SWISSBOROUGH DIAMOND MINES (PTY) LTD AND OTHERS v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 1999 (2) SA 279 (T)

Citation	1999 (2) SA 279 (T)
Case No	18474/93
Court	Transvaal Provincial Division
Judge	Joffe J
Heard	October 13, 1997; October 17, 1997; November 3, 1997; November 7, 1997; November 24, 1997
Judgment	December 12, 1997
Counsel	C Edeling (with him Anton Katz) for the second plaintiff J Dugard for all three plaintiffs GL Grobler (with him RJ Raath and EN Keeton) for the defendants
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Discovery and inspection - Discovery - Further discovery - Plaintiff calling for further discovery of documents it labelled C relevant - Relevance to be determined from pleadings - Plaintiff only entitled to discovery of documents relevant to issues in pleadings - In determining issues raised by pleadings no regard to be had to requests for further particulars for purposes of trial and further particulars furnished in response thereto - Such further particulars for trial given after close of pleadings and therefore relate to pleaded issues and do not raise further or new issues between parties. D

Discovery and inspection - Discovery - Further discovery - Onus - Onus of proving existence or relevance of additional documents - Sections 32(1) and 34 of Constitution of the Republic of South Africa Act 108 of 1996 not shifting onus in litigation against State.

Discovery and inspection - Discovery - Further discovery - In determining whether to go behind discovery affidavit E Court will only have regard to (i) discovery affidavit itself; (ii) documents referred to in discovery affidavit; (iii) pleadings; (iv) admissions made by party making discovery affidavit; or (v) nature of case or documents in issue - Limitation subject to exception that conclusiveness of discovery affidavit can always be challenged where mala fides shown. F

Discovery and inspection - Discovery - Further discovery - Due to consequences of failure to comply with notice in terms of Rule 35(3) of Uniform Rules, important that party dissatisfied with discovery should describe documents G required for inspection in such a manner that they are identifiable - However, Rule 35(3) notice not limited to specific document but may require production of any number of documents - Document described with sufficient accuracy to enable it to be identified where it is described within genus enabling it to be identified.

Discovery and inspection - Discovery - Privilege - State privilege - Court obliged to balance extent to which it is H necessary to disclose evidence against public interest in non-disclosure - Where interest in non-disclosure clearly outweighs interest in disclosure, challenge to claim to State privilege must fail.

Constitutional practice - Courts - Jurisdiction - Action instituted in 1993 and interlocutory application launched in 1997, after Constitution of the Republic of South Africa Act 108 of

1996 came into effect - Interlocutory application I constituting 'proceedings' in itself - Provisions of Constitution applicable to application.
Practice - Applications and motions - Affidavits - Issues upon which parties seek to rely to be raised in affidavits by defining relevant issues and setting out evidence relied upon - Relevant issues should be dealt with in J

affidavits and not left to be raised only in argument by counsel - Facts set out in affidavits to be set out simply, clearly A and in chronological sequence, and without argumentative matter - New matter cannot be raised in replying affidavit - Distinction drawn between primary and secondary facts, where former used as basis for inference as to B existence or non-existence of inferred or secondary facts - In absence of primary fact alleged, secondary fact is merely conclusion of law - Party can advance legal argument in support of relief or defence claimed even where such arguments were not specifically mentioned in papers, provided they arise from facts alleged and provided there is no prejudice to party.
Practice - Applications and motions - Affidavits - Party may not merely annex to its affidavit documentation and C request Court to have regard thereto - Party required to identify portions thereof on which reliance is placed and indicate case which is sought to be made out on strength thereof.
International law - International treaties and conventions - Treaty between two sovereign States not incorporated into D municipal law - Court can take cognisance of agreements between States, as well as contents thereof, as facts, just as it can take cognisance of any fact properly proved before it - Court, however, cannot interpret or construe agreements or legal consequences arising therefrom nor determine true agreement concluded between States.
International law - International treaties and conventions - Allegations of unlawful conduct by government of one E country which was party to treaty and allegations of interference in that country by other country which was party to treaty - Has to be very particular case, even if such case could exist, that would justify Courts interfering with foreign Sovereign - Judicial branch of government ought to be astute in not venturing into judicial no-man's land - In appropriate case, as exercise of Court's inherent jurisdiction to regulate its own procedure, Court can determine to exercise judicial restraint and refuse to entertain matter, notwithstanding it having jurisdiction to do so, in view of F involvement of foreign States therein.
Costs - Attorney and client costs - Plaintiff endeavouring to overwhelm defendant and Court with papers - Plaintiff G relying on speculative matter and arguments based on speculation - Plaintiff deposing to replying affidavit even more replete with offensive matter, even in face of application to strike out - Attorney and client costs justified.

Headnote : Kopnota

The plaintiffs had instituted action against the defendants arising out of an alleged interference with certain mining rights held by the plaintiffs in the Kingdom of Lesotho. The alleged interference related to the implementation of a treaty between the first defendant and the Government of the Kingdom of Lesotho (GOL) which provided for the I Lesotho Highlands Water Project (LHWP). In reply to the first defendant's request for further particulars for the purposes of trial the plaintiffs had raised several issues which had not been canvassed in or were at variance with their particulars of claim. It appeared from the plaintiffs' particulars of claim that they alleged that the first defendant controlled the LHWP, whilst in the reply to the request for further particulars it was alleged that the first defendant controlled the GOL. In response to the plaintiff's notice requiring the first J

defendant to discover the first defendant delivered a discovery affidavit in which it, inter alia, referred to A documents which the first defendant objected to producing on the basis of State privilege. In response thereto the plaintiffs applied in terms of Rule 35 of the Uniform Rules of Court for an order that the first defendant make further discovery of certain documents which it considered relevant and which were broadly defined; that the plaintiffs were entitled to inspect and copy certain documents in which privilege had been claimed; and that the B documents in respect of which State privilege had been claimed were not privileged. In attacking the first defendant's discovery affidavit the plaintiffs endeavoured to establish a conspiracy of silence or mala fides on the part of the

first defendant. In support of the application the plaintiffs annexed lengthy affidavits and endeavoured to incorporate several other documents by annexing them to the affidavits. C
The first defendant opposed the application and applied for the striking out of certain paragraphs of the affidavits and supporting documents used in support of the plaintiff's application. The plaintiffs argued, inter alia, that the new constitutional dispensation justified a departure from previous authorities which placed the onus of proving the existence and/or relevance of documents not discovered on the party requiring such additional documents. To D determine this issue the Court was further required to decide whether either the 'interim' Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) or the Constitution (the Constitution of the Republic of South Africa Act 108 of 1996) applied to the present matter, as the action had been instituted in 1993, although E the present application had been launched during 1997. It was further necessary for the Court to decide whether the determination of the true agreement between the first defendant and the GOL, as an international law agreement between two sovereign States and not incorporated into South African municipal law, was a justiciable issue. The first defendant contended that the Court should act with restraint in respect of allegations ascribing F unlawful conduct to the GOL or that the sovereignty of the GOL had been compromised.
Held, that what the plaintiffs had endeavoured to achieve in their notice in terms of Rule 35 was to foist upon the first defendant and the Court their definition of 'relevant issues'. Relevancy was to be determined from the pleadings and not extraneously. The plaintiffs were only permitted to obtain inspection of documents relevant to the G issues in the pleadings. (At 310I/J--311A/B and 337H/I--J.)
Held, further, that, in determining the issues raised by the pleadings, regard should not be had to requests for further particulars for the purposes of trial and the further particulars furnished in response thereto, as requests for further particulars for trial were made after the close of pleadings and therefore related to the pleaded issues and H did not raise further or new issues between the parties. (At 317B/C--C and 325I--I/J.)
Held, further, that, although the present application was interlocutory in nature, it constituted 'proceedings' in itself. The plaintiffs' notice in terms of Rule 35(3) had been served and the present proceedings instituted after the Constitution came into effect. In the circumstances the provisions of the Constitution were applicable to the I present application. (At 318F--G.)
Held, further, that, notwithstanding due regard to the requirements of openness and fair dealing which s 32(1) of the Constitution required and the requirement of a fair trial in s 34, it did not follow that there had to be a shifting of the onus of proving the existence and/or relevance of the documents from the party requiring such additional documents to the party J

allegedly in possession thereof. A litigant who engaged the State as referred to in s 32(1) had the right to utilise s A 32(1) and/or Rule 35 in order to obtain access to documentation in the possession of the State. If he elected to rely on Rule 35 and was not satisfied with the discovery that was made, he had to discharge the onus of proving on the probabilities that the documents existed and were relevant. (At 320B--E.) B
Held, further, that, accepting that the onus was on the party seeking to go behind the discovery affidavit, the Court, in determining whether do so, would only have regard to: (i) the discovery affidavit, itself; (ii) the documents referred to in the discovery affidavit; (iii) the pleadings in the action; (iv) any admissions made by the party making the discovery affidavit; or (v) the nature of the case or the documents in issue. This limitation is subject to the C exception that the conclusiveness of a discovery affidavit could always be challenged where male fides was shown. (At 320F--G/H and 321A/B--B.)

Held, further, that due to the consequences of failure to comply with a notice in terms of Rule 35(3), it was important that the party who was dissatisfied with discovery should describe the documents required for inspection in such a manner that they were identifiable. However, a notice in terms of Rule 35(3) was not limited to a specific document. The notice may require production of any number of documents. Whilst a document need not be described specifically in the notice, it had to be described with sufficient accuracy to enable it to be identified. This would occur where the document was described within a genus enabling it to be identified. (At 321F--I, 322I--J and 323B--C.)
Held, further, that an applicant had to raise the issues upon which it would seek to rely in the founding affidavit by defining the relevant issues and setting out the evidence upon which it relied to discharge the onus of proof resting on it. Relevant issues had to be dealt with in the affidavits and not left to be raised only in argument by counsel. This applied equally to the answering and replying affidavits. The facts set out in the affidavits had to be set out simply, clearly and in chronological sequence, and without argumentative matter. A distinction had to be drawn between primary and secondary facts: the former were used as a basis for inference as to the existence or non-existence of further facts, known as inferred or secondary facts. In the absence of the primary fact the alleged secondary fact was merely a conclusion of law. (At 323I/J--324F.)
Held, further, that it was not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard thereto. What was required was the identification of the portions thereof on which reliance was placed and an indication of the case which was sought to be made out on the strength thereof. (At 324F--G.)
Held, further, that a party could advance legal argument in support of the relief or defence claimed by it even where such arguments were not specifically mentioned in the papers, provided they arose from the facts alleged and provided there was no prejudice to the other party. (At 324H--I and 324J--325A.)
Held, further, that, as the plaintiffs had not sought to attack the discovery affidavit on one of the conventional bases, it would not be fair to consider them in the event of the plaintiffs failing to establish the conspiracy or mala fides. It could not be held that the first defendant would not be prejudiced thereby. The plaintiffs either had to succeed or fail on the case they sought to make out, namely the conspiracy of silence or mala fides. (At 325H--I.)
Held, further, that, although inspection may be obtained of documents described as a genus, the description of the documents in the present application was so wide and all-inclusive that it would not have been possible to determine

objectively what was or was not included therein. Although it may have been possible to prune the notice in terms of Rule 35(3) so as to be left with an enforceable notice, the plaintiffs had not endeavoured to do so. (At 326C--D/E.)
Held, further, that the Court could take cognisance of the agreements between the first defendant and the GOL, as well as the contents thereof, as facts, just as it could take cognisance of any fact properly proved before it. The Court, however, could not interpret or construe the agreements, nor the legal consequences arising therefrom. Further, the Court could not determine the true agreement concluded between the first defendant and the GOL. (At 329J--330B/C.)
Held, further, that, even if the issues related to the agreements between the first defendant and the GOL were raised in the particulars of claim, they were not relevant and the discovery of documents related thereto did not have to be made. (At 330B/C--C/D.)
Held, further, that it had to be a very particular case, even if such a case could exist, that would justify a Court interfering with a foreign Sovereign. The judicial branch of government ought to be astute not to venture into a judicial no-man's land. In an appropriate case, as an exercise of the Court's inherent

jurisdiction to regulate its own procedure, the Court could determine to exercise judicial restraint and refuse to entertain a matter, notwithstanding it having jurisdiction to do so, in view of the involvement of foreign States therein. (At 332H and 334D--F.)
Held, further, that in the present case it was apparent that decisions had to be made in regard to the alleged E unlawful conduct of the GOL, the control of the GOL and its relationship with the first defendant. As far as the latter was concerned there could be little doubt that this was not an area for the judicial branch of government. (At 334F--G.)
Held, further, as regards the application to strike out, that those documents which were annexed to the papers and introduced in order to prove the contents thereof were inadmissible. (At 326G--H/I.) F
Held, further, that the prejudice sustained by the first defendant was to be found in the sheer vastness of the scandalous, vexatious and irrelevant matter. It was literally and figuratively overwhelming and thus prejudicial. (At 338C.)
Held, further, that new matter could not be introduced in a replying affidavit. (At 338E/F.) G
Held, further, as to the costs of the application to strike out, that they were of such a nature that it would work an injustice were a special order as to costs not made. Certain parts of the papers had been put together without any regard to the rules of practice and procedure and the laws of evidence. The plaintiffs had simply endeavoured to overwhelm both the first defendant and the Court. They had relied on speculative matter and then raised argument H based on the speculation. They had inundated both the first defendant and the Court with irrelevant material. This conduct merited censure. Notwithstanding being faced with the application to strike out, which should have indicated that restraint on the part of the plaintiffs was called for when deposing to the replying affidavits, the replying affidavit was even more replete with offensive matter. (At 339E/F--H/I.) I
Held, further, that, whilst the plaintiff's conduct had been of such a nature that a special costs order ought to have been made, the circumstances had not been such that attorney and own client cost ought to be ordered. (At 339I/J--340A.)
Held, further, that, on the papers, the plaintiffs had simply not established mala fides or a conspiracy of silence involving the first defendant. Accordingly, J

their attack on the first defendant's discovery affidavit based thereon could not succeed. (At 343C/D--D.) A
Held, further, as to the claim to State privilege and the plaintiffs' reliance on the provisions of the Constitution, that the Court was obliged to balance the extent to which it was necessary to disclose the evidence against the public interest in its non-disclosure. The purpose for which the discovery was sought was to prove a conspiracy between B the first defendant and the GOL to defraud the plaintiffs of their rights. The underlying case is that the first defendant had exercised sovereignty over the GOL and had infringed upon the sovereignty of the GOL to such an extent that the GOL had no real independence and was controlled by the first defendant. These were matters which the Court was unable to determine and, in any event, were not relevant to the issues raised in the action. C Accordingly, the interest in non-disclosure clearly outweighed the interest in disclosure and the claim to the documents in respect of which State privilege had been raised had to fail. (At 344E/F--H/I.)

Cases Considered

Annotations

Reported cases D

*Administrator, Transvaal, and Others v Theletsane and Others*1991 (2) SA 192 (A): dictum at 196D--E applied

Alfred Dunhill of London Inc v The Republic of Cuba et al 425 US 682 (1976) (48 L ed 2d 301): considered

Aksionairnoye Obschetvo A M Luther v James Sagor and Company [1921] 3 KB 532: followed E
Arab Monetary Fund v Hashim and Others (No 3) [1990] 2 All ER 769 (CA): followed
Banco Nacional De Cuba v Peter L F Sabbatino et al 376 US 398 (1964) (11 L ed 2d 804): followed
*Barlow Motors Investments Ltd v Smart*1993 (1) SA 347 (W): referred to
Beinash v Wixley 1997 (3) SA 721 (SCA): dictum at 733J--734C applied F
Brunswick (Duke of) v Hanover (King of) (1848) 9 ER 993 (HL): followed
Buttes Gas and Oil Co v Hammer and Others (No 3); Occidental Petroleum Corporation v Buttes Gas & Oil Co and Another (No 2) [1980] 3 All ER 475 (CA): followed
Buttes Gas and Oil Co and Another v Hammer and Another (Nos 2 and 3); Occidental Petroleum Corpn G and Another v Buttes Gas & Oil Co and Another (Nos 1 and 2) [1981] 3 All ER 616 (HL): followed
*Cabinet for the Territory of South West Africa v Chikane and Another*1989 (1) SA 349 (A): referred to
*Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others*1990 (2) SA 574 (T): referred to
Carpede v Choene NO and Another 1986 (3) SA 445 (O): followed H
*Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another*1984 (4) SA 149 (W): dictum at 157E--H followed
Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55: applied
*Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd*1971 (4) SA 589 (W): followed
De Polo and Another v Dreyer and Others 1991 (2) SA 164 (W): dictum at 174H--J followed I
*Du Plessis and Others v De Klerk and Others*1996 (3) SA 850 (CC) (1996 (5) BCLR 658): dictum at paras [13], [14] and [20] applied
*Ehler (Pty) Ltd v Silver*1947 (4) SA 173 (W): dictum at 178 followed
*Enslin v Vereeniging Town Council*1976 (3) SA 443 (T): referred to
Federal Wine and Brandy Co Ltd v Kantor 1958 (4) SA 735 (E): followed J

Fourie v Morley and Co 1947 (2) SA 218 (N): dictum at 222--3 followed A
*Galp v Tansley NO and Another*1966 (4) SA 555 (C): followed
*Goodwood Municipality v Rabie*1954 (2) SA 404 (C): dictum at 406B--E followed
*Government of the Province of KwaZulu/Natal v Ngwane*1996 (4) SA 943 (A): referred to
Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D): dictum at 469C--E followed B
*Heckroodt NO v Gamiet*1959 (4) SA 244 (T): dictum at 246A--C followed
*Holomisa v Argus Newspapers Ltd*1996 (2) SA 588 (W) (1996 (6) BCLR 836): considered
Hunt et al v Mobil Oil Corporation et al 550 F 2d 68 (2nd Cir 1997): referred to
Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A): referred to C
*Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others*1995 (2) SA 433 (SE): considered
Jones v Monte Video Gas Company (1880) 5 QB 556: followed
Key v Attorney-General, Cape Provincial Division, and Another 1996 (4) SA 187 (CC) (1996 (2) SACR 113; D 1996 (6) BCLR 788): dictum at para [4] applied
*Khala v Minister of Safety and Security*1994 (4) SA 218 (W) (1994 (2) SACR 361; 1994 (2) BCLR 89): considered
*Le Roux v Direkteur-Generaal van Handel en Nywerheid*1997 (4) SA 174 (T): considered

Lenz Township Co (Pty) Ltd v Munnick and Others 1959 (4) SA 567 (T): followed E
*Lipschitz and Schwartz NNO v Markowitz*1976 (3) SA 772 (W): dictum at 775H followed
Maclaine Watson & Co Ltd v Department of Trade and Industry and related appeals; Re International Tin Council; Maclaine Watson & Co Ltd v International Tin Council; Maclaine Watson & Co Ltd v F International Tin Council (No 2) [1988] 3 All ER 257 (CA): referred to
Maclaine Watson & Co Ltd v Department of Trade and Industry and related appeals; Maclaine Watson & Co Ltd v International Tin Council [1989] 3 All ER 523 (HL): followed
Malcolm Lyons & Munro v Abro and Another 1991 (3) SA 464 (W): referred to G
*Maluleke v Minister of Internal Affairs*1981 (1) SA 707 (B): dictum at 712 applied
*Marais v Lombard*1958 (4) SA 224 (E): dictum at 227G followed
Maxwell and Another v Rosenberg and Others 1927 WLD 1: followed
*Minister of the Interior v Bechler and Others; Beier v Minister of the Interior and Others*1948 (3) SA 409 (A): considered
Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A): dictum at 285G applied H
Nel v Waterberg Landbouers Ko-operatiewe Vereeniging 1946 AD 597: dictum at 607 applied
Oetjen v Central Leather Co 246 US 297 (1918) (62 L ed 726): followed
Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A): I dictum at 161B--D applied
Phato v Attorney-General, Eastern Cape, and Another; *Commissioner of the South African Police Services v Attorney-General, Eastern Cape, and Others*1995 (1) SA 799 (E) (1994 (2) SACR 734; 1994 (5) BCLR 99): considered
Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A): referred to J

