

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION) REPORTABLE

CASE NO'S.: 2824/96
9647/96

In the matter between:

UNILEVER PLC
UNILEVER BROTHERS (PTY) LTD

First Applicant
Second Respondent

and

POLAGRIC (PTY) LTD

Respondent

JUDGMENT DELIVERED THIS 15th DAY OF DECEMBER, 1997.

THRING, J:

Rule 35(12) reads:

"Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in

such proceeding provided that any other party may use such document or tape recording."

This is an application to compel compliance with this sub-rule.

In March, 1996 Unilever PLC and Lever Brothers (Pty.) Ltd., (to which I shall refer as the first and second applicants, respectively) launched proceedings in this Court by way of motion against Polagric (Pty.) Ltd. (to which I shall refer as the respondent). I shall refer to these proceedings as "the main application". It is still pending. In this application the applicants seek orders interdicting and restraining the respondent from infringing certain of the first applicant's registered trade marks and from passing-off its goods as and for those of the first applicant, and further ancillary relief. The matter is opposed by the respondent. The main application is supported by a founding affidavit deposed to by Mr. T.D. Allchurch, who is currently the second applicant's marketing director. In this affidavit he deals, inter alia, with six trade marks of which the first applicant is the registered proprietor in the Republic of South Africa. These trade marks relate to the words "Handy Andy", to certain labels and devices, and to a container. Allchurch goes on in his affidavit to set out particulars of the

periods of use of these trade marks, the goods for which the marks have been used, the manner in which they have been used, and new applications thereof. In order to demonstrate the extent of the use which has been made of the marks and of the reputation and goodwill attaching to them, he has set out the applicants' turnover in the Republic of South Africa, rounded off to the nearest R1000, in relation to Handy Andy household cleaner for the years 1990 to 1994, both inclusive. He has also set out particulars of the manner in which and extent to which these products have been advertised on television and in the print media. All these allegations are prefaced by paragraph 5 of Allchurch's affidavit, which reads:

"EVIDENCE FROM RECORDS:

In this affidavit I shall refer to historical dates which have been extracted from the archives and records kept by Unilever and Lever Brothers. Lever Brothers, in particular, has kept a comprehensive record of the development of its products, including HANDY ANDY household cleaners. I shall also refer to certain turnover and advertising and promotional expenditure. The exact figures have been extracted from the records kept by Unilever and Lever Brothers which relate to sales of HANDY ANDY products and marketing, advertising and promotional expenditure in relation thereto. The records and archival material are part of a properly kept and

correct continuous record of the affairs of Unilever and Lever Brothers which have been under the control of my predecessors and which are now under my own control and to which I have access. Save as aforesaid, and unless special reference is made thereto, the records and archival material of Unilever and Lever Brothers are not relevant to this application. As will be seen further, the deponents who deliver supporting affidavits are personally aware of the general level of turnover and expenditure during the relevant period."

The respondent has not yet delivered its opposing affidavits in the main application. It has served a notice on the applicants which, in its material parts, reads as follows:

"RESPONDENT'S NOTICE IN TERMS OF RULE 35(12)

BE PLEASED TO TAKE NOTICE THAT the abovenamed Respondent requires you to produce for its inspection the following documents and tape recording referred to in the founding affidavit of Thomas David Allchurch filed in these proceedings:

1.

2. The 'archives and records kept by Unilever and Lever Brothers' referred to in paragraph 5 of the said affidavit which are under the deponent's control evidencing the following:

2.1 The date when:

- (a) Applicants' use of registered trade mark number 86/8184 (referred to in paragraph 7.3 of the affidavit) in the Republic of South Africa ceased; and
- (b) If such use did not cease prior to 1 January 1995, the sales figures and marketing, advertising and promotional expenditure in respect of products bearing the said trade mark for the period 1 January 1995 to date.

2.2 The date when:

- (a) Applicants' use of registered trade mark number 85/8423 (referred to in paragraph 7.4 of the affidavit) in the Republic of South Africa ceased; and
- (b) If such use did not cease prior to 1 January 1995 the sales figures and marketing, advertising and promotional expenditure in respect of products bearing the said trade mark for the period 1 January 1995 to date.

