in the applicant's Rule 35(14) notice. These outstanding items are the following:

- “a) The documentation evidencing the ownership of the tailings referred to in the final paragraph, paragraph 8.1 of the affidavit of Mr. Fisher.
- b) The documentation evidencing the rights to the minerals referred to in the final paragraph, paragraph 8.1 of the

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affidavit of Mr. Fisher.

- c) The documentary proof that the tailings were extracted from the Kimberley and De Beers Mines.
  - d) The documentary proof that the said tailings were deposited on the Remainder of Erf 5045."
8. In the main application the respondent seeks the order set out herein before. The dispute primarily concerns the fact that the applicant had obtained a mining authorisation from the second respondent in the main application in terms whereof the applicant was authorised to sort for diamonds on a portion of Erf 5024 (the description of the property is incorrect and has now been corrected by the second respondent in the main application – it should refer to Erf 5045). The applicant has thereafter entered the said property and has commenced exercising its rights pursuant to the said mining authorisation. The respondent claims in the main application that it is the

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owner of the mining tailings and the diamonds therein contained which has been deposited on Erf 5045 and also avers that it was in undisturbed possession of the said mining tailings, which possession has been disturbed unlawfully by the applicant.

9. Rule 35(14) reads 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 five 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.” (the emphasis is mine).

10. The respondent has objected to making discovery of the aforementioned four items on the basis:

- a) that they are not relevant to the anticipated issues in the matter; and
- b) that it has not been clearly specified.

I shall deal later with the question of relevance, but for purposes of deciding whether the request for discovery of the four items under Rule 35(14) is justified, I need do no more than to consider the question as to whether the requested documents had been clearly specified.

Van Dijkhorst J in the matter of **Cullinan Holdings Ltd v Mamelodi Stadsraad 1992(1) SA 645 (T)** emphasized the restricted confines within which the discovery of documents can be requested under Rule 35(14) and said the following at 647 H:

“Dit is myns insiens nie wat die Reël voorsien nie. Dit was nie die bedoeling met die invoeging van Reël 35(14) in 1987 om ‘n onbeperkte of wye reg tot blootlegging voor sluiting van pleitstukke in te voer nie.”

At 648 F-G the learned Judge continued as follows:

“Myns insiens skep Reël 35(14) nie ‘n metode waardeur ‘n gedingsparty deur gebruikmaking van **generiese omskrywings** ‘n net kan knoop waarmee vir halfbekende dokumente gevis kan word nie. Dit is ‘n

remedie wat vir besondere omstandighede geskep is. Dit vereis die oproep van 'n **spesifieke dokument** waarvan die applikant kennis dra en wat hy **presies kan omskryf**" (emphasis supplied).

11. When one compares the description of the documentation requested in these four outstanding items, they appear to be very similar to the nature of the request in the matter of **Quayside Fish Suppliers CC v Irvin & Johnson Ltd 2000(2)SA 529 (C)** at 533 A-G. In that case a vast array of documentation was requested "reflecting" certain information. In the present matter it strikes one that in two of the four items documentation is requested "evidencing" certain aspects.

12. In my view the documentation requested in the applicant's Rule 35(14)-notice pertaining to these four outstanding items, has been insufficiently described and can be categorized as generic descriptions. To my mind this is

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no more than a shot in the dark and a fishing expedition which the applicant is not entitled to embark upon under Rule 35(14).

13. Moreover, and in any event, it seems to me that, the applicant having been furnished at his request with the “mining licences pursuant to which the tailings were extracted from the Kimberley and De Beers Mines”, the rest of the documentation requested under these four outstanding items have become obsolete and should fall away. Be that as it may, I am satisfied that the applicant is not entitled to discovery of the said documentation.

14. I turn now to the question of relevance, particularly insofar as it concerns the documentation requested and discovered under the notice furnished in terms of Rule 35(12) and the rest of the items discovered under Rule 35(14) (i.e. save and except for the four outstanding

items dealt with herein above). Mr. Van Niekerk, who appears for the respondent in this interlocutory application, has argued strenuously that the main application is simply an application for a mandament van spolie and nothing else. That being the case, so he argued, the merits of the applicant's defence in the main application or his purported title or authorisation to the mining tailings on Erf 5045 do not come into the picture at all. Consequently, so the argument went, all the documentation requested in terms of Rule 35(12) and Rule 35(14) have no relevance to the issues in the main application and the applicant is not entitled to seek discovery thereof. It is the respondent's case that it has made discovery of the documents without conceding at all that same is relevant to the issues in the main application.

15. I think it is important that I should in this judgement,

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decide the question of relevance, since this is an aspect which may ultimately have an important bearing on the question of costs which I intend to reserve for determination at the main application.

16. Mr. Van Niekerk has in support of his contention that the main application concerns the mandament van spolie only and nothing else, referred me to the matter of **Minister of Agriculture and Agricultural Development v Segopolo 1992(3) SA 967 (T)**. In that matter the relevant prayer contained in the notice of motion reads as follows:

“(waarom) die respondent nie beveel sal word nie om die applikante in die vreedsame en onverstoorde besit van die plaas Goedgevonden in die distrik Ventersdorp te herstel of om besit daarvan aan applikante terug te gee en om alle woonstrukture wat deur hulle en lede van hulle huishoudings op daardie plaas opgerig is tesame met hulle ander persoonlike besittings onverwyld te verwyder.”

In respect of this prayer Goldstein J held that the prayer

seeks no more than spoliatory relief. I am in respectful agreement with the learned judge on that score.

A further prayer marked 2(c) in the notice of motion in that case reads as follows:

“(Waarom) die respondente nie belet sal word nie om die plase Nagel, Welgevonden en Doornkop in die distrik Ventersdorp te betree, te besit of te okkupeer.”