Port Nolloth Municipality v Xahalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) A SA 98 (C): dictum at 111B--C followed
Princess Paley Olga v Weisz [1929] 1 KB 718: followed
*Prokureursorde van Transvaal v Kleynhans*1995 (1) SA 839 (T): dictum at 849B followed
Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A): dictum at 793D applied B
*Rellams (Pty) Ltd v James Brown & Hamer Ltd*1983 (1) SA 556 (N): followed
*Reynolds NO v Mecklenberg (Pty) Ltd*1996 (1) SA 75 (W): dictum at 78I followed
Richardson's Woolwasheries Ltd v Minister of Agriculture 1971 (4) SA 62 (E): followed C
*S v Mhlungu and Others*1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793): referred to
*SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd*1968 (3) SA 381 (W): followed
Schlesinger v Donaldson and Another 1929 WLD 54: followed D
*Shabalala and Others v Attorney-General, Transvaal, and Another*1996 (1) SA 725 (CC) (1995 (2) SACR 761; 1995 (12) BCLR 1593; [1996] 1 B All SA 64): considered
Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W): dictum at 177 followed E
Society of Advocates of South Africa (Witwatersrand Division) v Rottanberg 1984 (4) SA 35 (T): referred to
*Southern Pride Foods (Pty) Ltd v Mohidien*1982 (3) SA 1068 (C): dictum at 1071H--1072B followed
*Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd*1991 (3) SA 276 (SE): dictum at 282H--283C applied

Taite v Bothwell 1912 CPD 60: followed F
*Thompson v Barclays Bank DCO*1965 (1) SA 365 (W): referred to
*Tractor & Excavator Spares (Pty) Ltd v Groenedijk*1976 (4) SA 359 (W): followed
*Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere*1984 (2) SA 261 (W): dictum at 269A--H followed
Tshwete v Minister of Home Affairs (RSA) 1988 (4) SA 586 (A): dictum at 606E--F applied G
*Tweefontein United Collieries Ltd v Lockers Engineers SA (Pty) Ltd*1964 (1) SA 186 (W): followed
Underhill v Hernandez 168 US 250 (1897): dictum at 252 followed
Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) (1990 NR 332): dictum at 566C--E (SA) and 334J--335B H (NR) applied
Van Bokkelen and Rohr SA v Grumman Aerospace Corporation (1984) 66 ILR 311: referred to
*Van der Linde v Calitz*1967 (2) SA 239 (A): considered
*Van Niekerk v Pretoria City Council*1997 (3) SA 839 (T) ([1997] 1 B All SA 305): considered
Van Rensburg v Van Rensburg en Andere 1963 (1) SA 505 (A): dictum at 509E--510B followed I
W S Kirkpatrick and Co Inc et al *v Environment Tectonics Corp, International* 29 ILM 182 (1990): considered
*Western Bank Ltd v Thorne NO and Others NNO*1973 (3) SA 661 (C): referred to
Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A): dictum at 602A applied. J

JOFFE J
Rules Considered
Rules of Court
The Uniform Rules of Court, Rule 35: see Erasmus and Barrow *The Supreme Court Act 59 of 1959 and the Magistrates' Courts Act 32 of 1944* 11th ed (1997) Part A at 65--8.
Statutes Considered
Statutes
The Constitution of the Republic of South Africa Act 200 of 1993: see Juta's Statutes of South Africa 1996 vol 5 B at 1-132
The Constitution of the Republic of South Africa Act 108 of 1996, ss 32(1) and 34; see *Juta's Statutes of South Africa 1997* vol 5 at 1-174--1-175.
Case Information
Application in terms of Rule 35(7) of the Uniform Rules of Court and an application to strike out certain portions of C the affidavits and related documents used in support of the Rule 35(7) application. The facts and the nature of the issues appear from the reasons for judgment.
C Edeling for the first plaintiff.
B Gudelsky (with him *Anton Katz*) until 15 October 1997 and thereafter *Anton Katz* for the second plaintiff.
The third plaintiff in person. D
J Dugard for all three plaintiffs on 6 November 1997.
G L Grobler SC (with him *R J Raath* and *E N Keeton*) for the defendants.
Cur adv vult. E
Postea (12 December 1997).
Judgment
Joffe J :
Introduction F
In 1986 the Government of the Republic of South Africa ('RSA') and the Government of the Kingdom of Lesotho ('GOL') concluded a treaty. The treaty provides for the Lesotho Highlands Water Project ('LHWP'). The LHWP is designed

to effect the delivery of water by Lesotho to South Africa and, to utilise such delivery system, to generate hydro- electric power in Lesotho. G
First plaintiff alleges that, in the implementation of the LHWP, certain rights conferred upon it in terms of a mining lease were interfered with and infringed. This resulted in much litigation in the High Court of Lesotho, some of which is still in the process of determination and, ultimately, in respect of one of the disputes, an appeal to the H Lesotho Court of Appeal.
In 1993 the plaintiffs instituted an action against the first defendant in this Court. The action has, as its cause of action, some of the interferences and infringements relied upon in the Lesotho litigation. In 1994 a further action was instituted in this Court by the first plaintiff. The defendant therein is the Trans-Caledon Tunnel Authority I ('TCTA'). This action also arises out of some of the interferences and infringements aforementioned.
In all the litigation aforementioned first plaintiff was joined by other parties. For ease of reference, unless otherwise necessary, reference will only be made herein to the first plaintiff. Likewise, in the present action, J

first defendant was cited together with other defendants. Unless otherwise necessary reference will only be made A to the first defendant. For ease of reference the parties will be referred to by their trial nomenclature irrespective of the nature of the proceedings.
In both actions instituted in South Africa first plaintiff has brought applications in terms of Rule 35(7) of the B Uniform Rules of Court. In these applications first plaintiff seeks inspection of certain documents.
In the ongoing Lesotho litigation, the first plaintiff caused subpoenas to be issued against, inter alia, the Minister of Water Affairs and Forestry of the RSA and various officials of that department. The Minister and the officials C have brought an application for the subpoenas to be set aside.
Argument was first heard in the application in terms of Rule 35(7) in the action against the first defendant. This judgment deals with that application and certain cost orders that were reserved for determination at the hearing thereof. The argument of the interlocutory application lasted 12 days. It involved excursions into international law, D mining law, the law of expropriation, constitutional law and many of the Rules of Court. It traversed a factual ambit of seemingly unending proportions. Eventually, despite the industry and perseverance of counsel, argument was concluded. Now, as always, judgment has to be delivered.
After the first application was heard counsel proceeded with the application in terms of Rule 35(7) in the TCTA E action. This argument only lasted one day. None of the factual and legal arguments that had been advanced in the first application were repeated.
Finally, the application to set aside the subpoenas was heard.
In giving judgment in this application all the relevant facts and arguments will be set out fully. The judgment in the F application against the TCTA and for the setting aside of the subpoenas will not regurgitate them.
In order to appreciate the issues between the parties and their respective arguments, it is necessary to set out the factual milieu against which they arise. In doing so reference is made to documents and facts, irrespective of their G source or admissibility, and mindful of the fact that the first defendant has brought two applications to strike out portions of the plaintiffs' papers, which applications still have to be determined in this judgment. To do otherwise would preclude a proper appreciation of the factual milieu. Counsel, likewise, argued the matter on this basis. H
In setting out the relevant facts reference will first be made to the so-called documentary background, thereafter to the litigation in Lesotho and, finally, to the litigation in South Africa.

<u>The documentary background</u>

The treaty

On 24 October 1986 the RSA and GOL concluded a treaty on the LHWP. The purpose of the LHWP is to effect the delivery of specified quantities of water by Lesotho to the Vaal River system in South Africa and to utilise such delivery system to generate hydro electric power in Lesotho. The LHWP is to be implemented in various phases. In terms

JOFFE J

of the treaty water deliveries to South Africa from subphase 1A were due to commence in January 1995. (This delivery date was not achieved.)

Phase 1A comprised the building of the Katse Dam and a transfer tunnel from there to the hydro power works at the Muela Dam, all situated in Lesotho. In addition, the phase comprised the construction of a delivery tunnel, partly in Lesotho and partly in South Africa. As will appear hereinafter, when the terms of the treaty are analysed, the RSA is liable for the cost of the LHWP in Lesotho in so far as it relates to water delivery.

The treaty provides that GOL and the RSA, respectively, shall have overall responsibility for that part of the LHWP situated in their respective countries and for the security thereof.

To this end the treaty provides for the establishment by GOL of the Lesotho Highlands Development Authority ('LHDA'), as an autonomous statutory body under the laws of Lesotho, and for the establishment by the RSA of the TCTA, as an autonomous body under the laws of South Africa. Each party to the treaty undertakes, in respect of its territory, to provide the LHDA and the TCTA respectively with all powers, authorisations, exemptions and rights necessary for the implementation, operation and maintenance of the LHWP, including the procurement of land and interest in land.

Articles 7 and 8 of the treaty relate to the LHDA and the TCTA respectively. For present purposes the one article may be regarded as the mirror image of the other.

Both the LHDA and the TCTA have responsibility for the implementation, operation and maintenance of that part of the LHWP situated in Lesotho and South Africa respectively. The RSA is responsible for payment to the LHDA and the TCTA, by way of cost-related payments, for the implementation, operation and maintenance of that part of the project relating to the delivery of water to South Africa. GOL has a similar obligation to the LHDA and the TCTA in respect of the generation of hydro-electric power in Lesotho. Article 10(3) of the treaty defines the costs for which the RSA is liable. In terms of art 10(3)*(g)* the RSA is liable for the cost of land or any interest in land acquired for the purpose of the implementation, operation and maintenance of the LHWP.

In order to finance the LHWP, both the LHDA and TCTA are obliged, in terms of the treaty, to raise money by way of loans, credit facilities and other borrowings. The treaty provides that the RSA shall provide such guarantees as the lenders of such loans, credit facilities or other borrowings may require, in so far as they relate to the delivery of water to South Africa. A similar provision applies to GOL in so far as the loans relate to the generation of hydro electric power in Lesotho. Article 11(10) provides that the LHDA or the TCTA, as the case may be, shall, on the request of the RSA, allow it to pay all moneys due and payable as cost related payments directly to any creditor from whom any loans, credit facilities or other borrowings are procured for the implementation, operation and maintenance of that part of the LHWP relating to the delivery of water to South Africa.

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Finally the treaty establishes, in art 6(6), the second defendant ('the JPTC'). The JPTC is composed of two delegations, one from the RSA and the other from GOL. Each delegation consists of three members nominated by the RSA and GOL

as the case may be. Decisions of the JPTC require the agreement of both delegations. If the delegations cannot reach agreement the matter is to be referred to the RSA and GOL. The JPTC has monitoring and advisory powers relating to the activities of the LHDA, in so far as such activities may have an effect on the delivery of water to South Africa. Similarly, the JPTC has monitoring and advisory powers relating to the activities of the TCTA, in so far as such activities may have an effect on the generation of hydro-electric power in Lesotho. Furthermore, the JPTC has the right to subject to management audit all those aspects of the management, organisation and accounts of the LHDA relating to the delivery of water to South Africa and all those aspects of the management, organisation and accounts of the TCTA relating to the generation of hydro-electric power in Lesotho. Article 9(11) provides that the LHDA and the TCTA shall each consult with the JPTC on a continuous basis with regard to all aspects of the matters listed in the article and any decision of either the LHDA or the TCTA with regard to all aspects of such matters shall require the approval of the JPTC in order to take effect. Both the LHDA and the TCTA are obliged to provide the JPTC with all information, as and when required, regarding all operational aspects of any phase of the LHWP implemented at that stage and to give their full co-operation to the JPTC. Finally, the treaty provides that the JPTC, its secretary and the persons nominated as representatives or alternates to the JPTC, shall enjoy such privileges and immunities as provided for in annexure III of the treaty. In terms of clause 2 of annexure III the JPTC shall enjoy immunity from the civil and administrative jurisdiction of any court of law in the territory of either the RSA or GOL. (Hence, the present action has not proceeded against the JPTC, although it is cited as second defendant.)

The establishment of the LHDA and the TCTA

In terms of Order 23 of 1986 the LHDA was established by GOL in Lesotho municipal law with effect from 24 October 1986. In terms of s 20 the LHDA is entrusted with the responsibility for the implementation, operation and maintenance of the LHWP and shall give full effect to the rights and duties of the JPTC provided for in the treaty. Section 39(1) of the order provides that, notwithstanding anything to the contrary in any other enactment, the LHDA may, at any time after the making of an approval order and before conveyance or ascertainment of price or compensation:

'*(a)* enter on and take possession of any land, or exercise any right which the (LHDA) is authorised by this Order to acquire for the purpose of carrying out the approved scheme to which the approval order relates;

(b) terminate, restrict or otherwise interfere with any servitude or other property or right which the (LHDA) is authorised by this Order to terminate, restrict or otherwise interfere with for the purpose of carrying out the approved scheme; or

(c) . . . .'

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In terms of s 39(2) interest is payable by the LHDA to the occupier of land or the owner of the servitude right or other property entered upon, exercised or interfered with from the date of such entry, exercise or interference, until payment of such price or compensation. Section 39(3) provides for various periods of notice prior the LHDA acting in terms of s 39(1).

In April 1990 the Minister of GOL responsible for Lesotho Highlands Water and Energy Affairs made regulations known as the LHWP Compensation Regulations, 1990. These regulations set out the basis of compensation in the event of interference as contemplated in s 39(1) of Order 23 of 1986. The nature of the compensation claims envisaged by these regulations are those of a rural peasant community obliged to vacate their land.

In terms of a notice made pursuant to s 138A of the Water Act 54 of 1956, the TCTA was established in South African municipal law. The object of the TCTA is the implementation, operation and maintenance of the LHWP situated in South Africa and the implementation, operation and maintenance of that part of the water conveyance system situated in Lesotho which may be entrusted to the

TCTA in terms of art 8(2) of the treaty. (No such authority was entrusted to the TCTA.)

Agreement in respect of the interface of the tunnels

As is apparent from the aforegoing, both the LHDA and TCTA have responsibilities in respect of the construction of the delivery tunnel through which the water is to be channelled. The respective tunnels interface at the Caledon river. This necessitates effective co-ordination of the construction activities. On 12 December 1989 the RSA and GOL concluded a written agreement on the establishment and operation of the common works area at the Caledon river. Certain functions are given to the TCTA in this regard. Article 5, however, states that nothing in the agreement shall be construed as excluding any part of the works area (as defined in art 1 of the agreement) from the administrative, legislative and judicial jurisdiction of the party having such jurisdiction over that part immediately before the entry into of the agreement.

The financial implementation of the project in Lesotho

In order to finance the construction of the LWHP in Lesotho the LHDA concluded loans with various banks and financial institutions. On 19 November 1991 the LHDA entered into a trust instrument with 21 banks and financial institutions which provided loans to it, as well as with The Law Debenture Trust Corporation plc ('the trustee'). In terms of the trust instrument, the repayments of the loans by the LHDA would be centrally administered by the trustee on behalf of the banks and financial institutions involved.

It will be recalled that, in terms of the treaty, the RSA is responsible to the LHDA for the cost-related payments in connection with that part of the LHWP which relates to the delivery of water to South Africa. The treaty further provides that the RSA is permitted to request the LHDA to

make such payments directly to the creditors from whom the LHDA has made loans for the establishment, implementation, operation and maintenance of that part of the project. On 19 November 1991 the RSA entered into a deed of undertaking with the trustee, in terms whereof the RSA undertook to make all payments due by the LHDA to the trustee under the trust instrument directly to the trustee, for payment to the said banks and financial institutions.

Other agreements concluded in November 1991

On 18 November 1991 a lease between GOL and the LHDA was registered in the Lesotho Deeds Registry. In terms of the lease certain immovable property situated within the LHWP was leased to the LHDA for a period of 90 years at an annual rental of M431 862. It is common cause that the land leased is that land which is required for the LHWP.

On 19 November 1991 the RSA and GOL concluded Protocol IV to the treaty. According to the preamble to the protocol it makes provision for a number of supplementary matters relating to phase 1A of the LHWP. In terms of art 7 the JPTC may, after consultation with the LHDA or the TCTA as the case may be, formulate detailed procedures with regard to any matter listed in art 9(11) or other relevant matter contemplated in art 7(38) or 8(26), which may include a provision that any act to be taken or decision to be made at any specified stage in such procedure by the authority concerned shall require consultation with, and the prior approval of, the JPTC and the authority concerned shall observe and take all steps necessary to ensure observance of such procedure. Where appropriate, such procedures shall take account of the requirements of any contract entered into by the authority concerned. Article 10 provides as follows:

'Article 10

Undertaking by Lesotho

(1)In this article ''relevant agreement'' means the trust instrument, or any designated loan instrument both as defined in the deed of undertaking or any other loan agreement, credit facility or other borrowings entered into by the Lesotho Highland Development Authority, the proceeds of which are intended to be used for the purposes of financing the implementation of phase 1A of the project in the Kingdom of Lesotho insofar as it relates to water delivery to South Africa.

(2)Lesotho shall not conduct its affairs and shall ensure that none of its agencies shall conduct its affairs in any way H which can be construed as a breach of the covenants by the Lesotho Highlands Development Authority or which results in or contributes towards a breach of the obligation of the Lesotho Highlands Development Authority or which may impair the ability or right of South Africa or the Lesotho Highlands Development Authority to perform their respective I obligations, as the case may be, either in terms of the deed of undertaking or any relevant agreement.
(3)Lesotho shall promptly inform South Africa of any change or prospective change in circumstances within its knowledge which might reasonably be expected to have an adverse effect on the rights and obligations of the Lesotho Highlands Development Authority or South Africa in terms of or resulting from any provision of any relevant agreement. In addition Lesotho J

shall promptly consult with South Africa with regard to all reasonable steps to be taken in order to prevent, mitigate or A remove such circumstances.
(4)Lesotho shall ensure that the Lesotho Highlands Development Authority shall be in the position and that it shall be allowed to effect payment of all amounts payable by such authority under any relevant agreement, free and clear of and without deduction for or on account of any taxes as may be defined in any relevant agreement, imposed in Lesotho. B
(5)Lesotho shall ensure that no stamp or registration charges or any other similar taxes or charges in respect of any relevant agreement shall be payable in Lesotho.'

Ancillary agreement C

The RSA and LHDA entered into a further agreement titled 'Ancillary agreement to the deed of undertaking and relevant agreements'. This agreement was concluded in 1992. In view of certain submissions made on behalf of the plaintiffs, and which will be dealt with later, it is necessary to analyse this agreement closely. The preamble to D the agreement refers to the treaty; the fact that for the purpose of the implementation of the LHWP the LHDA shall enter into loan agreements and that the RSA shall be required to make cost-related payments to the LHDA, inter alia to enable the LHDA to effect payments which will become payable by it in terms of the said loan agreements; the fact that the LHDA and the lenders under the loan agreements and the trustee have entered into E the trust instrument (referred to supra); and the fact that the RSA and the trustee have entered into the deed of undertaking. The preamble finally records that the LHDA and the RSA (referred to in the agreement as the parties) deem it necessary to regulate their respective positions in relation to the obligations accepted by the F LHDA pursuant to the trust instrument and relevant loan agreements and the RSA pursuant to the deed of undertaking and relevant loan agreements.

In terms of the definition set out in clause 1, the 'deed of undertaking' means the deed of undertaking referred to supra; 'relevant agreement' means the trust instrument referred to supra and G

'any designated loan instrument as defined in the deed of undertaking, or any other loan agreement, credit facility or other borrowings entered into by the LHDA. . . .'

In terms of clause 2.1 of the agreement the LHDA makes various undertakings to the RSA in respect of the trust H instrument and relevant agreement. The effect of the undertakings is to provide the RSA with knowledge of communications and legal process sent and received in respect of the trust instrument and relevant agreement and for consultation and co-operation in respect of such claims and furthermore to protect the RSA from any unilateral I conduct on the part of the LHDA in respect of the trust instrument and relevant agreement.

Plaintiffs' counsel made specific reference to various sub-clauses contained in clause 2 of the ancillary agreement. In order to deal with their submissions in due course these clauses are quoted in full hereunder: J

'2. Undertakings by LHDA A
2.1 LHDA hereby undertakes to South Africa that it shall -
2.1.3 provide to the designated authority copies of any legal process or claim which may be commenced or made against LHDA pursuant to any relevant agreement and consult with South Africa as to the most appropriate B way to deal with such legal process or claim: Provided that in the event of such legal process or claim arising as a result of South Africa not agreeing to any payment or the amount thereof pursuant to the provisions of clause 2.1.8 hereof, LHDA shall obtain South Africa's agreement conveyed in writing to it by the designated authority, on dealing with such legal process or claim with

the understanding that the parties C shall closely co-operate with each other in regard to all legal processes or claims;

. . .