2.3 The date when: -

- (a) Applicants' use of registered trade mark numbers 91/8407 and 91/8408 (referred to in paragraph 7.6 of the affidavit) in the Republic of South Africa ceased ('the container'); and
- (b) If such use did not cease prior to 1 January 1995 the sales

figures and marketing, advertising and promotional expenditure in respect of products bearing the said trade mark for the period 1 January 1995 to date.

- 2.4 The date when each so-called 'old label' ceased to be used by Applicants in the Republic of South Africa (paragraph 8.2.1 of the affidavit).
- 2.5 The date when each so-called 'new' Handy Andy label (referred to in paragraph 8.2.2 of the affidavit) was introduced in South Africa.
- 2.6 The sales of products bearing the said 'new' labels over the period January 1995 to date.
- 2.7 Advertising expenditure of products bearing the said 'new' labels over the period 1 January 1995 to 1 April 1995.
3.
4. The archives and records relied upon for the extraction of the sales figures referred to in paragraphs 11.1 and 11.2 of the affidavit.
5. The archives and records relied upon for the advertising and promotion expenditure referred to in paragraph 12.1

6. The originals of annexures 'TDA4(1)' to 'TDA4(17)' to the affidavit.

7.

TAKE NOTICE FURTHER THAT the abovenamed Respondent requires the said documents for purposes of answering the allegations contained in Applicants' founding affidavits and that, in the event of Applicants failing to make any such documents available in terms of Rule 35(12), Respondent will make application to the above Honourable Court for a direction in terms of Rule 35(13)."

(The documents referred to in paragraphs 1 and 3 and the video tape referred to in paragraph 7 of the notice have all been made available to the respondent, and no relief is sought in respect thereof in the present application.)

In response to this notice the applicants delivered a reply which has been amplified in certain respects in a subsequent opposing affidavit deposed to, again, by Allchurch. The applicants refuse to produce the documents in issue or to make them available to the respondent on various grounds, which I shall presently summarise. Hence this application.

As regards the documents sought by the respondent

in paragraphs 2.1(a), 2.2(a) and 2.3(a) of its notice, the applicants say that -

(a) They make no reference to any documents in the paragraphs of Allchurch's founding affidavit in the main application (viz. paragraphs 7.3, 7.4 and 7.6 thereof) in connection with which these documents are now sought, and the respondent consequently has no entitlement to the production or inspection of any documents;

(b) In each of the aforesaid paragraphs in Allchurch's founding affidavit reference is made by him to an accompanying affidavit deposed to by a Mr. E.W. Schulze, who is allegedly the media market research controller for the second applicant and who allegedly has personal knowledge of the marketing of the applicants' Handy Andy product at the relevant times.

As regards the documents sought by the respondent in paragraphs 2.1(b), 2.2(b) and 2.3(b) of its notice, the applicants say in their reply that the information sought does not relate to documents but is by way of a request for particularity to which the respondent is not entitled. In his opposing affidavit Allchurch does not deal separately with these paragraphs of the respondent's notice, but seems to treat them on the same basis as paragraphs 2.1(a),

2.2(a) and 2.3(a) thereof.

As regards the documents sought by the respondent in paragraphs 2.4 and 2.5 of its notice, the applicants say that -

- (a) The information sought is in the nature of a request for particularity to which the respondent is not entitled;
- (b) No documents are referred to in the paragraphs of Allchurch's founding affidavit in the main application (viz. paragraphs 8.2.1 and 8.2.2 thereof) in connection with which these documents are now sought;
- (c) The statements made by Allchurch in these paragraphs are supported by the deponents to two other accompanying affidavits in the main application, one by Mr. I.V. Everitt-Penhale, who has allegedly held various positions with the second applicant at various times in the past, and the other by Ms. A.H. Tatham, who is allegedly the marketing manager, liquids, of the second applicant.

As regards the documents sought by the respondent in paragraphs 2.6 and 2.7 of its notice, the applicants say that -

- (a) The information sought is in the nature of a request for particularity to which the respondent is not entitled;
- (b) No documents are referred to by the applicants;
- (c) The applicants' case in the main applications is not based on sales or advertising figures subsequent to the 1st January, 1995, and no mention has accordingly been made in the applicants' founding papers of archives or records in support of facts after this date.

