FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 050/2005

PARTIES: CAPRICORN MAKELAARS (EDMS) BPK & 3 OTHERS v EB SHELF INVESTMENT NO 79 (PTY) LTD & 3 OTHERS

DATE OF HEARING: 09/06/2005

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REFERENCE NUMBERS -

Registrar: 841/2004

JUDGE(S): FRONEMAN, J

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Applicant(s)/Appellant(s): NM PATERSON
- for the accused/respondent(s): RWN BROOKS
-

Instructing attorneys:

- Applicant(s)/Appellant(s): NETTELTONS
- Respondent(s): WHITESIDES

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION **Reportable**

Case No. 841/2004

In the matter between

CAPRICORN MAKELAARS (EDMS) BPK

AND THREE OTHERS **Applicants**

and

EB SHELF INVESTMENT NO 79 (PTY) LTD

AND THREE OTHERS **Respondents**

JUDGMENT

Summary: A party seeking early discovery under rule 35(14) must show that the discovery is 'reasonably necessary in the circumstances' (connoting a special advantage or element of need, but not 'necessity' or 'dire necessity') for the purposes of pleading, in addition to the specificity of documents and relevance to reasonably anticipated issues in the action required by the rule.

Froneman J.

[1] The respondents ('plaintiffs') have instituted action against the applicants

('defendants') claiming delivery of seven computers and a projector, alternatively payment of their alleged value. The defendants entered an appearance to defend, but have not yet filed their plea. In order to do so, they say, they need to inspect and make copies of the invoices relating to the purchase of the computers and the projectors by the plaintiffs. The plaintiffs have refused this request for discovery, on the basis that the defendants do not need the documents to enable them to plead. Whether discovery should be ordered is the issue at stake in this application.

[2] Rule 35 (14) provides that:

"After appearance to defend has been entered, any party to any action may, for the 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."

[3] The reported case law reveals considerable caution in allowing the use of discovery under the rule. In the three cases that I was referred to, namely *Cullinan Holdings Ltd v Mamelodi Stadsraad*, [1] *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Aust)*,[2] and *Quayside Fish Suppliers CC v Irvin & Johnson Ltd*,[3] similar applications under rule 35 (14) were all refused.

In *Cullinan* the application was brought after summary judgment had been abandoned upon receipt of the defendant's affidavit, setting out fully not only the basis of its defence to the plaintiff's claim, but also the details of a counterclaim. The application

1 1992 (1) SA 645 (T).
2 1999 (3) SA 500 (C).
3 2000 (2) SA 529 (C).

was refused on the fairly obvious ground that the documents were not needed to enable the defendant to plead [4], as well as on the ground that the documents sought were not 'clearly specified' in terms of the rule, but only in general generic terms. Van Dijkhorst J found that the purpose of the rule was not to allow a party to ensnare an opponent "deur gebruikmaking van generiese beskrywings …. waarmee vir halfbekende dokumente gevis kan word nie".[5]

Urgup was an admiralty matter where Thring J refused the application under rule 35(14) on the basis that the request for discovery amounted to "an interrogatory as to whether or not such documents existed" [6] and that they were also mostly described in wide, generic terms.[7]

Discovery under the rule in *Quayside* was refused because the documents were sought for the purpose of establishing whether the defendant in fact had a counterclaim.[8]

[4] The defendants here seek the discovery of clearly specified documents (sale invoices in the possession of the plaintiffs relating to the sale of the computers and projector to the plaintiffs), which are relevant to reasonably anticipated issues in the action (the alleged ownership, or right to possession, of these goods by the plaintiffs, and their value). The defendants' attorney expressly states in the founding affidavit to the application that the ownership, or right to possession, and the value of the assets claimed by the plaintiffs are in dispute. Copies of the invoices are sought, he says, to

4 Note 1above, at 647E-F.
5 Id., at 648F.
6 Note 2 above, at 516A.
7 Id., at 516B.
8 Note 3 above, paras. {16] and [17], 534E-J.

enable the defendants to admit or deny the plaintiffs' claim to ownership, or right to possession, of the goods. The invoices will reflect the date and purchase price of the items and will also enable the defendants to admit or deny the value claimed by the respondents. The plaintiffs do not dispute their possession of the documents: their resistance to disclosure is based on the ground that the documents are not "*necessary*" [9](my emphasis) to enable the defendants to plead "in that the allegations made on behalf of [plaintiffs] can both effectively and appropriately be pleaded to on the basis that the [defendants] put [plaintiffs] to the proof thereof if they … are unable to admit or deny the said allegations".