2.1.8 obtain the prior agreement of South Africa, conveyed in writing by the designated authority, in respect of all payments and the amount thereof payable by LHDA pursuant to the trust instrument: Provided that South D Africa shall, subject to clause 2.1.3 hereof, unconditionally and irrevocably indemnify LHDA against any and all claims, demands, liabilities, costs, losses and expenses which may be made of LHDA or which LHDA may incur or sustain as a result of South Africa not agreeing with LHDA regarding any payment or the amount thereof. LHDA further agrees that, in bringing any claim under the indemnity provided in its favour, it E shall be required to prove the loss that it has incurred and shall only be entitled to recover in respect of loss actually incurred. LHDA shall not be entitled to reimbursement for any payments made by LHDA to the trustee in circumstances where South Africa has not agreed, as required in the agreement, to such payment being made;

. . . F

2.1.11 not conduct its affairs in any way which might reasonably be expected to have an adverse effect on its rights and obligations in terms of or resulting from any relevant agreement as well as the rights and obligations of South Africa in terms of or resulting from the deed of undertaking, including without limitation any conduct G which is likely to result in a specified event or an event of default in terms of and as defined in any relevant agreement or which would nullify, impair or reflect negatively on any representations or warranties made pursuant to any relevant agreement;

2.1.12 promptly inform South Africa in writing conveyed to the designated authority of any change or prospective change within its knowledge in circumstances not relating to any payment made or to be made by South H Africa under the deed of undertaking or any relevant agreement, which might reasonably be expected to have an adverse effect on the rights and obligations of South Africa in terms of or resulting from the deed of undertaking, including without limitation any change or prospective change in circumstances which is likely to result in a specified event or an event of default in terms of and as defined in any relevant agreement or I which would nullify, impair or reflect negatively on any representation or warranty made in and pursuant to any relevant agreement. In addition, LHDA shall promptly consult with South Africa with a view to jointly determining the steps to be taken in order to prevent, mitigate or remove such circumstances. J

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. . . A

2.2 LHDA undertakes to South Africa that all representations, warranties or statements made or repeated or deemed to be repeated by LHDA pursuant to any relevant agreement shall be based to the best of its knowledge and information on reasonable assumptions and reasonably held beliefs. LHDA represents and warrants to South Africa that no representation, warranty or statement made or repeated or deemed to be repeated by LHDA in or B pursuant to any relevant agreement, in respect of any matter within its control or with regard to which it has or could reasonably be required to have any knowledge but excluding any matter within the exclusive control or knowledge of South Africa or of any agency, corporation, statutory body or other juridical entity in the Republic of C South Africa which is directly or indirectly controlled by South Africa, was materially incorrect when made.'

Immunity afforded to JPTC

By notice in the Government Gazette of 23 December 1994 the provisions relating to the immunity of the JPTC D contained in the treaty were put into effect in South Africa. GOL granted similar immunity to the JPTC by notice in the Lesotho Government Gazette dated 9 October 1995.

Amendment to the LHDA Order and the validation of activities in respect of phase 1A and phase 1B of the LHWP

By Act 5 of 1995 GOL amended the LHDA Order of 1986. The amendment gives the specific right to the LHDA E to expropriate mineral rights. In terms of s 5 of the Act provision is made for the payment of full compensation for mineral rights so expropriated. Section 2 defines various terms, including a holder in relation to a mineral right as meaning 'a person in whose favour a duly granted and executed mineral right is executed in terms of the Deeds Registries Act'. F

In Act 6 of 1995 GOL provided that, notwithstanding the requirements of ss 35--40 of the LHDA Order of 1986, the activities carried out in connection with phase 1A and phase 1B of the LHWP scheme are deemed to have been lawfully executed and carried out in all respects subject to any accrued or vested right to damages. G

The events and litigation arising in respect of some of these events in Lesotho

In approximately June 1988 of the LHDA commenced operations in an area which is described as the Rampai lease area. H

In 1986 first plaintiff applied for prospecting leases in Lesotho. The upshot hereof was the conclusion on 4 August 1998 of five mining leases between GOL and first

plaintiff. They were registered by the Registrar of Deeds in Lesotho on 26 October 1988. In terms of the leases first plaintiff was granted the exclusive right to prospect for, to I mine and dispose of precious stones in various areas for a period of ten years commencing on the date of registration of the lease, with an option to renew the lease for a further period of five years. Clause 5 of each of the leases provides that first plaintiff 'shall actively work the lease area in search of precious stones to the satisfaction of the ''Mining Board'' '. Clause 6.1 of the leases provides that the first plaintiff 'shall commence J

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mining operations in search of precious stones within six months from the registration of this lease. . .'. Portion of A the leased area in regard to one of these leases falls within the LHWP and it is to this portion that reference is made as the 'Rampai lease area'.

By letter dated 30 April 1991 first plaintiff complained to the LHDA in respect of the interference with its mining B rights in the Rampai lease area by contractors engaged by the LHDA in execution of the LHWP. The contractors had commenced operations in the Rampai lease area in approximately 1988. A work camp was established, a start was made to the upgrading of an existing road and the building of a bridge. In July 1991 first C plaintiff launched an urgent application under case No CIV/APN/198/91 in the High Court of Lesotho for an interdict against the LHDA, restraining it from performing certain works in the Rampai lease area. The application was not opposed. Very short notice (a matter of hours), if such notice as was granted may be regarded as proper notice, was given to the LHDA of the application. On 18 July a rule nisi was issued returnable on 12 August 1991 D and an interim interdict was granted.

In terms of the interim interdict the LHDA was 'interdicted (by itself or through any agent/s and/or subcontractor/s) from performing any works . . . in or upon the' Rampai lease area. In terms of the rule nisi the LHDA was called upon to show cause, on the return day, why a final interdict in the same terms should not be E granted. The final interdict would only endure, broadly put, until first plaintiff had been compensated for the interference with its rights or the LHDA had conducted sufficient sampling of the minerals in the lease area to enable first plaintiff to quantify its damages.

On 25 July 1991 the first plaintiff launched an application under case No CIV/APN/206/91 to have, amongst other F things, the LHDA held to be in contempt of Court for wilfully disregarding the aforesaid interim interdict. On the same date the LHDA launched a counter-application in case No CIV/APN/198/91 to have the aforesaid interdict set aside. The contempt application was postponed sine die and the LHDA was ordered to file answering G affidavits within two weeks. The counter-application was postponed to 29 July 1991.

On 29 July 1991 the parties agreed to the discharge of the rule *nisi* referred to above 'with a view to resolving the issues between the parties'. The applications were postponed *sine die*.

On 31 July 1991, in respect of the Rampai lease, and on 1 August 1991, in respect of three of the four other mining H leases, the Commissioner of Mines gave notice to the first plaintiff in terms of clause 13 of the various leases. On 10 October 1991 the Commissioner of Mines cancelled the four mining leases. The fifth mining lease was cancelled by the Commissioner of Mines later.

On 23 October 1991 LHDA filed a supplementary answering affidavit in the first application referred to above (ie I case No CIV/APN/198/91), raising as a ground of opposition to the relief claimed therein the cancellation of the Rampai mining lease.

In November 1991, and under case No CIV/APN/394/91, the first plaintiff launched an application for the review of the cancellation of the five mining leases by the Commissioner of Mines. The application was J

opposed by, inter alia, the LHDA. The application was heard on 20 November 1991. The parties were placed on A terms for the filing of affidavits and interim relief was granted to the first plaintiff. By subsequent agreement between the parties no affidavits were exchanged.

On 20 March 1992 a notice appeared in a Government Gazette Extraordinary. In terms thereof the Military Government of Lesotho gave notice of Order 7 of 1992. The purpose of the order was 'to revoke those mining B leases registered in the Deeds Registry, Maseru on 26 October 1988 . . .'. The order revoked all the first plaintiff's mining leases. The order not only revoked the mining leases, but also excluded the jurisdiction of the courts in respect thereof. It was subsequently described by the Lesotho Court of Appeal as 'truly ''nasty, brutish and short'' C in its consequences for the first plaintiff'.

On 7 April 1992, under case No CIV/APN/145/92, the first plaintiff applied to the Lesotho High Court for an order setting aside the revocation order and, inter alia, applying for an interdict preventing the LHDA from interfering with the first plaintiff's rights in the Rampai lease area. On 27 September 1994 an order was granted setting aside D the revocation and granting further interdictory relief. The additional relief is set out as follows in the order:

'(3) Pending the final determination of the proceedings referred in para (2):

(a) the interdict granted in the proceedings under civil application No 394 of 1991 on 20 November 1991 E shall continue to be of full force and effect, subject to any further order of this Court;

(b) the second respondent is interdicted from removing or selling any plant or equipment as contemplated in the provision of s 7(5) of Order 7 of 1992; F

(c) the fourth respondent is interdicted (by itself or through any agent or subcontractor) from interfering with (inter alia by destroying, using up, disturbing, mixing up, covering up with tunnel waste or otherwise) any gravel deposits or minerals in or upon the lease area described in the mining lease G granted on 4 August 1988 and registered pursuant to the Deeds Registry Act 12 of 1967 under No 21044 (Rampai area) in the Deeds Registry, Maseru on 26 October 1988.

Provided that the fourth respondent (by itself or through any agent or subcontractor) may continue with the actual digging of the tunnel for the Katse Dam intake north of the Malibamatso Bridge, H subject to the condition that no interference with the said lease area by other or related activities, nor any dumping of waste or other material in the lease area shall occur without the prior written consent of the first and second applicants.' I

An appeal was noted against the judgment. On 13 January 1995, after hearing argument, the appeal, insofar as it related to the setting aside of the revocation order, was dismissed. The Court of Appeal, however, interfered with the interdictory relief which the Lesotho High Court had granted. In the place thereof it ordered that: J

'5. During the period commencing from the date of this order and expiring at midnight on 31 July 1995 the A appellants are interdicted and restrained from interfering with, obstructing or impeding any agent, employee or expert engaged by or in the employment of the respondents (and who is lawfully entitled to be in Lesotho)

(a) from conducting any tests or investigations in the areas identified in schedule A hereto, for the bona fide B purposes of estimating and quantifying any damages suffered by the respondents or any of them, in consequence of any unlawful acts perpetrated by or on behalf of or at the instance of the appellants.

(b) from using equipment, machinery or materials to conduct such tests or investigations, in the said areas, C whether such equipment, machinery or

materials already exist within the areas/area covered by schedule A or is introduced for that purpose after the date of this order.'

As to the costs of the appeal, it was ordered that the respondents would pay 25% of the costs of the second D appellant and that the first appellant would pay 25% of the costs of the respondents. Save therefor each party would pay their own costs. The Court of Appeal further ordered that the applications under case Nos 198/1991, 206/1991 and 394/1991 be properly enrolled and expeditiously prosecuted. E

During March 1995 GOL conceded that the cancellation of the mining leases was invalid. On 20 March 1995 an order was granted in the High Court of Lesotho under case No CIV/APN/394/91 in terms whereof the cancellation notices were set aside and declared invalid.

Prior thereto, on 2 March 1995, the LHDA served a counter-application on the first plaintiff, in which an order was F sought declaring that the Rampai lease was void ab initio. It is contended in the counter-application that certain procedures in terms of the Mining Rights Act 43 of 1967 were not complied with by GOL when the lease was granted. This application has been referred to oral evidence together with the applications in case Nos 198/1991 G and 206/1991 and is still proceeding. The LHDA's case has been closed and first plaintiff's case is in the process of being advanced. At present Mr W A Labuschagne is giving evidence. It is to be noted that he is the first plaintiff's witness. He is in the employ of the first defendant as Director: Legal Services in the Department of H Water Affairs and Forestry. As is set out more fully hereinafter he is giving evidence in his personal capacity and not as a representative of the department.

On 2 June 1995 first plaintiff instituted action in Lesotho against GOL in case No CIV/T/288/95. In that action damages are claimed as a result of the alleged breach of contract by GOL with regard to four of the mining leases, I excluding the Rampai lease. First plaintiff states that, depending on the outcome of the litigation concerning the validity of the Rampai lease, first plaintiff intends instituting further action against GOL, the LHDA and possibly the first defendant. J

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The litigation in South Africa A

The plaintiffs instituted the present action against the defendants in September 1993. The first defendant filed its plea in October 1993.

After delivering a notice requiring first defendant to discover in November 1993, with which first defendant did not comply, the plaintiffs delivered an application to compel discovery in August 1994. The first defendant deposed to B an affidavit in opposition to this application. Plaintiffs did not persist in the application to compel. During January 1995 first plaintiff filed its discovery affidavit. It filed a supplementary discovery affidavit during March 1995. During April 1995 first defendant delivered its discovery affidavit. C

On 24 April 1995 the first defendant delivered a request for further particulars for purposes of trial. On 24 July 1995 first defendant delivered an application to compel a reply to the request for further particulars for purposes of trial. The notice stated that the application would be made on 15 August 1995. On 11 August 1995 the plaintiffs D gave notice of a counter-application that was to be brought on the 15 August 1995. In terms of the notice of motion the plaintiffs sought an order that all proceedings in the action be stayed pending the final determination of the application under case No CIV/APN/394/91 and the action under case No CIV/T/288/95 in the High Court of Lesotho. In addition, the plaintiffs sought leave to file their answering affidavit in response to the application to E compel after determination of the counter-application. The counter-application was supported by an affidavit deposed to by the third plaintiff.

The third plaintiff, in making the case for the stay of the proceedings, pointed to the fact that the revocation order precluded the plaintiffs from instituting any action for damages against GOL arising therefrom. He indicated that it F was always plaintiffs' contention that the first defendant was at all times involved in the decisions with regard to, inter alia, the revocation of the leases. Plaintiffs could, accordingly, not risk awaiting the outcome of the application in Lesotho to set aside the revocation order prior to instituting the present action, for fear of prescription. As a result of the judgment of the Lesotho Court of Appeal the plaintiffs instituted action against GOL G in respect of four of the leases. Once the current proceedings in Lesotho in respect of the Rampai lease are concluded, and depending on the outcome thereof, first plaintiff intends instituting further action against GOL, the LHDA and, possibly, first defendant. Third plaintiff finally stated that should first plaintiff be successful in the H action in Lesotho and succeed in recovering damages, the action against first defendant would fall away.

In view of the late filing of the counter-application, the application to compel and the counter-application were postponed sine die. Costs were ordered to be costs in the cause of the application. I

On 30 August 1996, just one year after the application had been launched, the first defendant filed an answering affidavit in the counter-application. No reply affidavit was forthcoming from the plaintiffs. By letter dated 7 January 1997 first defendant's attorney requested that the replying affidavit be served by 24 January 1997. In a letter dated J

21 January 1997, directed on behalf of plaintiffs to first defendant's attorney, it was stated that the replying A affidavit would be filed by 30 April 1997. In a subsequent letter dated 26 March 1997, plaintiffs' attorney stated that plaintiffs would not be able to file their replying affidavit by 30 April 1997 but would expect to be in a position to do so by 30 July 1997. B

Notwithstanding this intimation, first defendant's attorney proceeded to enrol the application. By notice, which was served on the plaintiffs' attorney of record on 9 April 1997, the first defendant's attorney of record enrolled both the application to compel a reply to the request for further particulars as well as the counter-application for hearing on 14 May 1997. C

On 30 April 1997 the plaintiffs caused a notice in terms of Rule 35(3) to be served on the first defendant. Pursuant thereto first defendant was given notice to make 'the relevant documents (as defined in the definition schedule hereto) available for inspection in accordance with Rule 35(6), or to state on oath within ten days that such D documents are not in their possession'.

On 6 May 1997 the plaintiffs delivered a replying affidavit in the counter-application and gave notice of a further application for hearing on 13 May 1997. In the further application the plaintiffs sought an order that all pending E interlocutory applications be postponed to 3 June 1997 and that the first defendant be ordered to pay the wasted costs occasioned by the postponement. The postponement was motivated by the complex nature of the litigation and the unavailability of plaintiffs' counsel, which fact was allegedly known to first defendant's representatives prior to the enrolment of the interlocutory applications. F

It appears, furthermore, from the affidavit in support of the application for postponement that plaintiffs utilised the last days of April 1997 and 1 May 1997 to consult with their counsel of choice (who was not available on 13 May 1997). During this time it was decided that plaintiffs were unable to give detailed answers to the request for particulars for trial in the absence of proper discovery from the first defendant. Accordingly, the plaintiffs utilised G the aforesaid time to prepare replying affidavits in the counter-application (and in the TCTA action), a notice in terms of Rule 35(3) calling for the discovery of further documents, a 'document complaint' setting out the grounds on which the plaintiffs would rely in

support of a request that first defendant be compelled to make better H discovery and an application in terms of Rule 35(7) to compel better discovery.
As already alluded to, the Rule 35(3) notice was served on 30 April 1997. Despite the fact that the ten day period provided for in the notice would not elapse prior to 13 May 1997, the plaintiff served the application in terms of I Rule 35(7) on 9 May 1997 and gave notice that the application would be heard on 13 May 1997 (hence the extraordinary relief sought in para 2 of the notice of motion).
In the replying affidavit in the counter-application seeking a stay of the proceedings, third plaintiff averred that:
'67.1 Based on current legal advice, SDM does not accept that an adverse finding in Lesotho would be fatal to the success of its claim in South Africa. This J

will be argued at the hearing, if necessary. A
67.2 The Rampai lease trial has forced us to apply our minds more carefully to the legal position and enforceability of the Rampai lease, and there are numerous grounds on which it can be argued that SDM has the rights contended for, even if the proper procedures were not complied with. To the extent that I may have made a contention of law, or an admission based on a legal view, SDM does not persist therewith and is entitled to retract it.' B
On 19 May 1997 an order was made by agreement between the parties. In terms of the agreement, the plaintiffs were to deliver a reply to the request for further particulars for trial on or before 25 July 1997. It was noted that the plaintiffs would not persist with the application for a stay of proceedings. The order further provided that the C application in terms of Rule 35(7) would be postponed to a date to be arranged. First defendant was given to 23 May 1997 to reply to the plaintiffs' notice in terms of Rule 35(3). The first defendant and the plaintiffs were placed on terms in regard to the filing of answering affidavits and replying affidavits in the Rule 35(7) application. The costs of the first defendant's application to compel a reply to the request for further particulars, the plaintiffs' D application for a stay of proceedings, the plaintiffs' application for a postponement and the Rule 35(7) application were reserved for determination at the hearing of the Rule 35(7) application.
Determination of reserved costs E
After the aforegoing recitation of the relevant facts it is convenient to immediately deal with the issue of the reserved costs.
Plaintiffs' counsel argued in general, in respect of all reserved cost orders, that the costs be further reserved for determination at the trial. It is not apparent how the trial Court will be in any better position to make a F determination of the reserved costs.
The first defendant was entitled to bring an application to compel the further particulars sought for purposes of trial. There was no opposition to the application. Once the plaintiff's counter-application was removed from the scene, as it was after plaintiff indicated that they would not persist therewith, there was no obstacle to the relief G pursuant to the application being granted. First defendant obtained an order compelling the further particulars. There is no reason why the plaintiffs should not be ordered to pay the first defendant's costs in regard to the application to compel further particulars. H
The plaintiffs ultimately noted that they would not persist in the application for a stay of proceedings. The serving of the notice in terms of Rule 35(3) and the launching of the application in terms of Rule 35(7) are entirely consistent with such intimation. Although the plaintiffs did not withdraw the application, there can be no difference I in effect between such an intimation and the withdrawal of the application. There is no reason why the plaintiffs should not be ordered to pay the costs of the counter-application.
As is apparent from the aforegoing, the application to postpone the interlocutory applications related to the application to compel and the counter-application. They were both disposed of on 16 May 1997, J

despite plaintiffs' difficulty in obtaining the services of counsel of choice. The purposes of the postponement fell A away and the application was not proceeded with.
As already alluded to, third plaintiff averred that the application for postponement was enrolled for hearing on a date on which plaintiffs' counsel was unavailable to the knowledge of first defendant's representatives. These B averments, which, if true, would indicate a high-handed attitude by first defendant, are denied in the first defendant's answering affidavit. On the affidavits no finding in favour of the plaintiffs can be made in this regard.
Plaintiffs were afforded substantial notice of the enrolment of the application. Despite its complexity, plaintiffs C could have secured adequate counsel to represent it on 13 May 1997. After all, the application was to be argued on the papers prepared by the counsel of their choice. Argument would be confined to the four corners of the papers before the Court. In the circumstances there does not appear to be any good reason why the plaintiffs should not D be ordered to pay the costs of the application to postpone.
First defendant seeks that the cost orders referred to above should be on the attorney and own client scale. It is submitted that plaintiffs abused the process of the Courts - hence the request for a punitive cost order. E
It is pointed out that both the counter-application and the application in terms of Rule 35(7) were served after the respective motion Court rolls had closed. This resulted in the postponement of all the applications that were enrolled on the same days. No explanation is furnished by plaintiffs for their failure to enrol the applications F timeously. As far as the counter-application is concerned, it must be recalled that it was the only answer to the application to compel. As far as the postponement is concerned, the failure to enrol the substantive application for post- ponement in a busy motion Court is perhaps a means to ensure a postponement of at least one week. G
The proceedings in terms of Rule 35 were commenced whilst the application for a stay of proceedings was still being prosecuted. It is incomprehensible how the plaintiffs could seek to do so. The proceedings in terms of Rule 35 are entirely inconsistent with an application for a stay of proceedings. By indicating that they do not persist in H the application for a stay the plaintiffs recognised the obvious. They failed to follow this recognition through with a withdrawal of the application accompanied by a tender of costs.
Whilst the plaintiffs' aforementioned conduct may be questionable, it does not give rise to a finding contended for by a first defendant, that plaintiffs' manipulated the procedure of the Court. I
It was further argued on behalf of the first defendant that the reason why plaintiffs brought the proceedings in terms of Rule 35 was that they require the documentation in the Lesotho litigation. This is evidenced by the fact that plaintiffs have, in the Lesotho litigation, subpoenaed officials of the first defendant to make available exactly the same documentation referred to in the Rule 35(3) notice. This may be so. The J

documentation may well be required in the Lesotho litigation as well as in the action in South Africa. This argument A cannot justify a punitive costs order being made.
Finally, as far as costs are concerned, first defendant seeks the costs of two counsel. It was not contended by plaintiffs that the employment of two counsel was not justifiable in the circumstances. It would appear to have B been 'a wise and reasonable precaution' to engage the services of two counsel, regard being had to the amount involved in the action and the nature of the issues in dispute between the parties. See Enslin v Vereeniging Town Council 1976 (3) SA 443 (T) at 453F; Barlow Motors Investments Ltd v Smart 1993 (1) SA 347 (W) at 352G. C