As regards the documents sought by the respondent in paragraphs 4 and 5 of its notice, the applicants say that -

- (a) They make no direct reference to such documents in the paragraphs of Allchurch's founding affidavits in the main application (viz. paragraphs 11.1, 11.2 and 12.1 thereof) in connection with which these documents are now sought, and the respondent consequently has no entitlement to the production or inspection of any documents;
- (b) Without prejudice to their rights "herein" the applicants attach to their reply a "computer generated summary of sales figures and promotional expenditure being in its nature a distillation of the information in

question";

(c) Allchurch, in his Opposing affidavit in this application says that the second applicant's records relating to the figures in question are computerised; that the computer system contains much confidential information relating, for example, to the second applicant's profit margins on its various products, and that the applicants wish to maintain the confidentiality of this highly sensitive information;

(d) The second applicant's auditors have prepared various tables after analysing the various figures, which tables are annexed to Allchurch's affidavit.

As regards the documents sought by the respondent in paragraph 6 of its notice, the applicants say that some of the original documents sought form part of their founding affidavit in the main application; where this is not the case, such documents are no longer or never were in their possession.

In addition to these specific grounds for their attitude and response to the respondents notice the applicants have raised two other, more general grounds. The first of these is that the respondent is adopting delaying tactics in seeking access to these documents. The second is

that the applicants aver that the respondent is on a "fishing expedition". In this regard Allchurch says in his opposing affidavit:

"The Respondent has failed to give any reason as to why it believes that the documents are relevant or why it requires the documents at all."

I assume the gravamen of these allegations to be an attack on the respondent's true motives for bringing this application, and therefore on its bona fides in doing so. These general grounds may be dealt with summarily before I proceed to deal with the others.

As far as delay is concerned, some ten months elapsed, from the 3rd May, 1995 to the 8th March, 1996, between the respondent's written response to the applicants' letter of demand dated the 4th April, 1995 to the launching of the main application. The respondent then timeously delivered its notice in terms of Rule 35(12) on the 15th March 1996. More than three months then passed before the applicants' replied thereto on the 5th July, 1996. The present application was thereafter launched fairly promptly by the respondent on the 31st July, 1996. Certain correspondence then passed between the parties' attorneys and the matter was postponed by agreement sine die. Further correspondence was exchanged thereafter,

culminating in a telefaxed letter dated the 17th September, 1996 from the applicants' attorneys to the respondents' attorneys in which the former said:

"We are obtaining our clients' instructions and will revert to you in due course."

However, nothing further was heard from them until the 10th February, 1997, when Allchurch's opposing affidavit was delivered.

It is clear from this history that it cannot be said that the respondent has been responsible for any substantial delay in this matter to date. Rather is the position the converse. Mr. Ginsberg, who, with Mr. Cullabine, appears for the applicants, did not press this point in argument, and I think that he was right not to do so. There is no merit in it.

As to the applicants' complaint that the respondent is on a "fishing expedition", this is to some extent neutralised by the manner in which the respondent, in its notice in terms of Rule 35(12), has confined the scope of the documentation to which it seeks access, viz. by demanding production only of documents "evidencing" certain things. But in any event the respondent is, in my view, in circumstances such as these, acting within its

rights to engage in a certain amount of "fishing", if that is the correct word to use, as long as it relates to what is, or will or may become, a bona fide basis for resisting the main application. In his founding affidavit in the present application the respondents' attorney, Mr. Zieff says:

"After the launch of the main application I was consulted by the Respondent and instructed, inter alia, to oppose the application on its behalf. At that time senior and junior counsel were briefed and consulted for purposes of considering the Applicants' papers and attending to the preparation of opposing affidavits. After careful consideration, we concluded that in order to conduct the Respondent's defence properly and, more particularly, to prepare its opposing affidavits, it was necessary to inspect the Applicants' archives and records referred to in Allchurch's affidavit, and in particular such of those documents as related to the allegations in paragraphs 7, 8, 11 and 12 of Allchurch's affidavit and the issues arising therefrom."