In respect of this subprayer 2(c) Goldstein J found as follows at 972 H:

“The prayer is consistent with both spoliatory and vindicatory relief. There is much to be said for the view that despite the surplusage I have referred to, the founding affidavits show that subprayer (c) was designed only for spoliatory relief and was intended to be no more than an interdict against spoliation. See paras 13 and 14 of the main founding affidavit. I need not, however, make a decision in this regard because counsel for the applicants expressly disavowed any claim for vindicatory relief and restricted his case entirely to spoliatory relief.”

In that matter the applicants, having abandoned their

claims for vindicatory relief, amended their notice of motion and restricted their case entirely to spoliatory relief. The following *dictum* of Goldstein J at 973 D-F in the said case, has been advanced by Mr. Van Niekerk as lending support to his submissions that the present case concerns spoliatory relief only:

“Counsel for the respondents contended that if prayer 2(c), which became para 1(c), of the rule *nisi*, were to be regarded merely as an interdict against spoliation, the applicant’s persistence in claiming such relief took them outside of the ambit of the rules I have discussed. The interdict, so the argument ran, was directed not at restoring possession which the mandament van spolie seeks to do, but at prohibiting interference with it. A respondent in such circumstances was in fact, it was argued, subjecting himself to the Court’s jurisdiction and was thus entitled to be heard on the merits and, furthermore, since he had not yet despoiled the applicant, there was no pressing reason not to entertain his defence on the merits.

In my view these arguments must be rejected. A respondent who threatens to spoliator sufficiently seriously to justify an interdict does not necessarily cease to do so when an interdict is sought against him and he opposes the proceedings. And it is just as important to stop him expeditiously as it is to undo the results of a completed

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spoliation.”

17. The aforementioned contention by Mr. Van Niekerk cannot be upheld. First and foremost, it must be borne in mind that the applicants in the aforementioned case had specifically abandoned any reliance on vindictory relief and had amended their notice of motion accordingly. Moreover, Goldstein J dealt with the argument there on the basis that the applicants merely sought an interdict to enforce spoliation. In the present matter, the situation is entirely different in my view. While paragraph 2.2 of the respondent’s notice of motion in the main application quite clearly constitutes nothing but spoliatory relief, the same cannot be said of paragraph 2.1 thereof. The respondent seeks not only an interdict as against the applicant prohibiting it from entering the property known as Erf 5045, but importantly also further seeks an interdict

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prohibiting the applicant from removing any mining tailings from the aforesaid property. This last portion is integral to my view that the main application concerns more than a mere mandament van spolie inasmuch as the said relief sought clearly contains elements of vindicatory relief. I am in agreement with the submissions made by Mr. Van Heerden on behalf of the applicant herein, that ownership of the mining tailings and the diamonds therein, will come to the fore in the adjudication of the main application. In that regard, the question of the applicant's right to minerals in the mining tailings which emanates from its mining authorisation issued by the second respondent in the main application, will also have to be dealt with.

18. In the premises I am of the view that the main application goes beyond mere spoliatory relief and that a request for the discovery of documentation relating to ownership is

indeed very relevant in this case.

19. Lastly I consider the question of costs. As is apparent from my aforementioned findings, the applicant was entitled to seek discovery of all the documents in its Rule 35(12) notice which are relevant to the issues in the main application, save and except for items 5 and 7 thereof which respectively entails a reported judgement and in the second instance does not refer to a particular document. It should also be clear that I hold the view that, save and except for the four outstanding items in the Rule 35(14) notice, the applicant was entitled to seek discovery of the balance of the documents in that notice. Ultimately, it will only become clear at the hearing of the main application whether these documents were in fact relevant to the issues for adjudication in the main application. It may also turn out that my view on the

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nature of the relief sought in the main application is incorrect and if that is the case, then it may well be that the judge hearing the main application may take the view that discovery of the documents in terms of the Rule 35(12) and 35(14) notices was not necessary. That being the case, I am of the view that I should reserve the decision on costs for the Court hearing the main application.

20. A final matter that remains is the fact that Mr. Van Heerden on behalf of the applicant has complained that full and proper discovery has not been made inasmuch as the applicant had merely been furnished with those documents which the respondent saw fit to make available, without conceding that it was in law obliged to do so. Insofar as it may be necessary to correct this matter, I issue the following order:

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- a) The respondent in the interlocutory application is ordered to make available for inspection to the applicant or its attorneys, the documents listed in items 1, 2, 3, 4 and 6 of the applicant's notice in terms of Rule 35(12) and as contained in annexure A to the founding affidavit in the interlocutory application as well as the documents listed in 1.1, 1.2, 1.3, 1.4, 1.7 and 1.10 of the applicant's notice in terms of Rule 35(14) and as contained in annexure B of the founding affidavit in the interlocutory application.**
- b) The costs of this interlocutory application stand over for determination at the hearing of the main application.**

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**SA MAJIEDT**  
**JUDGE**

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| ADVOCATE FOR THE RESPONDENT/APPLICANT: | ADV | JG |
| VAN NIEKERK                            |     |    |

ADVOCATE FOR THE APPLICANT/RESPONDENT: ADV CN VAN HEERDEN

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| ATTORNEY FOR THE RESPONDENT/APPLICANT: | DUNCAN & |
| ROTHMAN                                |          |

ATTORNEY FOR THE APPLICANT/RESPONDENT: VD WALL & PARTNERS

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|-----------------|---|------------|
| DATE OF HEARING | : | 2003-09-05 |
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DATE OF JUDGEMENT : 2003-09-12