At the conclusion of the judgment an order will be made directing plaintiffs, jointly and severally, to pay the costs, including the costs consequent upon the employment of two counsel, of:

1. First defendant's application to compel in terms of Rule 21(4), including the costs reserved on 16 May 1997.
2. Plaintiffs' counter-application to stay proceedings, including the costs reserved on 16 May 1997. D
3. Plaintiffs' application to postpone the hearing on 13 May 1997, including the reserved costs of 16 May 1997.

The plaintiffs' cause of action and the plaintiffs' further particulars for purposes of trial E

The plaintiffs' summons contains two claims. The first claim is brought by the first plaintiff. The second claim is brought by the second and third plaintiff. It is brought in the alternative to the first plaintiff's claim. The second and F third plaintiffs' claim is based on the same allegations as the first plaintiff's claim plus certain additional allegations.

In respect of these additional allegations, shortly prior to the commencement of argument on the Rule 35(7) application first defendant gave notice of an application to be moved simultaneously with the hearing therewith. First defendant sought an order, in terms of Rule 33(4), that the question of whether the second and third plaintiffs' G claim (pleaded in the alternative to the first plaintiff's claim) is sustainable in law, be determined at the hearing of the Rule 35(7) application. The second and third plaintiffs opposed the application.

During argument first defendant's counsel indicated that first defendant did not persist in the application. He H withdrew the application and tendered second plaintiff's and third plaintiff's costs in respect thereof, including the costs of two counsel.

At the end of this judgment an order will be made directing the first defendant to pay the second plaintiff's and third plaintiff's costs in regard to the application for a separation of issues in terms of Rule 33(4) for determination I of the issue that second and third plaintiffs' claims are not sustainable in law. The costs shall include the costs consequent upon the employment of two counsel.

The additional allegations in respect of the second and third plaintiffs' claim need not be considered as they do not widen the relevant issues for purposes hereof. J

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The plaintiffs allege in the particulars of claim that at all material times the first plaintiff, to the knowledge of the A defendants, had certain valuable rights as the holder of certain registered mining leases and was the owner of certain mining plant and equipment. The plaintiffs allege that there was an unlawful interference with these mining B rights resulting in the first plaintiff sustaining damages in the sum of R945 191 164. It is alleged that the unlawful interference was done with the improper motive of obtaining an unlawful advantage for the 'joint venture and/or the first defendant at the expense of the first plaintiff'. According to the plaintiffs, the unlawful interference includes one or more of the following: C

'4.1 the unlawful performance of civil engineering works of and relating to the joint venture in portion of the said mining lease areas;

4.2 the continuation thereof in wilful disobedience of an order of a competent Court; D

4.3 unlawful attempts to cancel the mining leases;

4.4 the repudiation of the said leases;

4.5 the subsequent cancellation and/or loss thereof;

4.6 the loss and/or destruction of the plant and equipment.'

The plaintiffs allege that the defendants unlawfully and intentionally (alternatively negligently) procured and/or E permitted and/or incited and/or encouraged and/or caused and/or instructed and/or failed to prevent (whilst under a legal duty to do so) and/or ratified and/or approved and/or participated in and/or

associated themselves with the unlawful interference with the first plaintiff's rights. The 'joint venture' for whose unlawful advantage the interference was perpetrated is referred to as follows in the particulars of claim: F

'2. At all material times:

2.1 The first defendant and the Government of the Kingdom of Lesotho were the parties to a joint venture known as the Lesotho Highlands Water Project.

2.2 The second defendant acted as the controlling body of the said joint venture. G

2.3 The first defendant . . . controlled (directly, indirectly by veto or otherwise) the second defendant and its decision-making process, and thereby controlled the joint venture.

2.4 The first defendant was the controlling partner (alternatively party) in respect of the joint venture, H alternatively was a joint controlling partner . . . thereof together with the Government of the Kingdom of Lesotho.'

Many of the averments contained in the plaintiffs' further particulars for purposes of trial are at variance with the averments contained in the particulars of claim or constitute new allegations not foreshadowed therein. For reasons I which will appear later, it is not necessary to set out these averments.

Insofar as the pleaded acts of interference are concerned, plaintiffs state in the further particulars that the performance of the civil engineering works (para 4.1) was carried out on behalf of the first defendant by contractors with the knowledge and approval of the defendants, GOL, J

the LHDA and the TCTA; the continued disobedience of the order (para 4.2) was committed by the first A defendant using the LHDA and other agents and/or instruments; the attempts to cancel the leases (para 4.3) was done by the Commissioner of Mines in Lesotho; whilst the repudiation of the leases (para 4.4), the subsequent loss thereof (para 4.5) and the loss of plant and equipment (para 4.6) were all performed by GOL. In para 13.4 of the B further particulars the plaintiffs state that

'*(t)*he acts of interference referred to in para 13.3 above were committed and performed pursuant to instructions and/or advice from the defendants and/or in terms of an agreement and/or under pressure from the first defendant for the benefit of the first defendant'.

Insofar as the express terms of the treaty between the RSA and GOL are contrary to the first defendant C controlling the JPTC or controlling the joint venture, plaintiffs allege in the further particulars for trial that the joint venture is in the form of a partnership between GOL and the RSA with the first defendant as the controlling partner. The partnership agreement, so it is alleged, includes an agreement, arrangement and understanding D between the two governments that GOL will assist and co-operate with the first defendant in order to remove any circumstance which may impact adversely on the first defendant's financial obligations under the treaty or may cause any delay in the implementation of the LHWP and that GOL and the LHDA will follow the advice of the first defendant in regard to such matters. The plaintiffs continue to allege that the true agreement between the first E defendant and GOL is that the first defendant has controlling power in regard to all water transfer-related costs and activities. The Lesotho delegates and the JPTC had and would have no say in regard to such matters, their role being limited to seeking to obtain, for the benefit of Lesotho, the most advantageous benefits in terms of F environmental development, community development and otherwise flowing from the first defendant's implementation of the LHWP, whether directly or through the JPTC and the LHDA. The further particulars for trial further set out how the RSA obtained political control over GOL. The extent of the alleged control is such that GOL is nothing more than a puppet in the hands of the RSA. G

The case made out in the further particulars for trial rests on the alleged partnership existing between GOL and the RSA and the control of that

partnership, whereby GOL is alleged to be under the total control of the RSA directly, in terms of the alleged agreement, and indirectly, by means of the political, economical and military pressure which it exercises on GOL.
The excipiability of the plaintiffs' particulars of claim, either on the grounds of being vague and embarrassing or lacking averments to sustain a cause of action, was one of the few issues not argued during the hearing of the application. For present purposes it suffices to state that the alleged control of Lesotho by the RSA, as extensively referred to in the further particulars, is not an issue raised in the particulars of claim. The alleged control of GOL (and through GOL of the LHDA and the JPTC) is central to the plaintiffs' action. These allegations are not facta probantia in proving that the first defendant controlled or jointly controlled the joint venture. They constitute facta probanda and constitute one of the

main issues, if not the main issue, to be determined at the trial. This allegation has not be made in the particulars of claim.

The first defendant's discovery affidavit

The first defendant's discovery affidavit is deposed to by Mr C M Audie. He describes himself as the Deputy-Director General: Utilisation in the Department of Water Affairs and Forestry. He states that the first defendant has in its possession or under its control the documents referred to in schedules I--V thereto.

The first schedule relates to the documents (910 in total) in respect of which first defendant has no objection to produce. The second schedule relates to 86 documents which first defendant objects to producing on the basis of legal professional privilege. The third, fourth and fifth schedules relate to 148, 131 and 83 documents, respectively, which first defendant objects to producing on the basis of State privilege. In this regard reliance is placed on affidavits deposed to by Prof K Asmal MP, the Minister of Water Affairs and Forestry (in respect of schedule III) and Mr A B Nzo MP, the Minister of Foreign Affairs (in respect of schedule III, IV and V). The objection to produce will be dealt with in greater detail hereinafter.

The application in terms of Rule 35(7)

The third plaintiff deposed to the founding affidavit in support of the application in terms of Rule 35(7). In para 1 thereof he states that he verily believes the content thereof to be true and correct. He proceeds to state that the plaintiffs believe that the first defendant's discovery affidavit is inadequate and that the claim to State privilege cannot be sustained. Third plaintiff refers to the notice in terms of Rule 35(3) which was served on first defendant on 30 April 1997 (ie less than ten days before the Rule 35(7) application itself was served on first defendant). He states that the application has been enrolled for hearing despite the fact that the ten day period provided for in Rule 35(3) has not elapsed as the 'plaintiffs wish the above honourable Court to know of this application, inter alia for purposes of adjudication of the other applications'. Third plaintiff thereupon refers to the document complaint. He states that, he has been advised, Courts attach great weight to a discovery affidavit and would not lightly go behind such affidavit for purposes of compelling further and better discovery, nor will a Court lightly disregard a claim of State privilege. Hence the document complaint was prepared. In regard thereto he states the following:

'14. I have read the document complaint and confirm that the content thereof accords with my knowledge and understanding of the facts. I also confirm the allegations therein which refer to me or any of the plaintiffs or their representatives. I also confirm the factual content of the reference documents which emanate from the plaintiffs or their representatives.

15. On the basis of the facts and grounds as more fully set out in the documents complaint (sic) I respectively submit that the first defendant has not made full and proper discovery, that it has withheld material documents, that it

has misconstrued (whether deliberately or by omission), the principle on which discovery must be made, and that A its claim to State privilege should be rejected.

16. . . . .

17. In regard to prayer 4.2, it is respectfully submitted that the claim to privilege thereof is misconceived, and that the documents in question are not privileged.' B

The plaintiffs seek the following relief in the Rule 35(7) application.

'3. The first defendant is ordered, within 21 days, to make further discovery under oath of all relevant documents as defined in the definition schedule to plaintiffs' Rule 35(3) notice dated 30 April 1997. C

4. The plaintiffs are entitled to inspect and copy all relevant documents, save only those covered by legal professional privilege; it being further declared that the following documents are not privileged:

4.1 All documents in respect of which State privilege was claimed; D

4.2 The following items as listed in schedule II of first defendant's discovery affidavit, namely 1--4,02; 6--12; 16; 21--25; 29--30; 35; 37--40; 42; 45; 46; 50; 50-.01; 52; 54; 55; 61; 66; 67; 71; 77; 81 and 83.' E

The first defendant's response to the plaintiffs' application was twofold. First, it has brought an application to strike out certain paragraphs of the founding affidavit and the entire document complaint, as well as the documentation to which reference is made therein. In the alternative, it seeks that substantial portions of the document complaint, as well as all the documentation to which reference is made therein, be struck out. Second, as it is required to do F notwithstanding the application to strike out, the first defendant filed an answering affidavit.

The plaintiffs hereupon filed a replying affidavit. It runs into 254 pages. In it reference is made to numerous annexures. These annexures are contained in 12 blue arch-lever files. Straining belief in what can be contained in a G arch-lever file, it appears that these files are even more replete with documents than the green counterparts to which reference will be made hereinafter.

First defendant filed a brief supplementary answering affidavit explaining why privilege was claimed in the discovery affidavit in respect of a document (item 49, schedule IV), despite the fact that the document had been H made available to the plaintiffs by officials of the former State President, and further explaining why the affidavit was not part of the answering affidavit.

The plaintiffs filed a supplementary affidavit dealing with the plaintiffs' attempts to obtain access to certain discovered documents and annexing the Mineral Titles Regulation and Compensation Order 1991, which had been I discovered by first defendant.

The plaintiffs also filed a further supplementary affidavit in which reference is made to evidence given by Mr W A Labuschagne in the counter-application in the High Court of Lesotho during September 1997. The evidence is contained in vols 30--40 of the record J

(pp 3002--3909). Third plaintiff confirms the correctness of the record. During the evidence of Mr Labuschagne A certain documents, which are not already before this Court, were handed in as exhibits. They are annexed to the affidavit. Among them is the lease concluded between GOL and LHDA referred to in the documentary background. In the affidavit reference is made, inter alia, to Mr Labuschagne's evidence in respect of the B discovery process relevant to this action and the preparation of the Mineral Titles Regulation and Compensation Order 1991.

It is perhaps apposite at this stage to set out the basis upon which Mr Labuschagne gave evidence in Lesotho. He gave evidence on behalf of the plaintiffs. The basis thereof was recorded in a letter dated 30 May 1997 directed by C the State-Attorney to plaintiffs' attorney. The basis is set out as follows:

'The basis upon which Mr Labuschagne has offered to give evidence has been fully recorded in the proceedings, and Mr Labuschagne will not deviate therefrom. Mr Labuschagne has made this offer on a personal basis, and not as a representative of the Government of the Republic of South Africa. D

We are further instructed to inform you that Mr Labuschagne has not been authorised to testify on any matter falling within the ambit of State privilege and/or legal professional privilege claimed by the Republic of South Africa (insofar as it may apply) or the TCTA.'

First defendant has brought a further application to strike out numerous paragraphs in the replying affidavit (the E overwhelming portion thereof), as well as the annexures thereto. Without leave of the Court a duplicating affidavit was filed by the first defendant, in the event of the striking out application not being successful.

The notice in terms of Rule 35(3) F

The notice calls upon the first defendant 'to make the relevant documents (as defined in the definition schedule hereto) available for inspection . . . or to state that such documents are not in (its) possession . . .'.

The definition schedule comprises some 13 pages. In para 23 thereof the 'relevant documents' are defined as the G 'documents (as defined herein) relating to the relevant events (as herein defined) and to the matters in question (as herein defined)'.

Paragraph 24, which is the definition of 'relevant events', sets out 50 so-called 'relevant events'. Included amongst H them are the following events: 'Coup d'état 1986' (para 24.1); 'Coup d'état 1991' (para 24.4); 'Requests for enquiries in Lesotho' (para 24.28); 'Character attacks on Van Zyl' (para 24.29); 'Questions in Parliament as to relevant events' (para 24.30); 'Van Zyl request for Parliamentary committee to investigate veracity of statements made by the hon F W de Klerk, State President, in Parliament' (para 24.31); 'SDM/Van Zyl requests to other I countries for diplomatic intervention' (para 24.32); 'Project disputes' (para 24.46)'; 'Raising of finance (and allocation and earmarking of funds) for payment of compensation and/or damages to SDM' (para 24.49); 'The RSA involvement in the relevant events' (para 24.50).

The 'matters in question' are defined in para 18 as follows:

'18. ''matters in question'' include the relevant events, matters and J

issues arising from the pleadings and requests for trial particulars in the RSA case and TCTA case and A include, inter alia, at least the following:

18.1 the extent of RSA and/or TCTA influence or control (via the JPTC or otherwise) over the LHDA and/or GOL in regard to the LHWP; B

18.2 whether there was/is a common purpose between RSA, TCTA, GOL, LHDA and/or JPTC to get rid of the SDM rights and/or not to pay compensation to SDM;

18.3 whether RSA and/or TCTA acted unlawfully pursuant to a common purpose as aforesaid; C

18.4 whether, in regard to any of the events in question, GOL and/or LHDA acted under the direction of, or against the wishes of, RSA or TCTA.

18.5 the exercise (through the JPTC or otherwise) of the RSA monitoring and supervision powers in regard to:

18.5.1 the LHWP generally; D

18.5.2 the SDM disputes.'

During the course of argument, plaintiffs' counsel was constrained to endeavour to limit the overwhelming breadth of the notice. He endeavoured to do so by recasting the introduction of para 18 thereof to read as follows: ' E ''matters in question'' include the relevant events and the following:'. In addition he sought the deletion of the words 'and inter alia' in para 29.6, and of the words 'anyone or more of' and 'or relating to' in para 31 thereof.

The 'RSA involvement in relevant events' is defined in para 29 of the definition schedule. It F

'covers the whole spectrum of the involvement, if any, of RSA and/or TCTA in the relevant events and in relation to every relevant event, includes:

29.1 whether RSA/TCTA had any knowledge thereof; G

29.2 when and how such knowledge was obtained;

29.3 the extent of such knowledge;

29.4 whether RSA/TCTA had prior knowledge of the event or planning thereof;
29.5 all communication to and from RSA/TCTA in regard to the relevant event, both before and after the H event;
29.6 communications between RSA officials with one another in regard thereto and, *inter alia*, in regard to the formulation of High Government policy in relation thereto;
29.7 whether the event or any aspect of it was done against the wishes of RSA/TCTA; I
29.8 whether the event or any aspect of it had the blessing or approval of RSA/TCTA (either before or after the event);
29.9 whether the event or any aspect of it was done at the suggestion or instruction of RSA/TCTA;
29.10 any agreements or understanding between GOL and RSA in regard thereto'. J

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Once the definitions in the remainder of the document are read with the open-ended definition of 'matters in A question', the demand for documents becomes a matrix of requests for documents of the widest possible amplitude. For example, in para 18.5 thereof a 'matter in question' is the 'exercise (through the JPTC or otherwise) of the RSA monitoring and supervision powers in regard to: LHWP generally; the SDM disputes'. The term 'SDM B disputes' is again defined in para 31 and refers to the disputes in all the Lesotho litigation, as well as the South African litigation. This spreads the ambit of the matters in question to an immensely wide range of possible disputes in the whole mass of litigation in Lesotho as well as the cases in South Africa. The definition connects all C the disputes raised or relating to all these cases.