Allchurch deals with this application in his opposing affidavit by saying, inter alia:

"I dispute that it was necessary for the Respondent to inspect the Applicants' archives and records in order to conduct its defence. In this regard I submit that the Respondent should know what its defence will be without having to

inspect the Applicants' archives or records."

In my view, Allchurch is wrong. It does not necessarily follow that the respondent should know what its defence will be without having to inspect the applicants' documents. The respondent is not required to depose to or deliver its opposing affidavits before it has been afforded an opportunity of inspecting and copying the documents referred to in Rule 35(12). This is clear from the following dictum of Marais, J, as he then was, in Protea Assurance Company Ltd v Waverley Agencies CC and Others, 1994(3) SA 247(C) at 249 B-D:

"Applicant's desire that second respondent should first have to file his affidavit in response to the allegations made by Roberts as to what second respondent said to him during the telephone conversations which were recorded on the tape before being allowed to listen to the tape is understandable as a forensic strategy, but to gratify it would be to defeat the object of Rule 35(12). That rule plainly entitles a litigant to see the whole of a document or tape recording and not just the portion of it upon which his adversary in the litigation has chosen to rely. That entitlement, unlike the entitlement to general discovery for which Rule 35(1) provides, does not arise only after the close of pleadings in a trial action, or after both answering and replying affidavits have been filed in motion proceedings: it arises as soon as reference is

made in the pleading or affidavit to a document or tape recording. It is inherent in that that a litigant cannot ordinarily be told to draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's pleading or affidavits."

See, also, Erasmus v Slomowitz(2), 1932 TPD 242 at 244. It is clear from these decisions that, otherwise than is the case with discovery under Rule 35(1) and (2) read with Rule 35(13), a defendant or respondent does not have to wait until the pleadings have been closed or his opposing affidavits have been delivered before exercising his right under Rule 35(12): he may do so at any time before the hearing of the matter. It follows that he may do so before disclosing what his defence is, or even before he knows what his defence, if any, is going to be. He is entitled to have the documents produced "for the specific purpose of considering his position" (Erasmus v Slomowitz(2), supra, at 244: see, also, Gehle v McLoughlin, 1986(4) SA 543(W) 546 D-E). I conclude that the applicants' refusal to produce the documents sought cannot be justified on this ground.

Before I turn to the more specific grounds of objection relied on by the applicants it may, I think, be

useful to advert briefly to the scope of Rule 35(12), and to the question of which party bears the onus in an application under this sub-rule.

Rule 35(12) is cast in very wide terms. It does not contain the requirement mentioned in Rule 35(1) or Rule 35(11) that the document concerned must be one "relating to any matter in question" nor the requirement mentioned in Rule 35(3) that the document must be "relevant to any matter in question": see Gorfinkel v Gross, Hendler & Frank, 1987(3) SA 766(C) at 771 D. In Magnum Aviation Operations v Chairman, National Transport Commission and Another, 1984(2) SA 398(W) the Witwatersrand Local Division may have gone as far as to hold (obiter) that relevance is not a requirement for documents of which production is sought under Rule 35(12). In Universal City Studios v Movie Time, 1983(4) SA 736 (D) it was held by the Durban and Coast Local Division at 748 A-C that, where a party in an application such as this files an opposing affidavit in which he relies on privilege or irrelevance as a ground for not producing a document the onus lies on his opponent to satisfy the Court on a balance of probability that the document is indeed relevant or not privileged as the case may be. Both these aspects were dealt with in this Court by Friedman, J., as he then was, in Gorfinkel v Gross, Hendler & Frank, supra. At 773 H to 774 I the learned

Judge said:

"There are undoubtedly differences between the wording of Rule 35(12) and the other subrules relating to discovery, for example subrules (1), (3) and (11) of Rule 35. The latter subrules specifically refer to relevance whereas subrule (12) contains no such limitation and is prima facie cast in terms wider than subrules (1), (3) and (11).

It is nevertheless to my mind necessarily implicit in Rule 35(12) that there should be some limitation on the wide language used. One such limitation is that a party cannot be compelled under Rule 35(12) to produce a document which is privileged.