[5] Although the three cases referred to above are distinguishable from the present one on the facts, in that the documents sought in the present case are clearly specified for a specific purpose (and is thus not a generic fishing expedition) and are in the plaintiffs' possession, it was argued that the interpretation given to the rule in those cases vindicates the plaintiffs' refusal to discover the documents on the grounds set out in the previous paragraph.

[6] The express terms of rule 35 (14) do not require that the documents must be *necessary* for purposes of pleading, as the plaintiffs' contend for. That is, however, the meaning that was given to the rule in by Van Dijkhorst J in the *Cullinan* matter:[10]

"Die eerste vereiste is dat die aangevraagde dokument 'vir doeleindes van pleit' benodig word. Uit die eedsverklaring van Nel is dit duidelik dat die verweerder sy verwere duidelik kon formuleer sonder die

9 The word "necessary" is used both in the answer to the rule 35 (14) notice and the notice of opposition under rule 6(5)(d)(iii).
10 Note 1 above, at 647E-F.

vermelde dokumente. Die dokumente is nie *noodsaaklik* [my emphasis] ten einde te kan pleit nie. Die feit dat dit nuttig kan wees indien die opsteller van die pleitstuk dit beskikbaar het, is nie die toets nie."

[6] In *Quayside* Traverso J (as she then was) rejected a submission that *Cullinan* was wrongly decided on the basis that a wider interpretation of the rule, to allow discovery for establishing whether a counterclaim existed, would make inroads into the common law principle that prior to the institution of an action no right to discovery of another party's documents exists.[11]

[7] The caution, or perhaps even reluctance, to allow discovery outside its traditional setting is described thus by Thring J in *MV Urgup*:[12]

"Discovery has been said to rank with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for it can be, and often is, a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased. It seems to me that, generally speaking, its employment should be confined to cases where parties are properly before the Court and are litigating at full stretch, so to speak. It is not intended to be used as a sniping weapon in preliminary skirmishes …. unless there are exceptional circumstances present."

[8] During argument Mr. Paterson, who appeared for the defendants, expressed some bemusement at this apparent reluctance to allow early discovery where the documents

11 Note 3 above, para. [16], at 534 F-G.
12 Note 2 above, at 513H-I.

so discovered might help in 'defining the case' right from the outset, as he put it. I think it may now help if one approaches the interpretation and application of the rule in the context of the rights and interests articulated in, or underlying, the Constitution, and not solely, or primarily, in its historical context.[13] What one then finds, I venture to suggest, is that what underlies the caution expressed in the case law is a concern for the individual's right to privacy, now fundamentally enshrined in the Bill of Rights.[14] That is obviously a legitimate concern, but it is counterbalanced by everyone's fundamental right of access to any information that is held by another person and that is required for the exercise or protection of any rights.[15] The extension of this fundamental right to information held by private bodies has been described by the Supreme Court of Appeal as "unmatched in human rights jurisprudence" [16], but I do not think the description was intended as justification for a restrictive interpretation of the right. Nor do I think that the effective exemption of the rules of civil and criminal procedure from the operation of the *Promotion of Access to Information Act* [17] ('the Information Act') is an indication that this fundamental right should be restrictively interpreted where it is found or expressed in such other law.