Plaintiffs themselves appear to realise the enormous breadth of their demand. Paragraph 18 of the definition schedule concludes as follows:

'This is a broad issue, but goes to the crux of the dispute in the RSA case and the TCTA case, namely the question of the D extent of RSA control over GOL and LHDA in regard to any LHWP matter involving money (including the SDM disputes). The investigation of this issue involves an examination of the relationships between RSA, GOL, TCTA, LHDA and JPTC ever since the start of the project up to the present time. This necessarily includes questions of how these bodies and their officials perceived the respective rights and powers of each of these bodies in regard to the LHWP as a E whole. For these reasons, this broad issue does not relate only to the SDM disputes but generally the day to day management of the LHWP as a whole. Since this involves a very large volume of paper, SDM suggests that it be given access (under supervision if required) to inspect such documents before RSA and TCTA make a list, since SDM may be F able to save RSA and TCTA some time and effort by extracting a bundle of relevant documents therefrom.'

In Beinash v Wixley 1997 (3) SA 721 (SCA) the Court had occasion to consider a subpoena duces tecum and the G effect of the generality and wide ambit of the demands for documents contained therein. At 735C--D the Court held:

'The language used is of the widest possible amplitude, including within its sweep every conceivable document of whatever kind, however remote or tenuous be its connection to any of the issues which require determination in the H main proceedings. The possible permutations are multiplied with undisciplined abandon by a liberal and prolific recourse to the phrase ''and/or''. Its potential reach is arbitrarily expanded by the demand that the documentation must be produced whether it be ''directly or indirectly'' of any relevance to a large category of open-ended ''matters''.'

The inordinate breadth of the demand for documents, was one of the factors which was taken into account by the I Supreme Court of Appeal in determining whether the issue and enforcement of the subpoenas in that matter constituted an abuse of the process of the Court.

What the plaintiffs have endeavoured to achieve in the notice in terms of Rule 35(3) is to foist upon the first defendant and this Court their definition of 'relevant issues'. As appears supra, relevancy is determined J

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from the pleadings and not extraneously therefrom. The plaintiffs may only obtain inspection of documents relevant A to the issues on the pleadings.

<u>The document complaint</u>

The document complaint is signed by the third plaintiff in his personal capacity and on behalf of first plaintiff, second plaintiff and Rampai Diamonds (Pty) Ltd. The document is not attested to under oath. It runs into some 82 pages and has 13 annexures attached to it, referred to as 'DCB 1--DCB 13'. The document complaint and its aforesaid annexures fill an arch-lever file.

It commences with an introduction (para 1--15). In the introduction brief reference is made to the relevant history. The document's central theme emerges in these paragraphs. Firstly, first plaintiff's mineral rights in the Rampai area put the LHWP in jeopardy. Secondly, first plaintiff was unlawfully deprived of its rights. Thirdly, although the unlawful conduct occurred in Lesotho and was perpetrated by the LHDA, or GOL, the RSA is a joint wrongdoer in respect thereof. Fourthly, the RSA's involvement in the unlawful conduct arises out of the national importance of the LHWP, the contention that the RSA would have to pay any compensation payable by GOL or the LHDA to the first plaintiff and the contention that the RSA controls the LHWP via the JPTC, the LHDA, the TCTA and GOL, all of which are controlled by the RSA. Paragraph 14 is of central importance to the present application. It is there contended that it will be shown that the RSA and GOL and

> 'related entities appear to have acted in common purpose, as if in terms of a plot, to deny access to documents, and to withhold the true facts from the courts of law. This is referred to as ''the cover-up or, conspiracy of silence''.'

The suggestion of a 'conspiracy of silence' is repeated frequently in the document complaint. The conspiracy, common purpose or plot to deny access to the documentation arises out of and has, as its anchor, the central theme referred to.

In paras 16--31 the so-called reference documents upon which the plaintiffs rely are identified. They comprise, in addition to the pleadings and correspondence relating to the present action and that against the TCTA, of the following:

1. The record in the appeal in the Lesotho Court of Appeal against the revocation order. The record includes the proceedings in the following applications 198/91, 206/91, 394/91 and 145/92. This record runs into 1870 pages.
2. The application papers together with the record in the hearing of the counter-application in case No 394/91, which was referred to oral evidence. This record at present runs into 3 909 pages.
3. The exhibits in the counter-application in case No 394/91. They are contained in 13 green arch-lever files, all replete with documents. These files contain thousands of pages.
4. Documents discovered by the first plaintiff in the counter-application aforementioned, but not yet handed in as exhibits.

5. Documents discovered by first defendant and the TCTA which have been disclosed by them, but which are not in possession of first plaintiff.
6. First plaintiff's and first defendant's discovery schedules in both the counter-application in case No 394/91 and this action as well as the action instituted against the TCTA.
7. A bundle of further documents contained in the documents complaint bundle and referred to by the reference 'DCB'.

The document complaint proceeds in paras 32--130 to develop the central theme. In paras 32--93 reference is made to the so-called 'strange events'. In the main these are the events in Lesotho and the litigation that followed in respect of some of them, to which reference has already been made.

In addition, it is contended in the document complaint that the RSA provided legal support to GOL. The exact nature of the legal support is not described. Plaintiffs relied, in this regard, on a statement made in the South African Parliament by the then Minister of Water Affairs. He is alleged to have said that 'South Africa gave ''legal support'' in order, inter alia, to avoid unnecessary expense'. Plaintiffs contend that the legal support was visible as Mr Hiddema and

Mr Labuschagne, senior officials in the Department of Water Affairs of the RSA, attended virtually every Court hearing in Lesotho. Reference is also made to abortive settlement talks and the so-called E 'tightening of control under Protocol IV'. It is also pointed out that by the Lesotho legislation referred to above, namely Act 6 of 1995, GOL effectively admitted that the LHDA had acted illegally and beyond its powers. Finally, reference is made to the method adopted by the LHDA in conducting tests, to determine the concentration of F diamonds in the Rampai area and the alleged editing of expert reports utilised in the Lesotho litigation, all of which is criticised.

The plaintiffs proceed in paras 94--7 to introduce the next issue contained in the documents complaint, namely that there is 'a strong prima facie case that the South African Government has been responsible for, or involved in, G various unlawful acts all forming part of a plot to get rid of (first plaintiff's) rights'. In paras 95--6 the following is stated in regard to the 'conspiracy of silence':

'95. Any shortcomings in this *prima facie* case are solely due to the ''conspiracy of silence'' or the plot to withhold documents and the true facts from the Court.

96. This complaint is directed at obtaining relief, with a view to breaking the ''conspiracy of silence'' and to making H documents available to (first plaintiff) to assist in the search for truth in the pursuit of justice.'

In para 98 of the document complaint, under the heading 'Alleged common purpose', it is pointed out that in the counter-application in Lesotho, which is still proceeding, first plaintiff contends, as part of its defence to the attack I on the Rampai lease, that the LHDA does not have a right to seek the relief, and that it is not the real applicant. It is pointed out that it is contended in that litigation that 'LHDA is used as a front by GOL and RSA, who seek an order to which neither would be entitled to' and that such proceedings are brought in furtherance of the improper common purpose between GOL and RSA 'to get rid of (first plaintiff's) rights'. J

In para 100 reference is made to certain 'curious features and events'. Firstly, reference is made to the contention A that first plaintiff's settlement proposal was not placed before the chief executive officer of the LHDA and the board of the LHDA. First plaintiff suggests that both the LHDA and the JPTC were bypassed in this regard and that the RSA made the relevant decisions. Secondly, reference is made to a television announcement that B construction of the LHWP would proceed, despite the interdict that had been granted. It is contended that this announcement was made by a representative of the Department of Water Affairs of the RSA. Thirdly, it is suggested that the RSA had substantial input in the wording of the LHDA order. The question is raised whether other legislation, such as the revocation order and the 1995 legislation, had been drafted by the RSA or submitted C to the RSA for approval. Fourthly, reference is again made to the fact that two senior representatives of the Department of Water Affairs of the RSA had been present in Court in Lesotho. This raises the question, according to the first plaintiff, whether the RSA gives instructions in the litigation. Fifthly, it is pointed to the fact that LHDA's D attorneys of record and counsel had at various times also acted for GOL, the RSA, the TCTA and also represented witnesses employed by the RSA who had given evidence in Lesotho. Sixthly, it is pointed out that the LHDA had launched attacks on the character of the third plaintiff and has suggested that there were irregularities surrounding the grant of the first plaintiff's mining leases. Seventhly, it is pointed out that first plaintiff's calls for a E judicial inquiry have not been acceded to by either GOL or the RSA. Eighthly, it is contended that the LHDA improperly interfered with first plaintiff's witnesses. Ninethly, it is pointed out that, whilst first plaintiff is accused of obtaining the mining lease with the intention to claim compensation in due course, it offered in October 1991 to F settle the disputes on the basis that it withdraws all its claims against the LHDA and that it gets its leases back. Tenthly, ever since 1991 first plaintiff had accused the RSA and GOL of acting in common purpose to get rid of

first plaintiff's rights. Eleventhly, reference is made to first plaintiff's attempts to get documentation from GOL, RSA and the JPTC, all of which were to no avail. G
Under the heading 'Other probabilities on common purpose', a series of arguments are set out in paras 102--118 of the document complaint. These arguments are, according to the plaintiffs, 'strong indications arising from the evidence and probabilities' of the existence of the alleged common purpose. Most of the indications are arguments H based on unproven facts.
In para 102 reference is made to the evidence of Mr Putsoane, the acting chief executive of the LHDA, in the counter-application. He is alleged to have confirmed the existence of a common purpose between GOL, RSA, including JPTA, and LHDA to get rid of first plaintiff's Rampai lease rights by way of the counter-application. In I para 103 it is contended that there must have been a dispute between GOL and the RSA in respect of the compensation payable consequent upon the granting by GOL of the Rampai mining lease. It is contended that the dispute must have been resolved by an agreement. This contention appears to be based solely on conjecture and speculation. In para 104 the J

question is posed why, in the absence of an agreement, would GOL allow the LHDA to echo the RSA's views A against Lesotho's interest. In para 105 the question is asked why GOL would act against its own interests in cancelling the remaining four leases, unless it did so in terms of an agreement reached between itself and RSA. In para 106 reference is made to the fact that the same legal representatives act for all the parties. In para 107 it is B pointed out that the by-passing of the JPTC in the counter-application against the first plaintiff would invalidate the litigation in the absence of an agreement. There does not appear to be any factual support for this allegation. In paras 108--118 various other arguments are raised. C
In paras 119--130 submissions are set out in respect of collusion and civil fraud.
The document complaint proceeds in paras 131--141 to refer in general terms to the 'conspiracy of silence'. In para 140 it is contended that there are no signs of full and frank disclosure by either GOL or the RSA or their D parastatals. It contends that '*(o)*n the contrary, there are all the signs of a conspiracy of silence'. Plaintiffs then proceed to set out the main features of the conspiracy. Firstly, in paras 142--145 reference is made to the first plaintiff's requests to both GOL and RSA for a judicial inquiry and the refusal of these requests. Secondly, in paras 149--56 reference is made to the change in diplomatic relations between GOL and RSA. Thirdly, in paras 157--71 E reference is made to the 'disappearing advice document'. In this regard it appears that a meeting was held between representatives of the first respondent and a Dr Ackerman, who was a legal adviser in the office of the then State President, Mr De Klerk. A minute of this meeting was kept. First defendant, in its discovery affidavit, F claims privilege in respect thereof. First plaintiff has discovered the minute. It contends that it was given a copy thereof by Dr Ackerman. It is further contended that, pursuant to that meeting, Dr Ackerman prepared an advice document recommending payment of R50 million to first defendant. Thereafter, so it is contended, for reasons which cannot be understood by it, the existence of the advice note was denied. Fourthly, in paras 172--81 G reference is made to the disappearance of certain files in the possession of GOL. It was contended that the files were mislaid during the transition of power from a military government to the present government. Fifthly, in paras 182--3 reference is made to first plaintiff's request to the RSA for access to the relevant documents. This request H was refused. Sixthly, in paras 184--94 reference is made to first plaintiff's abortive attempts to gain access to the documentation and information in the possession of the State in terms of s 23 of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993). Seventhly, in paras 195--233 certain so-called further major events are referred to. After the Lesotho High Court had set aside

the revocation order it is alleged that a joint planning conference was held in Cape Town during November 1994 between GOL and RSA. First plaintiff contends that certain further steps against it were planned at the conference. The first step involved the appeal against the judgment setting aside the revocation order; the second step involved the institution of the counter-application challenging the validity of the Rampai

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lease and the third step manifested itself in the failure to make proper discovery both in Lesotho and in South Africa in the relevant litigation.

Under the heading 'Reasons for doubting the veracity of the State versions' the first plaintiff identifies in paras 234--9 three aspects which, it contends, support its contention. These aspects are dealt with in paras 240--77 under the headings 'Did the RSA Government give its blessing and approval for the revocation appeal and the procedural attack?' (paras 240--52); 'Was the 1991 interdict uplifted by agreement, with a view to negotiations in good faith' (paras 245--60); and 'On what terms, if any, was the dispute between the two governments (as to who would pay SDM) resolved?' (paras 261--77). These paragraphs all contain arguments and speculation advanced by the first plaintiff in support of its contentions.

Plaintiffs then proceed in paras 278--282.2 to set out their reasons for believing that there are further relevant documents. It is contended that the nature of the project and the control structures that are in place are such that thousands of documents must exist. First plaintiff concludes that there can be no doubt as to the existence of a very large volume of 'relevant documents'.

In paras 284--93 plaintiffs set out their contention for rejecting the claim to State privilege. Reference will be made thereto hereinafter.

It is necessary to make some general comments on the document complaint. It is replete with argument. It reads more like a novel than an affidavit for use in litigation. It raises speculation to the level of facts and thereafter raises argument based on the speculation. First defendant's counsel analysed the documents annexed to the document complaint and the annexures referred to therein. No purpose will be served in repeating the analyses herein. Suffice to say, plaintiffs' counsel did not argue that the analysis was inaccurate. The analysis revealed that, even on the basis that the plaintiffs launched the application, the document complaint should only have had annexed to it annexures DCB 1--DCB 13 (ie 1 arch-lever file) and have been accompanied with the record of the appeal against the revocation order and the record of the counter-application and some further 200 pages of documents. The balance of the 13 green arch-lever files containing thousands of pages are not referred to.

Finally, despite the comprehensive nature of the document complaint, para 31 thereof reads as follows:

'What is set out below is no more than a brief summary or overview of the argument, without getting into that kind of detail or particularity that would be necessary during argument in a Court of law. The summary of events which follows is very brief and to the point. More detailed summaries of the historical events will be found, inter alia, in the Cullinan judgment on appeal, and in the founding papers in case 145 which form part of the appeal record. For purposes of understanding the document complaint that level of detail is probably unnecessary, but any required detail will appear from reference.'

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<u>The law relating to discovery</u>

Rule 35(1) and (2) require a party to any action who has been requested thereto, to make discovery of all documents and tape recordings 'relating to any matter in question in such action'. The discovery is done on affidavit

'as near as may be in accordance with Form 11 of the First Schedule specifying separately -

(a) such documents and tape recordings in his possession or that of his agent other than documents and tape recordings mentioned in para *(b)*;

(b) such documents and tape recordings in respect of which he has a valid objection to produce;

(c) such documents and tape recordings which he or his agent had but no longer has in his possession at the date of the affidavit.'

In terms of Rule 35(3), if a party believes that there are other documents or tape recordings which may be relevant to any matter in question in the possession of any party, D

'the former may give notice to the latter requiring him to make the same available for inspection in accordance with subrule (6), or to state under oath within ten days that such documents are not in his possession. . .'.

The requirement of relevance, embodied in both Rule 35(1) and 35(3), has been considered by the Courts on various occasions. The test for relevance, as laid down by Brett LJ in Compagnie Financiere et Commerciale du E Pacifique v Peruvian Guano Co (1882) 11 QBD 55, has often been accepted and applied. See, for example, the Full Bench judgment in Rellams (Pty) Ltd v James Brown & Hamer Ltd 1983 (1) SA 556 (N) at 564A, where it was held that:

'After remarking that it was desirable to give a wide interpretation to the words ''a document relating to any matter in F question in the action'', Brett LJ stated the principle as follows:

''It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring G the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.'' ' H

See also *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd*1971 (4) SA 589 (W) at 596H and *Carpede v Choene NO and Another*1986 (3) SA 445 (O) at 452C--J.

Counsel for the plaintiffs laid special emphasis on the indirect relevance a document may have, that is a document I which may fairly lead him to a chain of enquiry which may advance the plaintiffs' case or damage the case of the first defendant. Reference was made hereto as 'indirect relevance' or 'secondary relevance'.

The broad meaning ascribed to relevance is circumscribed by the requirement in both subrules (1) and (3) of Rule 35 that the document or tape recording relates to (35(1)) or may be relevant to (35(3)) 'any J

matter in question'. The 'matter in question' is determined from the pleadings. See in this regard SA Neon A Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd 1968 (3) SA 381 (W) at 385A--C; Schlesinger v Donaldson and Another 1929 WLD 54 at 57, where Greenberg J held

'In order to decide the question of relevancy, the issues raised by the pleadings must be considered . . .', B

and *Federal Wine and Brandy Co Ltd v Kantor*1958 (4) SA 735 (E) at 753D--G.

In determining the issues raised by the pleadings regard would not be had to requests for further particulars for purposes of trial and the further particulars furnished in response thereto. The purposes of particulars for purposes C of trial are to prevent surprise, to inform the other party what is going to be proved to enable the other party to prepare his case and, having regard to the foregoing, nevertheless not to tie the other party down and limit his case unfairly at the trial. See Thompson v Barclays Bank DCO 1965 (1) SA 365 (W) at 369D--H. Rule 21(2) provides for requests for particulars for trial to be made 'after the close of pleadings'. The request for particulars would D therefore relate to the pleaded issues and would not 'raise further or new issues between the parties'. See De Polo and Another v Dreyer and Others 1991 (2) SA 164 (W) at 174H--J and Tweefontein United Collieries Ltd v Lockers Engineers SA (Pty) Ltd 1964 (1) SA 186 (W). E

It is well established law that Courts are reluctant to go behind a discovery affidavit, which is *prima facie* taken to be conclusive. In *Marais v Lombard*1958 (4) SA 224 (E) at 227G it was held that

'when a party making discovery has sworn an affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is either mistaken or false in his assertion'. F

This approach was held in Richardson's Woolwasheries Ltd v Minister of Agriculture 1971 (4) SA 62 (E) at 67C--F to be also applicable when possession, as opposed to the relevance of a document, is in issue. In Continental Ore v Highveld Steel & Vanadium Ltd (supra) the following was held at 597E--H: G

'It has further been held in a series of cases before the enactment of the present Rules that when a party to an action refuses to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the Court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevancy is incorrect. Caravan Cinemas (Pty) Ltd v London Film Productions 1951 (3) SA 671 (W), per Murray AJP, at H675--7. The affidavit denying relevance is generally taken as conclusive, and the Court will not reject it unless a probability is shown to exist that the deponent is either mistaken or false in his assertion. Marais v Lombard 1958 (4) SA 224 (E), per O'Hagan J, at 227G; Lenz Township Co (Pty) Ltd v Munnick and Others 1959 (4) SA 567 (T), per Williamson J, at 572--3. See also the authorities collected in Federal Wine and Brandy Co Ltd v Kantor 1958 (4) SA 735 (E) at I745--8, a judgment of Wynne J, which was described in the Lenz case (at 573) as a veritable thesaurus of the decisions on discovery.'

It is submitted on behalf of the plaintiffs that the new constitutional dispensation justifies a departure from the previous authorities which fix the onus of proving the existence and/or relevance of the documents on J

the party requiring such additional documents. That such a departure may, in appropriate circumstances, be A justified appears from various dicta, such as Du Plessis and Others v De Klerk and Others 1996 (3) SA 850 (CC) (1996 (5) BCLR 658) at 897E (para [86]) and Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W) (1996 (6) BCLR 836) at 603E. B

The starting point in dealing with plaintiffs' counsel's submission must be the determination of which of the two Constitutions, that is the Constitution of the Republic of South Africa Act 200 of 1993 ('the interim Constitution'), which came into operation on 27 April 1994, and the Constitution of the Republic of South Africa Act 108 of 1996 C('the Constitution') which came into operation on 4 February 1997, is applicable. In this regard the following factors appear to be relevant. The plaintiffs commenced their action against the first defendant in September 1993. The conduct complained about in the particulars of claim and which forms the basis of the plaintiffs' claim took place during the period 1991 to September 1993. Plaintiffs called upon the first defendant to discover in November D1993. First defendant discovered in April 1995. In March 1997 plaintiffs served a notice in terms of Rule 35(3) and the present application was launched in March 1997.