.....

With regard to relevance there must also, in my view, be some limitation read into Rule 35(12). To construe the Rule as having no limitation with regard to relevance could lead to absurdity. It would be absurd to suggest that the Rule should be so construed that reference to a document would compel its production despite the fact that the document has no relevance to any of the issues in the case. It is not difficult to conceive of examples of documents which are totally irrelevant. Booyesen J in the Universal City Studios case gave one such example. What is more difficult to decide is where the line should be drawn. A document which has no relevance whatsoever to the issues between the parties

would obviously, by necessary implication, be excluded from the operation of the Rule. But would the fact that a document is not subject to discovery under Rules 35(1), 35(3) or 35(11) render it immune from production in terms of Rule 35(12)?

In my view the parameters governing discovery under Rules 35(1), 35(3) and 35(11) are not the same as those applicable to the question whether a document is irrelevant for the purposes of compliance with Rule 35(12). A party served with a notice in terms of Rule 35(1) is obliged to make discovery of documents which may directly or indirectly enable the party requiring discovery either to advance his own case or to damage that of his opponent or which may fairly lead him to a train of enquiry which may have either of these consequences. Documents which tend merely to advance the case of the party making discovery need not be disclosed. As Rule 35(12) can be applied at any time, ie before the close of pleadings or before affidavits in a motion have been finalised, it is not difficult to conceive of instances where the test for determining relevance for the purposes of Rule 35(1) cannot be applied to documents which a party is called upon to produce under Rule 35(12), as for example where the issues have not yet become crystallised. Having regard to the wide terms in which Rule 35(12) is framed, the manifest difference in wording between this subrule and the other subrules, ie subrules (1), (3) and (11) and the fact that a notice under Rule 35(12) may

be served at any time, ie not necessarily only after the close of pleadings or the filing of affidavits by both sides, the Rule should, to my mind, be interpreted as follows: prima facie there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35(12). That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so. (See the Moulded Components case supra at 461 D-E.) Similarly, a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production. As it would not necessarily be within the knowledge of the person serving the notice whether the document is one which falls within the limitations which I have mentioned, the onus would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document. Cf Quilter v Heatly (1883) 23 ChD 42 at 51."

Insofar as there are differences between the decisions in the Magnum Aviation and Universal City Studios, cases supra, on the one hand, and the decision of this Court in the Gorfinkel case, supra, on the other, I prefer the latter, for the reasons given by Friedman, J. in that case. Accordingly, I approach this matter on that basis.

In my view there can be no doubt that, in

paragraph 5 of his founding affidavit in the main application, Allchurch has referred to certain documents.

He has described them as:

- (a) "archives and records kept by Unilever and Lever Brothers";
- (b) "a comprehensive record of the development of its products, including Handy Andy household cleaners";
- (c) "records kept by Unilever and Lever Brothers which relate to sales of Handy Andy products and marketing advertising and promotional expenditure in relation thereto";
- (d) "records and archival material" which are "part of a properly kept and continuous record of the affairs of Unilever and Lever Brothers....."

This being so, there is, in terms of the Gorfinkel case, supra, at 774 G-I, prima facie an obligation on the applicants to produce them for inspection if called upon to do so under Rule 35(12), as they have been. The onus is on them to set up facts relieving them of this obligation, such as privilege, irrelevance or that the documents are not in their possession, and that they are therefore unable to produce them. The fact that the documents of which

production is sought are not separately identified in the respondent's notice in terms of Rule 35(12) is immaterial for the applicants, having referred to them, know what they are and can identify them for themselves: see Cullinan Holdings Ltd. v Mamelodi Stadsraad, 1992(1) SA 645 (T) at 650 D.