[9] The effect of approaching the interpretation of rule 35(14) in this context is that there should be no preconceived historical bias in favour of a restrictive approach to its interpretation. Once litigation starts the parties involved each have a right to information to protect or exercise their rights,[18] qualified, or expressed, by the terms

13 As the Constitution requires: see, for example, ss.39 (2) and 173.
14 S. 14.
15 S. 32 (1) (b).
16 *Clutchco (Pty) Ltd v Davis* [2005] 2 All SA 225 (SCA), para. [10], at 228h.
17 No. 2 of 2000.
18 Any rights, not only fundamental rights: *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA), para. [27], at 1026 E-F.

of the rules themselves, but by nothing more. In *Clutchco (Pty) Ltd v Davis* [19] the Supreme Court of Appeal (per Comrie AJA) held that the word "required" in the expression "required for the exercise or protection of any … rights" in the Constitution and the Information Act [20] could not be formulated more precisely than as "reasonably required in the circumstances":

" It seems to me that Streicher JA's choice of the words "assistance" and "assist" in the above passage [he was referring to *Cape Metropolitan Council v Metro Inspection Services* [21]] indicates that 'required' does not mean necessity, let alone dire necessity. I think that reasonably required in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need."

[10] It seems to me that there is nothing in the wording of rule 35 (14) which preclude a similar interpretation, namely that clearly specified documents or tape recordings in the possession of any party which is relevant to a reasonably anticipated issue in the action, *required* (in the sense explained above) for purposes of pleading, must be discovered upon a request to that effect under the rule. There seems to me to be no compelling countervailing interests, at this stage of the proceedings, to protect the other party's right to privacy beyond this. To the contrary, it appears to me that there are compelling reasons not to do so. The trend in current civil procedure is, as far as I can discern, away from secrecy and withholding of information until the last moment.

19 Note 16, para. [13], at 230b-c.
20 No. 2 of 2000.
21 2001 (3) SA 1013 (SCA), paras.[28] and [29], at 1026G-I where the following was stated:
"[28] Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s. 32, [of the Constitution] an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.
[29] …". (the contents of this paragraph relate to the facts of the case).

Pre-trial procedure is increasingly geared towards laying one's cards on the table before actually going to trial. The purpose is to ensure a quicker and more effective resolution of the real disputes between the parties.[22] If discovery is indeed a 'mighty engine for exposing truth' then the purpose of rule 35 (14), to expose the truth earlier rather than later, would be undermined by restricting its ambit to 'necessity' instead of "reasonably required in the circumstances" as explained in the *Clutchco* case. [23]

[11] This does not mean that the rule should become the gateway for a generalised earlier discovery process. Parties invoking its use will need to show that discovery is reasonably required in the particular circumstances of their case in accordance with the limiting requirements of the rule itself. That implies a certain openness on their part as well. They will have to demonstrate a "substantial advantage or an element of need" for the purposes of pleading, in addition to the specificity of the documents and relevance to reasonably anticipated issues required by the rule. Each case, as usual, will depend on its own circumstances and facts, so further generalisation would serve no purpose. But the facts and circumstances of the present matter illustrate the point.

[12] The defendants say that disclosure of the invoices will provide a substantial advantage to them in pleading in that the disclosure will enable them to determine not only whether the goods in their possession are the same goods the plaintiffs claim as theirs, but also whether the age and costs of the goods likely to be revealed by the invoices justify the value claimed for them by the plaintiffs. It is difficult to see what

22 Rules 33 to 37A all in different ways are geared to this purpose.
23 Note 16 above. To the extent that *Cullinan* holds otherwise on this particular aspect (and I am not sure that it does, considering its own particular factual context) it appears to me, with respect, to have been impliedly overruled by the Supreme Court of Appeal in both *Clutchco* and the *Cape Metropolitan Council* matters.

particular disadvantage the plaintiffs may suffer by disclosing the invoices. If it assists in establishing the truth of their claims earlier than at the trial they would obviously have benefitted from the early discovery. If it assists in establishing the truth of the defendants' claims earlier than that, they stand to lose, but then the purpose of the rule would nevertheless have been well served. In my judgment the defendants have shown that they are entitled to the discovery they seek.

[13] There will be an order in terms of prayers 1, 2 and 4 of the notice of motion.

J.C.Froneman

Judge of the High Court.