Pursuant to the provisions of s 17 of Schedule 6 to the Constitution and s 241(8) of the interim Constitution, neither Constitution applies to the plaintiffs' action. See Du Plessis and Others v De Klerk and Others (supra at paras E[13], [14] and [20]) and Key v Attorney-General, Cape Provincial Division, and Another 1996 (4) SA 187 (CC) (1996 (2) SACR 113; 1996 (6) BCLR 788) at para [4]. The present application before the Court is an interlocutory application relating to the pending action instituted by the plaintiffs. Although interlocutory in nature, Fthe present application constitutes in itself 'proceedings'. As appears supra, although first defendant made discovery in April 1995, the plaintiffs' notice in terms of Rule 35(3) was served in March 1997, after the Constitution had come into effect. The present proceedings were instituted thereafter. In the circumstances the provisions of the Constitution are applicable to the present application. A similar result is arrived at if the approach Gadopted by the majority in S v Mhlungu and Others 1995 (3) SA 867 (CC) (1995 (2) SACR 227; 1995 (7) BCLR 793) is adopted.

In developing their submission plaintiffs' counsel relied upon the following chap 2 rights, namely those contained in ss 32 and 34. At present s 32(1) must be regarded to read as follows: H

'Every person has the right of access to all information held by the State or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.'

(Section 23 of the interim Constitution is similarly, although not identically, worded. For present purposes there is no need to distinguish between the two sections.) Section 34 provides as follows: I

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, other independent and impartial tribunal or forum.'

Plaintiffs' counsel relied on the following judgments in developing their arguments: Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others 1995 (2) SA 433 (SE); Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T) J

([1997] 1 B All SA 305); Le Roux v Direkteur-Generaal van Handel en Nywerheid 1997 (4) SA 174 (T) and A Khala v Minister of Safety and Security 1994 (4) SA 218 (W) (1994 (2) SACR 361; 1994 (2) BCLR 89). At the outset it must be noted that each of these judgments deals with the right to information in terms of s 23 of the interim Constitution. They did not relate to a party's obligation to discover in terms of Rule 35. B

It was held expressly by a Full Bench in Phato v Attorney-General, Eastern Cape, and Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, and Others 1995 (1) SA 799 (E) (1994 (2) SACR 734; 1994 (5) BCLR 99) at 815G (SA) and Khala v Minister of Safety and Security (supra at 225F and 226G (SA)) and impliedly in Van Niekerk v Pretoria City Council (supra at 850B (SA) that, in an C action between a litigant and the State, or any of its organs in any sphere of government, in addition to the litigant's right to require the State or its organ to discover in terms of Rule 35, the litigant may seek relief in terms of s 32 of the Constitution or s 23 of the interim Constitution. D

In Shabalala and Others v Attorney-General, Transvaal, and Another 1996 (1) SA 725 (CC) (1995 (2) SACR 761; 1995 (12) BCLR 1593; [1996] 1 B All SA 64) consideration was given as to whether s 23 or s 25(3) of the interim Constitution was applicable in an application for access to a police docket in the context of a criminal E prosecution. Contrary to the dicta referred to above, the Constitutional Court held at 742D (SA) (para [34]) that not only was s 25(3) of the interim Constitution

'of direct application in considering the merits of that application, but it is difficult to see how s 23 can take the matter any further'.

The Constitutional Court further held at 743C (SA) (para [35]) that s 25(3) must F

'not be read in isolation but together with s 23 and in the broad context of a legal culture of accountability and transparency . . .'.

The purpose of s 23 was described thus in Phato v Attorney-General, Eastern Cape, and Another (supra at 815D (SA)): G

'The purpose of s 23 is to exclude the perpetuation of the old system of administration, a system in which it was possible for government to escape accountability by refusing to disclose information even if it had bearing upon the exercise or protection of rights of the individual. This is the mischief it is designed to prevent. Under the new Constitution H the State no longer has the same immunities. This is so in general terms in respect of all State activity. Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society for which the Constitution strives. Demonstrable fairness and openness are also essential to the good administration of justice and to the promotion of public confidence in the judicial process.' I

In *Van Niekerk v Pretoria City Council (supra* at 850B (SA)) it was held that

's 23 entails that public authorities are no longer permitted to ''play possum'' with members of the public where the rights of the latter are at stake. . . . The purpose of the Constitution, as manifested in s 23, is to subordinate the organs J

of State, including municipal authorities, to a new regimen of openness and fair dealing with the public.' A

When considering plaintiffs' counsel's submission based on s 23 regard must not be lost of s 39(2) of the Constitution which enjoins every court when developing the common law to 'promote the spirit, purpose and objects of the Bill of Rights'. B

Notwithstanding due regard to the requirement of openness and fair dealing which s 32(1) requires and the requirement of a fair trial in s 34, it does not follow that there must be a shifting of the onus of proving the existence and/or relevance of the documents from the party requiring such additional documents to the party C allegedly in possession thereof. Such a shift of onus does not appear to be necessary. A litigant who engages the State as referred to in s 32(1) has the right to utilise s 32(1) and/or Rule 35 in order to obtain access to documentation in the possession of the State. If he elects to rely on Rule 35 and is not satisfied with the discovery that is made he must discharge the onus of proving on the probabilities that the documents exist and/or are D relevant. This is in line with the normal incidence of onus as it applies in civil procedure. The fact that such onus lies on the party seeking the additional discovery should not act as a bar to him obtaining the relief which he seeks in an appropriate case. After all, a party who seeks relief in terms of s 32(1) of the Constitution likewise has an E onus to discharge. Again this is in keeping with the requirements of the civil procedure.

Whilst the requirement of a fair trial would entail access to all relevant documentation, the incidence of the *onus* would not preclude a litigant in appropriate cases of having the required documentation.

Plaintiffs' counsel's submission in this regard must accordingly be rejected. F

Accepting that the *onus* is on the party seeking to go behind the discovery affidavit, the Court, in determining whether to go behind the discovery affidavit, will only have regard to the following:

(i) the discovery affidavit itself; or
(ii) the documents referred to in the discovery affidavit; or G
(iii) the pleadings in the action; or
(iv) any admissions made by the party making the discovery affidavit; or
(v) the nature of the case or the documents in issue.

See Continental Ore v Highveld Steel and Vanadium (supra at 597H--598A); Schlesinger v Donaldson H (supra at 56); Lenz Township Co (Pty) Ltd v Munnick and Others 1959 (4) SA 567 (T) at 573D--F; Federal Wine and Brandy Co Limited v Kantor (supra at 749G--H).

The limitation of the sources on which a discovery affidavit may be attacked was imported into South African law from the English Courts. See Halsbury's Laws of England 4th ed vol 13 para 37. The purpose of the limitation I was described by Cotton LJ in Jones v Monte Video Gas Company (1880) 5 QB 556 as 'to prevent a conflict of affidavits as to whether the affidavit of documents was sufficient' (at 559). The ratio for the limitation was accepted by Greenberg J in Schlesinger v Donaldson and Another (supra at 57).

It is argued by plaintiffs' counsel that the requirement of fairness and J

openness enshrined in the Constitution compels this Court to hold that the authorities limiting the material to which A regard may be had are no longer binding.

The limitation of the material is subject to an exception. The conclusiveness of a discovery affidavit can always be challenged where mala fides is shown. Taite v Bothwell 1912 CPD 60, Federal Wine and Brandy Co Ltd v B Kantor (supra at 749H). Where mala fides is alleged the applicant would not be limited to the sources aforementioned. The applicant would bring a normal application in terms of the Rules. It would appear that our practice and procedure caters for the normal challenge to discovery, as well as the more unusual challenge

where C mala fides is alleged. The limitation in the normal challenge must be weighed up against the delay and costs which would result if the source material on which the challenge to the discovery affidavit could be mounted was wider. The prospect of two trials being fought, the one to obtain discovery and the other on the merits, cannot be excluded. This would entail unnecessary cost and delay. The normal challenge can adequately be dealt with on the D limited material. Where mala fides is alleged there is no such limitation. There is, accordingly, no need to widen the source material for a challenge to the adequacy of the discovery affidavit.

It should be borne in mind that, where the discovery affidavit is challenged on the basis of mala fides, the principles enunciated in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd1984 (3) SA 623 (A) at E 634G would apply. It would, of course, be open to an applicant, in such an application, to seek a referral of the disputes of fact for oral evidence or even trial.

As indicated above, Rule 35(3) provides the procedure for a party dissatisfied with the discovery of another party. It requires the former party to give notice to the latter party to make the documents or tape recordings available for F inspection in accordance with Rule 35(6). Rule 35(6) requires the notice to be, as near as may be, in accordance with Form 13 of the First Schedule. Form 13 requires the production for inspection of 'the following documents referred to in your affidavit'. It is obviously designed for inspection of discovered documents. It must be adapted to G deal with the situation envisaged in Rule 35(3). In particular, the degree of specificity of the documents that the party dissatisfied with the discovery must comply with in the notice must be determined. The importance of this requirement cannot be understated. A party can clearly be severely prejudiced by a notice which does not exhibit H the necessary degree of specificity. Failure to comply with the notice can result in an order compelling compliance, and failure to comply therewith can result in the claim being dismissed or defence being struck out in terms of Rule 36(7).

In Richardson's Woolwasheries Ltd v Minister of Agriculture (supra) a notice in terms of Rule 35(3) described I the undisclosed documents, allegedly in possession or under the control of the other party, as

'*(c)*orrespondence, valuations, feasibility studies, experts' reports, minutes of meetings, memoranda, notes of interviews and discussion etc, in connection with the consideration and conclusion of the sale of the property involved in this dispute by plaintiff to Corlett Drive Estates Ltd, and subsequently to PE J

Undertakings (Pty) Ltd, both during the period of negotiations of such sale, as well as during the period after conclusion A of the said sale and up to the date when the negotiations between the Post Office and the plaintiff started'.

(At 63D--E.) In an *obiter dictum* the Court considered the adequacy of the notice and found as follows:

'I may add that the notice under Rule 35(3) would, in any event, appear to be couched in terms far too wide for it to B constitute a proper demand. The Rule clearly envisages the demand for production of specific documents for inspection. Here all the defendant has in effect said is ''I believe there may be other relevant documents'' and thereafter has named every type of document which may possibly exist without specifying what actual documents are required.'

(At 67H--68A.) This dictum was followed in Tractor & Excavator Spares (Pty) Ltd v Groenedijk 1976 (4) SA C 359 (W) at 363F.

The judgment in Richardson's Woolwasheries Ltd v Minister of Agriculture (supra) was considered by the Full Bench in Rellams (Pty) Ltd v James Brown & Hamer Ltd (supra). In that matter a defendant was given notice D to produce for inspection documents itemised in 25 paragraphs. Unfortunately it is not possible to determine from the judgment the description of the documents in the aforesaid paragraphs, other than for the reference at 560A that some of the items in the notice relate to documents of a specified nature or to documents concerning the plaintiff's dealings with specific customers. After referring to the judgment in the Court a quo and the view E expressed in that Court, with reliance on Richardson's Woolwasheries Ltd v Minister of Agriculture (supra), that there was much to be

said for the view that Rule 35(3) 'was intended to extract specific documents on specific points', the Court went on to hold as follows at 560A--D:

'Apart from the fact that some of the items in the Rule 35(3) notice relate to documents of a specified nature or to F documents concerning the plaintiff's dealings with specific customers, it is not entirely clear why Rule 35(3) should have been intended to cover only ''specific documents on specific points''. Rule 35(1) contemplates the discovery of all relevant documents, specific or otherwise, and indeed provides that a document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specific nature which have been initialled and G consecutively numbered by the deponent. If such a bundle of documents existed but was not discovered there could be no valid reason why it should not be permissible to obtain its production under Rule 35(3) which is certainly couched widely enough to allow the production of ''a vast number of documents covering a long period''.'

Clearly reference to an identifiable bundle of documents, even if not consecutively numbered, would be an H adequate description enabling both the party who is required to produce it for inspection and the Court which may ultimately be required to enforce compliance therewith to identify the documents. Although the Full Bench judgment clearly disapproves of the dictum in Richardson's Woolwasheries Ltd v Minister of Agriculture I (supra) that Rule 35(3) is designed to extract specific documents, it did not hold that the documents required for inspection must not be described in such a manner that they are identifiable. Likewise a Court would not grant an order in terms of Rule 35(7) compelling compliance with a notice in terms of Rule 35(3) unless the documents were identifiable. J

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As appears from the judgment in SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd 1968 (3) SA A 381 (W) and Maxwell and Another v Rosenberg and Others 1927 WLD 1, the Court ordered additional discovery of documents by referring to the genus of the documents. Although the genus may be wide, the documents are determinable within it. B

A notice in terms of Rule 35(3) is accordingly not limited to a specific document. The notice may require production of any number of documents. Whilst a document need not be described specifically within the notice, it must be described with sufficient accuracy to enable it to be identified. This will occur where the document is described within a genus enabling it to be identified. C

It was further argued that it was incumbent upon a party opposing an application in terms of Rule 35(7), on the basis that the documents which it is required to produce are not relevant, to refer to the documents and set out what they comprise of and to indicate why they are not relevant. This is what occurred in Continental Ore D Construction v Highveld Steel & Vanadium Corporation Ltd (supra - see 601A--C). It may be appropriate to do so in certain cases. No rule of general application can be laid down. The present application is a trenchant example why no general rule can be laid down. On one issue the parties are ad idem and that is the vastness of the documents in possession of the first defendant to which the application relates. Assuming that the documents E referred to in the Rule 35(3) notice are identifiable, the sheer volume of the documents would, from a practical point of view, preclude the first defendant from dealing with each one. Instead the first defendant has dealt with the issue of relevancy on another basis. F

<u>The law relating to the content of affidavits generally</u>

It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for G the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D) it was stated at 469C--E that

'where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings H by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not

been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition I such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge J

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the onus of proof resting on it in respect thereof. As was held in Prokureursorde van Transvaal v Kleynhans A 1995 (1) SA 839 (T) at 849B in regard to a constitutional issue:

'Dit is myns insiens vir die behoorlike ordening van die praktyk absoluut noodsaaklik dat konstitusionele punte nie deur advokate as laaste debatspunt uit die mou geskud word maar pertinent in die stukke as geskilpunt geopper word sodat B dit volledig uitgepluis kan word deur die partye ten einde die Hof in staat te stel om dit behoorlik te bereg.'

The dictum is not only of application to constitutional issues - it applies to all issues. Nor is the dictum only of application in the context of a founding affidavit - it applies equally to answering affidavits and replying affidavits. C The more complex the dispute between the parties the greater precision that is required in the formulation of the issues. See in regard to actions Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 106--7. Although this dictum relates to pleadings in an action it is equally applicable to affidavits in motion proceedings. D

The facts set out in the founding affidavit (and equally in the answering affidavit and replying affidavit) must be set out simply, clearly and in chronological sequence and without argumentative matter: see *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78I. A distinction is drawn between primary facts and secondary facts.

'Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence E of further facts, which may be called, in relation to primary facts, inferred or secondary facts.'

See Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A. In the absence of the primary fact, the alleged secondary fact is merely a conclusion of law. Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793D. F

Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the G strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met. See Lipschitz and Schwarz NNO v Markowitz 1976 (3) SA 772 (W) at 775H and Port Nolloth Municipality v Xahalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C) at 111B--C. H

In Heckroodt NO v Gamiet 1959 (4) SA 244 (T) at 246A--C and Van Rensburg v Van Rensburg en Andere 1963 (1) SA 505 (A) at 509E--510B, it was held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged. As was held in Cabinet for the Territory of South West I Africa v Chikane and Another 1989 (1) SA 349 (A) at 360G, the principle is clear but its application is not without difficulty. In Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A) at 285G it was held that this principle

'word egter gekwalifiseer deur die voorbehoud dat die Hof alleen so kan optree as daar geen onbillikheid teenoor die respondent geskied nie. In die sake word J

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hierdie element gewoonlik uitgedruk deur te vereis dat alle relevante feite voor die Hof moet wees. . . . Hierdeur word die A mees voor die hand liggende bron van moontlike onbillike benadeling van die respondent uitgeskakel. In die onderhawige geval gaan dit egter om 'n leemte in die getuienis.'

In determining whether there is prejudice, regard must be had to the case that has to be met

'it is not permissible to consider . . . the affidavits in isolation. . . . To the extent that (the parties' affidavits) went further than may have been necessary to answer the case as presented, it cannot be postulated *a priori* that (that party) would not be prejudiced if their affidavits are relied upon to determine the nature and ambit of the hearing that took place.'

Administrator, Transvaal, and Others v Theletsane and Others 1991 (2) SA 192 (A) at 196D--E. See also Government of the Province of KwaZulu/Natal v Ngwane 1996 (4) SA 943 (A) at 949B--D.

Application of the law relating to discovery and content of affidavits

Regard being had to the content of the plaintiffs' founding affidavit in the Rule 35(7) application and the document complaint, it is manifest that plaintiffs seek to challenge the first defendant's discovery affidavit by establishing the so-called 'conspiracy of silence' or mala fides on the part of the first defendant. The plaintiffs seek to do this on affidavit, notwithstanding all the risks associated with motion proceedings. Plaintiffs' counsel's reference in argument to documentation which fortuitously may have been discovered by first defendant was done to establish the conspiracy or mala fides. It was not done to establish the probable existence of other relevant documents not disclosed by first defendant. Similarly, reference to the pleadings in the action and the nature of the action was done to establish the conspiracy or mala fides. The plaintiffs do not seek either in the founding affidavit, the document complaint, their counsels' heads of argument or in their oral argument, to make out a case to go behind first defendant's discovery affidavit on the more conservative and usual basis relying upon the limited sources of documentation.

The question arises in the event of the plaintiff not succeeding in establishing the conspiracy or mala fides, whether regard can be had to the limited sources only and, if satisfied that there are undisclosed relevant documents, to order the discovery thereof. It would not appear to be fair to do so. The application has not been brought on that basis. Counsel have not addressed the application on that basis. In the circumstances it cannot be held that first defendant would not be prejudiced thereby. The plaintiffs must accordingly succeed or fail on the case that they have sought to make out, namely the conspiracy of silence or mala fides.

In determining relevance regard can only be had to allegations contained in the plaintiffs' particulars of claim. Insofar as the further particulars for trial seek to widen the issues they cannot be taken into account. In this regard it was submitted by plaintiffs' counsel that the further particulars for purposes of trial set out the facta probantia, whilst the particulars of claim set out the facta probanda. This submission is fallacious. The case that the first defendant has to meet, as is set out in

the particulars of claim, is that first defendant controlled the alleged joint venture. The case made out in the further particulars for trial is that first defendant controlled the joint venture through its control of GOL. This constitutes a factum probandum and had to be pleaded if plaintiffs seek to rely thereon. As it is at present not alleged in the particulars of claim, in the absence of an amendment thereof, it cannot be taken into account in the determination of relevancy.

The inordinate breadth of the notice in terms of Rule 35(3) has already been adverted to. Notwithstanding the definition of relevant documents (read with all the other definitions relevant thereto), it cannot be held that the documents which plaintiffs' require inspection of are adequately described. Although inspection may be obtained of documents described as a genus, the description of the documents in the present application is so wide and all inclusive that it would not be possible to determine objectively what is or is not included therein. This in itself would preclude relief being granted in terms of para 3 of the notice of

motion as presently formulated. It may, however, be possible to prune the notice in terms of Rule 35(3) so as to be left with an enforceable notice. Plaintiffs' counsel did not make any submissions in this regard.