To my mind it does not avail the applicants to say, as Allchurch says in his opposing affidavit, that they make no reference to any documents in those paragraphs of his affidavit in the main application in connection with which the production of documents is sought by the respondent. The same applies to Allchurch's disavowal of reliance on the contents of documents in making the applicants' case in the main application, and the applicants' reliance in making their case, rather on the affidavits of persons who have personal knowledge of the relevant facts. The documents to which Allchurch makes reference in paragraph 5 of his founding affidavit in the main application seem very clearly to me, at least prima facie, from what he himself says in that paragraph, to have evidentiary value. They constitute, he says, part of a "properly kept and correct continuous record of the affairs of" the applicants. "Historical dates" have been extracted from them, as have "exact figures which relate to sales of Handy Andy products and marketing, advertising and promotional expenditure in relation thereto". The

documents may well, and probably do, contain a great deal of information which supports the applicants' case in the main application. However, the possibility can certainly not be excluded, in my view, that they may contain material, or an absence of material, which may be adverse to that case. For that reason, if for no other, the documents would have had to be discovered by the applicants in due course in terms of Rule 35(1) and (2) if this had been an action, or if discovery were to be ordered by the Court in these proceedings in terms of Rule 35(13). The fact, if such it be, that other evidence may exist on which the applicants may prefer to rely in advancing their case seems to me to be quite irrelevant to the present enquiry. In Erasmus v Slomowitz(2), supra, Murray, J., as he then was, said at 244:

"An essential is, of course, a reference by the opponent, in his pleading or affidavit, to the documents whereof such production is required, but the terms of the rule do not require a detailed or descriptive reference to such documents, nor is any distinction made between documents upon which the action or other proceeding is actually founded and documents possessing merely evidentiary value."

I am unable to agree that any of the material sought by the respondent in paragraph 2 of its notice constitutes merely a "request for particularity to which

the respondent is not entitled", as the applicants aver in their reply to the notice. All the material sought in this paragraph of the notice is expressly specified in the notice to consist of the "archives and records kept by Unilever and Lever Brothers... evidencing" certain matters, being dates, sales and advertising expenditure. Not a single question is asked of the applicants anywhere in the notice: there is, in my view, no request for particularity to be found in the notice. All that it contains is a demand that the applicants produce certain documents and a tape recording for inspection by the respondent.

As regards the applicants' resistance to producing the documents referred to in paragraphs 4 and 5 of the respondent's notice on the ground that they contain information of a confidential nature, this, of course, does not per se in our law confer on them any privilege against disclosure. I shall return to this aspect later. The applicants' tender, in lieu of production of these documents, of tables compiled by their auditors of certain information extracted therefrom is, in my view, clearly not compliance with Rule 35(12). There is no reason why the respondent should have to be content with these tables.

The applicants' reply to the respondent's demand that they produce the original documents referred to in

paragraph 6 of the notice, viz. that some of these are attached to their founding affidavit and others are no longer or never were in their possession seems to me to be adequate: those documents that are attached to the affidavits, are of course available for inspection by the respondent at any time. As to the others, the Court will not compel production of documents which a party does not have in his possession or under his control: see the Gorfinkel case, supra, at 774 H.

As regards the question of the relevance of the documents sought, this is not mentioned at all in the applicants' reply to the respondent's notice. It is raised cursorily by Allchurch in two passages in his opposing affidavit. The first of these I have already quoted above, where, speaking generally, he points out that the respondent has failed to give any reason why it believes that the documents are relevant. If I am correct in my view of the law, Allchurch has misconceived the incidence of the onus: I find, on the clear authority of Gorfinkel's case, supra, that it is for the applicants to establish the absence of relevance, and not vice versa. The second passage occurs in the context of the document sought by the respondent in paragraph 6 of its notice, where he says:

"I deny that the original annexures are relevant.

I challenge the Respondent to state in reply what relevance the original annexures have for the preparations of its defence in these proceedings."

As I do not propose to grant the respondent relief in respect of this paragraph of the notice, I need say no more about this passage. It is clear, in my view, that the applicants have failed to discharge the onus which rests on them of establishing that the documents sought, other than those sought in paragraph 6 of the notice, are irrelevant. Indeed, from the mere fact that Allchurch has seen fit to refer to these documents in his founding affidavit it can be inferred, in the absence of any clear disclaimer, that they are relevant.