As already indicated, the plaintiffs' attempt to foist upon the first defendant and the Court, in their notice in terms of Rule 35(3), their definition of relevant documents. Relevancy must be determined from the pleadings. In this regard it is important to note that the conduct complained of by plaintiffs in the particulars of claim relates to a period which terminated when summons was issued. Many of the so-called relevant events took place thereafter. Plaintiffs' counsel argues that these events cast a shadow backwards. If the events were relevant to the plaintiffs' cause of action there would be merit in this argument. However, in many cases the shadow, if it exists at all, is extremely faint. In any event the shadow that is cast and, as faint or pronounced as it may be, is cast on issues not relevant on the pleadings. This applies equally to events which took place prior to and during the period covered by the plaintiffs' cause of action. Plaintiffs seek to establish from the relevant events their basic thesis, namely that the RSA controls the LHWP, through GOL, the LHDA and the JPTC, all of which are controlled by the RSA. This is just not an issue on the particulars of claim. In the circumstances the following so-called relevant events set out in the notice in terms of Rule 35(3) are not relevant to the issues raised in the particulars of claim: paras 24.1; 24.4; 24.11; 24.14; 24.19; 24.24; 24.25; 24.28 to 24.36; 24.42 to 24.50.

Insofar as the matters in question are concerned, as is set out in the aforesaid notice, they are likewise not relevant to the issues raised on the pleadings.

The plaintiffs failed to make out a case in the founding affidavit or the document complaint for the inspection of those documents in respect of which first defendant claims legal professional privilege and which are referred to in para 4.2 of the notice of motion. Plaintiffs seek to make out such a case in their replying affidavit. No reason is advanced for their

failure to do so in the founding affidavit or document complaint. In the circumstances no relief can be granted in terms of para 4.2 of the notice of motion.

Through the document complaint the plaintiffs seek to place a mass of documentation before the Court. Their counsel seeks to refer to excerpts thereof, despite the fact that they are not expressly referred to in the founding affidavit or the document complaint. The issues which they seek to raise in this manner have not been fully canvassed in the application. No regard can be had to them in determining the application.

The rule of non-justiciability

In the event of the finding that the issue of the control of GOL by the RSA not being raised in the particulars of claim being incorrect, it falls to be decided whether the determination of the true agreement between the RSA and GOL is a justiciable issue in this Court. The treaty, protocol IV thereto and the various agreements concluded between RSA and GOL are all international law agreements. They were concluded between two sovereign States. None of them have been incorporated into the municipal law of South Africa.

In Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A) at 161B--D it was held that:

'Apart from this, there is a further difficulty in the way of the appellant. It is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process. . . . In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject.'

From this dictum it is clear that the rights of the subject are not affected by such a treaty. See Maluleke v Minister of Internal Affairs 1981 (1) SA 707 (B) at 712H and Tshwete v Minister of Home Affairs (RSA) 1988 (4) SA 586 (A) at 606E--F.
In Minister of the Interior v Bechler and Others; Beier v Minister of the Interior and Others 1948 (3) SA 409 (A) at 447 the existence of exceptions to the general rule were acknowledged. Dugard recognises four such exceptions (International Law - A South African Perspective at 51--7). Firstly, a municipal court may have recourse to an unincorporated treaty in order to interpret an ambiguous statute. Secondly, an unincorporated treaty may be taken into account in the challenge of the validity of delegated legislation on grounds of unreasonableness. Thirdly, if an unincorporated treaty provides evidence of a rule of customary international law it may be applied as a customary rule - but not as a treaty. Fourthly, an exception arises in the case of treaties that fall solely within the purview of the executive prerogative. It is not contended that any of these exceptions are of application.

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Some international agreements contain self-executory provisions. These international agreements form part of municipal law. It is not contended that the international agreements relevant in this matter are self-executory.
Section 231(4) of the Constitution is in accordance with the aforegoing:

'231(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

The principles set out above are derived from the English Law. The judgment in Maclaine Watson & Co Ltd v Department of Trade and Industry and related appeals; Maclaine Watson & Co Ltd v International Tin Council [1989] 3 All ER 523 (HL) is illustrative of the application of these principles.
In that matter the International Tin Council ('ITC'), which was the subject-matter of the judgment, was created by a treaty. Its continued existence was provided for in the Sixth International Tin Agreement, a treaty concluded between the UK Government, 22 other sovereign powers and the European Economic Community. The treaty provided that the ITC shall have legal personality. The treaty was not incorporated into the law of the UK. The International Tin Council (Immunity and Privileges) Order 1972, S1 1972 120 (the 1972 Order), made under the International Organisations Act, 1968, provided in art 5 that the ITC shall have the legal capacities of a body corporate. In the Court of Appeal (Maclaine Watson & Co Ltd v Department of Trade and Industry and related appeals; Re International Tin Council; Maclaine Watson & Co Ltd v International Tin Council; Maclaine Watson & Co Ltd v International Tin Council (No 2) [1988] 3 All ER 257 (CA)) Kerr and Nourse LJJ took the view, on the facts, that justice and good sense dictated a reference to the treaty and that the principle of non-justiciability must give way.
In the House of Lords, Lord Tempelman held at 526j that

'(i)nternational law regulates the relations between sovereign States and determines the validity, the interpretation and the enforcement of treaties'.

Lord Oliver of Aylmerton stated that

'It is axiomatic that municipal courts have not and cannot have the competence to adjudicate on or to enforce the rights arising out of transactions entered into by independent sovereign States between themselves on the plane of international law.'

(At 544*e*.)

'So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the Court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.'

(At 545*a*.) He went on to hold as follows:

'These propositions do not, however, involve as a corollary that the Court must never look at or construe a treaty. Where, for instance, a treaty is directly incorporated into English law by Act of the Legislature, its terms become subject

of the interpretative jurisdiction of the court in the same way as any other Act of the Legislature. Fothergill v Monarch A Airlines Ltd [1981] 2 All ER 696, [1981] AC 251 is a recent example. Again, it is well established that where a statute is enacted in order to give effect to the United Kingdom's obligations under a treaty the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statute. Clearly, also, where parties have entered into a domestic contract in which they have chosen to incorporate the B terms of the treaty, the Court may be called on to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract: see, for instance Phillipson v Imperial Airways Ltd [1939] 1 All ER 761, [1939] AC 332.

Further cases in which the Court may not only be empowered but required to adjudicate on the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless C requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation (as in Zoernsch v Waldock [1964] 2 All ER 256, [1964] 1 WLR 675) or the very rare case in which the exercise if the royal prerogative directly effects an extension or contraction of the jurisdiction without the constitutional need for internal legislation, as in Post Office v Estuary Radio Ltd [1967] 3 All ER 679, [1968] 2 QB 740. D

It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that E the purpose for which such reference can legitimately be made is purely an evidential one. Which States have become parties to a treaty and when and what the terms of the treaty are, are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts.' F

(At 545*b*--*f*.) Finally, at 559*f*--*h* the following was held:

'The creation and regulation by a number of sovereign States of an international organisation for their common political and economic purposes was an act jure imperii and an adjudication of the rights and obligations between themselves and that organisation or inter se, can be undertaken only on the plane of international law. The transactions here concerned (the participation and concurrence in the proceedings of the council authorising or countenancing the act of G the buffer stock manager) were transactions of sovereign States with and within the international organisation which they have created and are not to be subjected to the processes of our courts in order to determine what liabilities arising out of them attached to the members in favour of the ITC.'

In Arab Monetary Fund v Hashim and Others (No 3) [1990] 2 All ER 769 (CA) Lord Donaldson MR described H an international organisation absent an order in council such as referred to above in respect of the ITC as something 'which, in the eyes of English law, is as much a fact as a tree, a road or a hill' (at 775e), but once an order in council is made it becomes a person quite unlike other persons. I

'It is not a native, but nor is it a visitor from abroad, it comes from the invisible depths of outer space.'

(At 775*f*.)

It would appear to follow from the aforegoing that:

1. This Court can take cognisance of the treaty, protocol IV and the J

other international agreements, as well as the contents thereof, as facts, just as it can take cognisance of A any fact properly proved before it.

2. This Court, however, may not interpret or construe the treaty, protocol IV or the ancillary agreements, nor may it determine the legal consequence arising therefrom. B
3. This Court may not determine the true agreement allegedly concluded between the RSA and GOL.

Accordingly, and even if relevant as an issue raised on the pleadings in the action, this Court is unable to construe the agreements between RSA and GOL, nor is it able to determine true agreement between them. Accordingly, C and even if raised in the particulars of claim, these issues are not relevant. Hence, discovery of documents related thereto ought not to be made.

Act of State or judicial restraint D

It is submitted on behalf of the first defendant that this Court should act with restraint in respect of allegations ascribing unlawful conduct to GOL and in respect of the allegations that the sovereignty of GOL has been compromised. The basis for this submission is to be found in the act of State doctrine or in the

principle of judicial restraint. Counsel did not refer to any South African authority in regard hereto. There is none. It is necessary to E embark on a consideration hereof by reference to judgments of the USA and the English courts.

Act of State as applied in the USA

In the USA, reference is made to this rule as the 'act of State doctrine'. F

According to Oppenheim's *International Law* 9th ed vol 1 at 365 one of the consequences of the quality or the independence of States is the 'act of State doctrine'. This doctrine is to the effect that the courts of one sovereign State, do not, as a rule, question the validity or legality of the official acts of another sovereign State.

A dictum of Chief Justice Fuller in Underhill v Hernandez 168 US 250 (1897) at 252 is often referred to as the G classical statement of the relevant principle. He held:

'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of H grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'

Applying the doctrine, the Court refused to inquire into the acts of Hernandez, a revolutionary Venezuelan military commander, whose government had been later recognised by the United States. The action brought against I Hernandez was based on the claim that the claimant had been unlawfully assaulted, coerced and detained in Venezuela by Hernandez.

The doctrine was applied in Banco Nacional De Cuba v Peter L F Sabbatino et al 376 US 398 (1964) (11 L ed 2d 804). At 416 (US) and 817 (L ed 2d) it was pointed out that none of the Court's subsequent J

judgments 'in which the act of State doctrine was directly or peripherally involved manifest any retreat from A Underhill'.

The basis for the doctrine was stated thus in *Oetjen v Central Leather Co* 246 US 297 (1918) (62 L ed 726).

'The principle that the conduct of one independent government cannot be successfully questioned in the courts of B another . . . rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly ''imperil the amicable relations between governments and vex the peace of nations''.'

(At 303--4 (US) and 819 (L ed 2d).) In Banco Nacional De Cuba v Sabbatino (supra) it was held that the doctrine is not compelled C

'either by the inherent nature of sovereign authority . . . or by some principle of international law. If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it'. D

(At 421 (US) and 819 (L ed 2d).)

As to the application of the doctrine the Court held as follows at 428 (US) and 823--4 (L ed 2d):

'It is also evident that some aspects of the international law touch much more sharply on national nerves than do others; E the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of State is no longer in existence, as in the Bernstein case, for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing F rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognised by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complainant alleges that the taking violates customary international law.' G

In *Alfred Dunhill of London Inc v The Republic of Cuba et al* 425 US 682 (1976) (48 L ed 2d 301) Justice White held at 695 (US) and 312 (L ed 2d) that

'the concept of an act of State should not be extended to include the repudiation of a purely commercial obligation owed H by a foreign sovereign or by one of its commercial instrumentalities'.

This *dictum*, however, did not command the support of the majority of the Court. Indeed, Justice Marshall at 728 (US) and 331 (L ed 2d) questioned

'the wisdom of attempting the articulation of any broad exception to the act of State doctrine within the confines of a single case'.

He pointed out that the Court in *Sabbatino's* case,

'aware of the variety of situations presenting act of State questions and the complexity of the relevant considerations, eschewed any inflexible rule in favour of a case-by-case approach'.

(At 728 (US) and 331 (L ed 2d).) See also Van Bokkelen and Rohr SA v Grumman Aerospace Corporation (1984) 66 ILR 311 and Hunt et al v Mobil Oil Corporation et al 550 F 2d 68 (2nd Cir, 1997) where a Second Circuit Court 'seems to adopt the reasoning contained in (Alfred Dunhill of London) without realising that the section of Dunhill did not command a majority of the Court'. See Van Bokkelen and Rohr SA (supra).

Finally, as far as the learning on this issue in the United States is concerned, reference must be had to the judgment in W S Kirkpatrick and Co Inc et al v Environmental Tectonics Corp, International 29 ILM 182 (1990). The appeal related to an action by an unsuccessful bidder on a Nigerian Government contract (Tectonics) against the successful bidder (Kirkpatrick) who had bribed Nigerian officials to obtain the contract. In an independent criminal proceeding Kirkpatrick and its chief executive officer pleaded guilty to charges of the violation of the US Foreign Corrupt Practices Act. This action followed. The judgment of the Court was delivered by Justice Scalia. He held that:

'Act of State issues only arise when a Court must decide - that is, when the outcome of the case turns upon - the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of State doctrine. That is the situation here. Regardless of what the Court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of State doctrine requires.'

(At 188.) The judgment concludes as follows at 189:

'The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of State doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign act is at issue.'

Judicial restraint in England

In England reference is made to the general rule set out above as an act of judicial restraint.

In Brunswick (Duke of) v Hanover (King of) (1848) 9 ER 993 (HL) Lord Lyndhurst stated:

'It must be a very particular case indeed, even if such a case could exist, that would justify us in interfering with a foreign Sovereign in our Courts.'

(At 1000.) Further applications of the principle are to be found in Aksionairnoye Obschetvo A M Luther v James Sagor and Co [1921] 3 KB 532 and Princess Paley Olga v Weisz [1929] 1 KB 718. Both judgments referred with approval to Oetjen v Central Leather Co (supra), which Sankey LJ held, in Princess Paley Olga v Weisz (supra), states the law which, in his view, is the same as the English law in such circumstances (at 728).

In Buttes Gas and Oil Co v Hammer and Others (No 3); Occidental Petroleum Corporation v Buttes Gas & Oil Co and Another (No 2) [1980] 3 All ER 475 (CA) the Court of Appeal declined to grant an application

for discovery in a libel action between two companies as it was alleged that there was a fraudulent conspiracy between Buttes and the ruler of Sharjah, a sovereign country, and some of the facta probantia would have involved international relations between that country and another. That country was not a party to the action and could not be joined because of the principle of sovereign immunity.

'After all, the power to order discovery is discretionary. . . . The object of the discovery here is to condemn the ruler of Sharjah and Buttes as conspirators, conspiring together to extend the territorial waters of the ruler of Sharjah so as to defraud Occidental. In the exercise of their discretion the

Courts should not give their aid to discovery made with that object, so contrary to the comity of nations, not at any rate when the ruler of Sharjah objects.' C

(At 483*e--f*.)

These principles were confirmed in Buttes Gas & Oil Co v Hammer and Another (Nos 2 and 3); Occidental Petroleum Corpn and Another v Buttes Gas & Oil Co and Another (Nos 1 and 2) [1981] 3 All ER 616 (HL). At 628g--j Lord Wilberforce held as follows: D

'So I think that the essential question is whether, apart from such particular rules as I have discussed, viz those established by *(a)* the Mo‡ambique and Hesperides cases and by *(b)* Aksionairnoye Obshestestvo A M Luther v James Sagor & Co and Princess Paley Olga v Weisz, there exists in English law a more general principle that the Courts will not adjudicate on the transactions of foreign sovereign States. Though I would prefer to avoid argument on terminology, E it seems desirable to consider this principle, if existing, not as a variety of ''act of State'' but one for judicial restraint or abstention. The respondents' argument was that although there may have been traces of such a general principle, it has now been crystallised into particular rules (such as those I have mentioned) within one of which the appellants must bring the case, or fail. The Nile, once separated into a multi-channel delta, cannot be reconstituted. F

In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of USA, which is effective and compelling in English Courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process.'

At 633a--f Lord Wilberforce held further as follows: G

'If Occidental is to succeed either in its counterclaim for conspiracy or in the slander action, it is necessary to show that these actions were brought about by Buttes, more exactly by a fraudulent conspiracy between Buttes and Sharjah. This certainly involves an examination of the motives (exclusive or dominant?) for the action of Sharjah in making and, if proved, back dating the decree of 1969--70. It involves establishing that the actions at least of Sharjah, and it appears H also of Iran and of Her Majesty's government, were at some point unlawful. ''Unlawful'' in this context cannot mean unlawful under any municipal law (I remind that Occidental does not contend that the Sharjah decree was unlawful under the law of Sharjah), but under international law. As Mr Lauterpacht QC put it, it involves deciding whether the Sharjah decree was inefficacious, at least for a time, in international law. If, in the absence of unlawful means, it is I alleged that the action taken by Sharjah and the co-conspirators was predominantly to injure Occidental (I am not convinced that Occidental makes this case but I will assume it), this involves an inquiry into the motives of the then ruler of Sharjah in making the decree, and a suggestion that he invited Iran to enter into an arrangement about Abu Musa predominantly in order to injure Occidental. J

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It would not be difficult to elaborate in these considerations, or to perceive other important interstate issues and/or A issues of international law which would face the Court. They have only to be stated to compel the conclusion that these are not issues in which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said have not been drawn to the attention of the Court by the Executive), there are, to follow the B Fifth Circuit Court of Appeals, no judicial or manageable standards by which to judge these issues, or, to adopt another phrase (from a passage not quoted), the Court would be in a judicial no man's land: the Court would be asked to review transactions in which four foreign States were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were ''unlawful'' under international law. I would C just add, in answer to one of the respondents' arguments, that it is not to be assumed that these matters have now passed into history, so that they now can be examined with safe detachment.'

Application in South Africa D

The basis of the application of the act of State doctrine or that of judicial restraint is just as applicable to South Africa as it is to the USA and England. The comity of nations is just as applicable to South Africa as it is to other sovereign States. The judicial branch of government ought to be astute in not venturing into areas where it would E be in a judicial no-man's land. It would appear that in an appropriate case, as an exercise of the Court's inherent jurisdiction to regulate its own procedure, the Court could determine to exercise judicial restraint and refuse to entertain a matter, notwithstanding it having jurisdiction to do so, in view of the involvement of foreign States therein. F

In the present matter it is apparent that decisions have to be made in regard to the alleged unlawful conduct of GOL in Lesotho and the control of GOL and its relationship with the RSA. As far as the latter is concerned there can be little doubt that this is not an area for the judicial branch of government. It belongs to international law. As was held in Buttes Gas (supra), the Court would be in judicial no-man's land. It would have no judicial or G manageable standards by

which to judge the issue. It clearly is a matter in respect of which this Court should exercise judicial restraint. As far as the former is concerned the matter appears to be even more complex. Firstly, the interferences upon which the plaintiffs rely occurred in Lesotho. The lawfulness or otherwise thereof will have H to be determined according to Lesotho law. Secondly, the interferences have all been the subject of litigation in Lesotho. The interferences with the plaintiffs' mining lease in the Rampai area were not disputed. What was and is disputed is the relief which plaintiffs are entitled to as a result thereof. The unlawfulness of the cancellation of the mining leases was conceded. The revocation of the mining leases has been found to be unlawful. Nonetheless, I these issues will have to be determined again before this Court. As a result hereof this Court will have to express a view on the lawfulness or unlawfulness of the action of GOL. Thirdly, the conduct of GOL which has to be considered is that of a previous military government and not of the subsequently elected democratic government. Counsel did not make submissions on this J

issue. Fourthly, if this Court should decline to entertain the matter it could mean that the plaintiffs would not be able A to ventilate their present claim at all.

In view of the conclusion to which I have come to in this matter it is not necessary for a finding to be made whether this Court should decline to exercise jurisdiction in respect of the conduct of GOL. B

The applications to strike out

First defendant gave notice in terms of Rule 6(11) of both applications to strike out. The first application relates to the plaintiffs' founding affidavit and the document complaint. The second application relates to the plaintiffs' replying affidavit. C

In the second application first defendant submits that the replying affidavit contains 'new matter as well as argumentative, speculative, irrelevant and vexatious matter'. First defendant further contends that the presentation of the hearsay evidence has 'simply been taken to new extremes' therein. Plaintiffs filed a notice in terms of Rule 30, contending, inter alia, that the second application constituted an irregular proceeding. Plaintiffs contend that D the irregularity is to be found in the first defendant's failure to specify the particular ground on which it contends that the identified portions of the replying affidavit are to be struck out. The notice was not followed by an application to set aside the application to strike out. During argument, however, plaintiffs' counsel persisted in E raising the complaint.