I digress momentarily to point out in this regard that the applicants do not seek to rely on the principle set out in Freeman v Freeman, 1921 WLD 1 at 3-4, viz. that a party need not discover a document if it does not support or tend to support his opponent's case, and, at the same time also contains nothing which impeaches his own case: see, also, Lenz Township Company (Pty) Ltd. v Munnik and Others, 1959(4) SA 567(T) at 569 B-C.

To sum up, then: I find that the applicants have referred to certain documents in their founding affidavit

in the main application; prima facie they are consequently obliged, under Rule 35(12), to produce them for the respondents inspection; the onus is on the applicants to justify their refusal to do so. They have failed to raise any valid objection based on privilege. They have failed, with the possible exception of the documents referred to in paragraph 6 of the notice, to establish that any of the documents are irrelevant, or that they are unable to produce them.

I conclude that, save for the documents of which production is sought by the respondent in paragraph 6 of its notice, none of the grounds advanced by the applicants for resisting the production thereof are valid, and the respondent is consequently entitled to succeed in this application.

To meet the applicants' objection relating to confidentiality, Mr. van Schalkwyk who, with Mr. Dickerson, appears for the respondent, indicated during the course of his argument that the respondent would be content, as regards the documents sought in paragraphs 4 and 5 of its notice, with an order confining the production thereof to the legal advisers and experts of the respondent only. Such orders were made in Moulded Components & Rotomoulding SA (Pty) Ltd v Coucourakis & Another, 1979(2) SA 457 (W)

and in Crown Cork & Seal Co. Inc. and Another v Rheem SA (Pty.) Ltd. and Another, 1980(3) SA 1093 (W). No doubt there are cases where such orders are necessary and can be justified. However, I do not think that this is one of them. It is unwise, in my view, unless very special circumstances exist, to create a situation in which the legal advisers or experts of a party to opposed litigation may find themselves in possession of information which may be highly relevant to the litigation, but which they are precluded from communicating to their client. What are they to do with such information? How are they to obtain instructions in relation thereto? How are they to advise their client on the further conduct of the litigation, or on whether it should be proceeded with at all? These, it seems to me, are some of the questions which can arise, and which, in this case, could potentially place the respondent's legal advisers and experts in an invidious and even untenable position. Serious ethical questions could arise. The interests of the respondent could be prejudiced by the fact that it is unable to receive proper advice based on all the relevant facts. In the Crown Cork case, supra, Schutz, AJ, as he then was, said at 1100 A - D:

"No less in South Africa than in England does the conflict arise between the need to protect a man's property from misuse by others, in this case the property being confidential information,

and the need to ensure that a litigant is entitled to present his case without unfair halts. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part. I trust that by holding what I have I have not opened a new door to interlocutory litigation or to a flood of ill-founded objections on grounds of confidentiality. Practitioners would do well to remember that the normal rule is full inspection."

I find myself in respectful agreement with these views. Moreover, Mr. Ginsberg resisted the imposition of any such limits on the production of the documents: his attitude was an all-or-nothing one - the application should be refused in its entirety, with no attempt to carve out a compromise solution. In the circumstances I have decided to exercise my discretion against imposing such qualification on the respondent's right to inspect and copy the documents

concerned. If, thereby, the confidentiality attached to some of them may be compromised, that is an inevitable consequence of the applicants' having referred to them in Allchurch's affidavit.

In the result, I make the following order:

1. The first and second applicants are ordered to produce for the respondent's inspection and to permit the respondent to make copies thereof, the archives and records referred to in paragraph 5 of the founding affidavit of Thomas David Allchurch jurat the 4th February, 1996 and requested in paragraphs 2, 4 and 5 of the respondent's notice in terms of Rule 35(12) dated the 15th March, 1996.
2. In the event of the applicants failing to produce the said documents for such inspection and copying within a period of 60 days from the date of this order, the respondent is given leave to apply on these papers, amplified as it may be advised, for an order dismissing the applicants' application, with costs.
3. The costs of this application are to be borne by the first and second applicants jointly and severally, the one paying the other to be absolved; such costs are to include the costs of the 21st August, 1996, and the costs occasioned

by the employment of two counsel.

A handwritten signature in cursive script, appearing to read 'J. Thring', positioned above a horizontal line.

THRING, J.