First defendant could have raised each of the grounds to which collective reference is made, in the alternative. As was held in Ehler (Pty) Ltd v Silver 1947 (4) SA 173 (W) at 178, all that is required of an application to strike out F is the identification of the passages objected to and that the grounds of the objection should be shortly stated. See also Western Bank Ltd v Thorne NO and Others NNO 1973 (3) SA 661 (C) at 664D. There is simply no merit in the objection raised by plaintiffs' counsel.

First defendant's counsel submitted heads of argument in respect of the striking out applications. During argument G first defendant's counsel sought to amend the applications to strike out, so that the offending paragraphs therein referred to corresponded with the offending paragraphs referred to in the heads of argument. Plaintiffs' counsel did not object thereto. There is no prejudice to the plaintiffs if such an amendment is granted. Accordingly, the first H defendant's first application to strike out is amended by the deletion of para 1.1; by the deletion of para 2.6 and the substitution in the place thereof of 'paras 35--69; 71--9 and 82--4'; by the addition after '100.01' in para 2.9 of 'to 100.4; 100.8 and 100.11' and by the deletion of '292' in para 2.11 and the substitution in the place thereof of '283'. The second application is amended by the deletion of the

reference to para 79.15 and by the substitution in the I place thereof of '79.19' and the insertion of a reference to para 91.
The main thrust of the first application to strike out is directed at the document complaint and the documentation, including the records of the Lesotho litigation, annexed thereto. In the alternative the first J

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defendant seeks the striking out of vast portions of the document complaint and the aforementioned A documentation.
As already alluded to the document complaint has not been attested to under oath. Evidence is placed before a Court in motion proceedings by way of affidavit. That is, a solemn assurance of fact known to the person who B states it and sworn to as a statement before some person in authority. See Goodwood Municipality v Rabie 1954 (2) SA 404 (C) at 406B--E. Clearly the document complaint cannot be regarded as an affidavit and, in the absence of anything else, would fall to be struck out. In para 1 of the founding affidavit, however, the third plaintiff states that:

'The facts herein stated are, except where the context indicate otherwise, within my own personal knowledge. I verily C belief the content hereof to be true and correct' (sic).

The document complaint is annexed thereto. On a generous interpretation it is possible to construe the document complaint as being incorporated into the founding affidavit.
As is apparent from the document complaint itself and para 14 of the founding affidavit, the document complaint D contains matter which does not fall within the personal knowledge of the third plaintiff. Insofar as it does contain matter within the third plaintiff's personal knowledge and otherwise admissible material, it can be regarded as having been incorporated into the founding affidavit deposed to by the third plaintiff. Furthermore, in the plaintiffs' E replying affidavit the third plaintiff again confirms as being true and correct, to the best of his knowledge and belief, all the factual allegations contained in the document complaint. Finally, first defendant has answered the allegations contained in the document complaint. In the circumstances the first defendant's application to strike out F the document complaint, on the basis that it has not been attested to under oath, cannot be granted.
Insofar as it is contended that the document complaint, the founding affidavit and the replying affidavit contain hearsay matter, it is trite law that our Courts have consistently refused to countenance the admission of hearsay G evidence. See Galp v Tansley NO and Another 1966 (4) SA 555 (C) at 558 and 560.
Notwithstanding the aforegoing, the Courts do on occasion take cognisance of hearsay statements for limited purposes and subject to certain conditions. In Galp v Tansley NO and Another (supra) it was held that: H

'For a considerable period, now, our Courts have recognised the need to admit and act upon sworn statements of ''information'' and ''belief'' in interlocutory matters (as distinct from matters in which the rights of the parties concerned are finally decided) where urgency, or possibly the existence of other special circumstances, appear to justify their doing so. . . .'

(At 558H.) See also Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another 1984 (4) SA I 149 (W) at 157E--H; Southern Pride Foods (Pty) Ltd v Mohidien 1982 (3) SA 1068 (C)at 1071H--1072B.
Whilst the application is of an interlocutory nature there is neither urgency nor special circumstances to justify the acceptance of hearsay evidence in these proceedings.
In Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) at 566D J

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(1990 NR 332 at 334J--335B) the Court held that the words scandalous, vexatious and irrelevant in regard to the A content of an affidavit had the following meanings:

'Scandalous matter - allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

Vexatious matter - allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

Irrelevant matter - allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.'

(At 566C--E.) Matter that is hearsay or argumentative would fall under the description of irrelevant matter.

In determining an application to strike out the existence of prejudice as required by Rule 6(15) must not be lost sight of. See Beinash v Wixley (supra at 733J--734C). In determining the presence or absence of prejudice, the approach adopted in Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd 1991 (3) SA 276 (SE) at 282H--283C is particularly instructive. It was held that:

'Rule 6(15) provides for the striking out of any matter in an affidavit which is ''scandalous, vexatious or irrelevant'', but goes on to add that

''the Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted''.

In the case of Parow Municipality v Joyce & McGregor (Pty) Ltd 1973 (1) SA 937 (C) Van Heerden J pointed out that the reference to ''irrelevant'' matter in the Rule includes matter which is argumentative.

I have considered each of the paragraphs complained of and am of the view that the vast majority of them are purely argumentative and ought not to have been included in the answering affidavit at all. In addition many of these paragraphs attack the credibility and the bona fides of Mr Gallow, a director of plaintiff, on the flimsiest grounds. To my mind such allegations may properly be considered scandalous and vexatious, and in this sense prejudicial to the plaintiff, and ought not to be allowed to stand (cf Weeber v Vermaak and 'n Ander 1974 (3) SA 207 (O) at 215--16, and Steyn v Schabort en Andere NNO 1979 (1) SA 694 (O) at 699). These other paragraphs which are merely argumentative and which do not contain scandalous and vexatious matter are, in my view, so prolix and extensive and so bound up with scandalous and vexatious matter to which I have referred that they too must be regarded as prejudicial and fall to be struck out.'

As already alluded to, the third plaintiff has annexed to the document complaint the records in the appeal of the Attorney-General of Lesotho and Another v Swissbourgh Diamonds (Pty) Ltd and Others. This record consists of the affidavits filed and the judgment of the High Court as well as the judgment of the Lesotho Court of Appeal dealing with the interdictory relief that was granted. These documents are annexed and introduced into these proceedings in order to prove the contents thereof. They are inadmissible. See in this regard Fourie v Morley and Co 1947 (2) SA 218 (N) at 222--3, and Society of Advocates of South Africa (Witwatersrand Division) v Rottanberg 1984 (4) SA 35 (T) at 36I.

Likewise the affidavits and the record of the oral evidence in the counter-application are inadmissible save for the evidence of Mr Labuschagne. Particular reference was made during argument to the evidence of Mr Labuschagne. It will be recalled that he was called by the first plaintiff as a witness. He has deposed to affidavits on behalf of first

defendant in these proceedings. His evidence in the Lesotho proceedings, properly proved, can be placed before this Court on the basis of impeaching his credibility.

Against this background consideration must be given to the first defendant's attack against the various identified paragraphs in the founding affidavit, the document complaint, as well as the documents annexed to the document complaint. A schedule is set out hereunder indicating the basis on which the various paragraphs contained therein are struck out. Where first defendant's contentions are not upheld no reference is made to the paragraph or document complained of.

The prejudice sustained by the first defendant is to be found in the sheer vastness of the scandalous, vexatious and irrelevant matter. It is literally and figuratively overwhelming and thus prejudicial.

Irrelevant

Paragraphs 4; 20, save for first sentence but including the record of the revocation appeal; 21, save for first two sentences but including the record of

the Rampai lease trial; 22 and documents referred to; 23 and documents referred to; 24 and documents referred to; 26; 27; 28.2 and documents referred to; 29 footnotes 1, 2, 3, 4 and 6; 38; 39 first sentence; 40 first sentence; 55; 57; 59 save for first sentence; 61, 64, 65, 66; 71 first sentence; 72; 74 E second sentence; 85; 86; 87; 88; 89; 90; 91; 92; 93; 99; 101.1; 102--31; 197--233 and 239--83.

In considering the second defendant's second application to strike out, an additional principle must be considered. New matter cannot be raised in the replying affidavit. See, in this regard, Shephard v Tuckers Land and F Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at 177; Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere 1984 (2) SA 261 (W) at 269A--H.

The application to strike out relating to the replying affidavit will be dealt with under the same headings as set out above together with an additional heading, namely new matter. G

Scandalous

Paragraphs 86.12, 91.22 and 91.23.

Vexatious

Paragraphs 47.2; 65.2; 66.1, save for first sentence, 76; 86.12; 90.7; 91.22 and 91.23. H

Irrelevant

Paragraphs 9; 11; 12; 19, save for first and last sentence and DCR1; 21; 22; 23; 24; 25; 27; 28; 29, save for first sentence, 30, save for first sentence, 31; 33; 34; 35; 36; 37; 38; 41; 43.2, save for last sentence, 44.1; 44.2; 44.3; I 44.4; 44.5; 45.6 and DCR2; 46.2--46.8; 46.19; 46.20; 46.21; 46.22; 46.23; 47.2; 47.3; 47.4; 47.5; 47.6, save for first sentence, 47.8; 47.12; 47.13; 47.16; 48.2; 48.3; 49.1; 49.3; 49.4; 49.5; 49.6; 49.8; 50.2; 50.3; 50.7; 50.8; 52.1, save for first sentence, 54; 55; 56; 57.1--57.11; 61; 65.2; 66.1, save for first sentence; 66.2; 66.3; 66.9; 68.3; 68.4; 68.5; 69; 70; 71; 72; 73; 74; 75.1, save for first sentence, 76; 77; 78; 79.1--79.16; 80; 82.2; 82.3; 82.7; 82.8; 82.9; 82.10; 82.11; J

83.12--83.14; 83.16; 85.2; 85.3; 88.4; 88.5; 88.7; 88.8; 88.9; 89; 90; 91.1--91.12; 91.18--91.21; 92.2; 92.5; A 93.2--93.12 and 93.14--93.18; 94; 95; 96; 97; 98; 99; 100; 103.2; 103.3; 104; 105; 106.1; 106.2; 106.5; 107; 108.2; 108.3; 109; 110; 111; 112.2; 112.3; 112.4; 114.2; 114.16; 116.2--116.8; 117.1; 117.3; 118--24; 125; 126 and DCR16; 127; 128; 129; 130 save for 130.5; 131; 132; 133.2--132.4; 133.8--133.11; 134; 135; 137--9; 141--5; B 146.2--146.6; 147.3--147.6; 148--50; 151.2--151.7; 152; 153.3; 153.5--153.16; 154; 155; 156; 157; 158; 159; 160; 161; 162; 163; 164; 165; 166; 167 and 168.

New matter C

Paragraphs 43.3; 44.2; 45.6 and DCR2; 46.11; 46.12 and DCR3; 46.13; 46.14; 46.15 and DCR4; 46.16; 46.18; 46.19; 46.20; 46.21; 46.22; 46.23; 49.7; 50.5 and DCR24; 50.6; 50.8; 52.1, save for first sentence, 57.8; and DCR6; 58; 59; 60; 68.2 and DCR7; 68.3; 68.4; 77.2; 77.11; 79.4; 79.8; 79.9; 79.10; 79.12; 79.17; 79.18; 79.19; D 80.9; 81.4 and DCR7; 82.12; 83 and DCR8; DCR9; DCR10; DCR11; DCR12; 86; 87; 90.2; 91.13--91.16; 93.4; 93.19 and DCR15; 106.3; 106.4; 132.5; 136.3; 140 and DCR21; 153.4 and DCR22.

As far as the costs of the application to strike out are concerned, the first defendant seeks an order that the E plaintiffs pay the costs on the scale between attorney and own client.

Applying the principles laid down in decisions such as Nel v Waterberg Landbouers Ko-operatiewe Vereeniging 1946 AD 597 at 607, it would appear that the applications to strike out are of such a nature that it would work an injustice were a special order as to costs not be made. The document complaint and its annexures were put F together without any regard to the rules of practice and

procedure and the laws of evidence. The plaintiffs simply endeavoured to overwhelm both the first defendant and this Court. They sowed as widely as they could in the hope of reaping sufficient to establish a case. In so doing they relied on speculative matter and then raised argument G based on the speculation. They inundated both the first defendant and this Court with irrelevant material. This conduct merits censure. Notwithstanding being faced with the striking-out application in respect of the founding affidavit and the document complaint, which should have indicated that restraint on the part of the plaintiffs was H called for when deposing to the replying affidavit, the replying affidavit is even more replete with offensive matter. Plaintiffs thereby indicate complete disdain with the rules aforementioned.

The distinction between attorney and client costs and attorney and own client costs appears from Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 574 (T); Malcolm Lyons & Munro v Abro and I Another 1991 (3) SA 464 (W) at 469D--E.

Whilst the plaintiffs' conduct is of such a nature that a special costs order ought to be made, the circumstances are not such that attorney and own client costs ought to be ordered. In the circumstances an award of attorney and client costs will be made in respect of both J

striking-out applications. The costs are to include the costs consequent upon the employment of three counsel (in A regard to the three counsel see infra).

Arguments raised in first plaintiff's heads of argument and not advanced in the founding affidavit nor the document complaint B

First plaintiff's counsel has seen fit to raise various arguments in the written heads of argument which were not based on factual averments contained in the plaintiffs' founding affidavit nor the document complaint. These arguments were persisted in during argument in Court. C

Under the heading 'JPTC designed to give RSA control', submissions are made to show that 'the JPTC is really the alter-ego of RSA, and that JPTC approval in fact means RSA approval'. These submissions are based on extracts from a detailed feasibility study which proceeded the treaty (annexure DCB 7 to the document complaint); the evidence of Mr Labuschagne in Lesotho and an article entitled 'Financing a mega project' by M M Krige. D

The evidence of Mr Labuschagne and the views of the draftsmen of the feasibility study, as well as those of Krige, on the interpretation of the treaty are interesting, but irrelevant. The treaty stands to be interpreted on its own. As such, it appears that both the RSA and GOL jealously safeguarded their sovereignty. The treaty provides a E mechanism for both the RSA and GOL to have what was described by defendant's counsel as a window through which they could see that which was and is of concern to them and which was occurring in the jurisdiction of the other sovereign party. This is achieved through the JPTC. To submit that the JPTC was designed to give the RSA F control of the LHWP and that which occurred in Lesotho is to disregard the express wording of the treaty.

Under the heading 'The puppet master agreement' the plaintiffs deal with the ancillary agreement to the deed of undertaking and relevant agreements concluded between the RSA and the LHDA. In argument much was made of the fact that the agreement was concluded between the RSA and the LHDA. It was submitted that this was G indicative of the RSA not being content to exercise control over the LHDA via GOL, but seeking to exercise direct control over the LHDA. There is simply no basis for this submission. It borders on the paranoid.

The LHDA had entered into loan agreements with the banks and financial institution providing the finance required H for the LHWP. The LHDA had entered into the trust instrument. The RSA had entered into the deed of undertaking with the trustee committing itself to make all payments due by the LHDA to the trustee. From the terms of the ancillary agreement it is clear that they are

designed to protect the RSA against any unilateral conduct on the part of the LHDA and to insure that the LHDA keeps the RSA fully informed of all events. In these circumstances it seems to be neither strange nor part of a diabolical plan for the agreement providing for these matters to be concluded between the RSA and the LHDA.
First plaintiff's counsel referred to clause 2.1.3, where the LHDA undertakes to the RSA 'that the parties shall closely co-operate with each

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other in regard to all legal processes or claims', and poses the question whether it can be said that first plaintiff's 'claims and processes are excluded from the provision hereof'. A reading of clause 2.1.3 indicates, to a reader who wishes to be informed, that the close co-operation relates to claims pursuant to any relevant agreement, as defined. There is no basis on which the question raised by first plaintiff's counsel can be asked.
The other subclauses specifically relied upon by first plaintiff's counsel, namely 2.1.8, 2.1.11, 2.1.12 and 2.2, must all be viewed against the background of the deed of undertaking. Against that background they appear to be innocuous terms reasonably required to protect the interest of the RSA.
In all these circumstances, the description of the ancillary agreement to the deed of undertaking and relevant agreements as the puppet master agreement is not indicative of the use of hyperbole but the abuse of poetic licence.
First plaintiff's counsel made various submissions in respect of the agreement of lease. These submissions are made under the inflammatory heading in the heads of argument: 'Did RSA bribe GOL with a favourable lease?' The submission is premised on the cancellation of the first plaintiff's mining rights together with the fact that GOL was to provide the land necessary for the implementation of the LHWP at no charge.
In making these submissions first plaintiff's counsel relied on certain evidence given by Mr Labuschagne in the proceedings in Lesotho. It is contended that his evidence was to the effect that GOL was under the obligation to make the land available and that there was no cost implication in respect thereof.
Mr Labuschagne's evidence must be seen in its correct factual background. As appears supra, in terms of art 6(6) of the treaty GOL undertook to provide the LHDA with all power necessary for the implementation of the project including the procurement of land and interest in land. In terms of art 10(3)*(g)* of the treaty referred to supra, the RSA is liable for the cost of land or any interest in land acquired for the purpose of the implementation, operation and maintenance of the LHWP. It would appear that Mr Labuschagne's evidence as to the obligation of GOL to make the land available appears contrary to the provisions of the treaty and thus incorrect.
It would appear that these serious submissions made by first plaintiff's counsel were made without regard to the express provisions of the treaty and appear to have been made recklessly. First plaintiff's counsel also made submissions in regard to the Mining Titles Regulations Compensation Order, 1991. In making these submissions counsel relied on evidence given by Mr Labuschagne in Lesotho. It will also be recalled that the order itself was annexed to a supplementary affidavit and was not dealt with by the first defendant in its answering affidavit. Likewise, Mr Labuschagne's evidence was not dealt with in the first defendant's answering affidavit. Findings cannot be made in this regard. The issues have just not been adequately canvassed. In any event, Mr Labuschagne's evidence and the order are not indicative of the conspiracy

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plaintiffs contend for. It appears from Mr Labuschagne's evidence that the order was prepared by Mr Labuschagne and first defendant's present senior counsel when they went to Lesotho shortly after the interdict was granted. It provides for

limited compensation in the event of expropriation of the first plaintiff's mining rights. It is submitted by first plaintiff's counsel that the preparation of the document is indicative of the role of the RSA B and the existence of its control over GOL and the conspiracy. Fact is that the order was not enacted by GOL, which would seem to refute the contention advanced by first plaintiff's counsel.
First plaintiff's counsel raised other arguments not dealt with in the document complaint. No regard can be had thereto. C

Conclusion

Plaintiffs set out to challenge the first defendant's discovery affidavit by proving mala fides on the part of the first defendant and the so-called conspiracy of silence. The conspiracy of silence is part of a larger conspiracy between D the RSA and GOL to 'get rid' of first plaintiff's claims.
Plaintiffs annexed to their founding affidavit in the counter-application for a stay of proceedings a document in respect of which first defendant claims privilege. It is a memorandum by the Director-General of the Department E of Water Affairs to the Minister dated 31 January 1995. It deals with a settlement offer received from the plaintiffs. In para 9 the Minister is advised that a settlement entered into by first defendant at that stage would be inopportune. Paragraph 9*(c)* and *(d)* read as follows:

'9*(c)* As stated above, any compensation due to SDM in respect of the expropriation of the Rampai lease, will be payable F by the LHDA. This will be effected from funds available to it from loans procured for the construction of the water transfer components of the Project. As explained to you previously, the Department is of the opinion that there are good grounds for eventually attempting to recover such disbursements by the LHDA from the Lesotho Government in terms of the Treaty. A unilateral settlement of the issue by the RSA would in all probability prejudice the basis of any such claim G and could even be considered by Lesotho as unwarranted conduct by the RSA in respect of a situation which had its origin in Lesotho and which (according to the sources available to the Department) the Lesotho Government wants to dispose of finally in Lesotho.

(d) The allegations of complicity on the part of the RSA Government by SDM are of such a serious nature that any H payment in settlement of the cases as pleaded by SDM would amount to an acknowledgment of these allegations which may affect foreign relations with the Kingdom of Lesotho.'

The document complaint claims that an agreement between the RSA and GOL had been in place since approximately the middle of 1991. The memorandum, which is dated January 1995, clearly would have mentioned I such an agreement if it had existed. The memorandum indicates that there is a conflict of views between the RSA and GOL, which will have to be dealt with if the plaintiffs are successful with their claims in Lesotho. It is clear that this conflict of views has not yet been brought to a head or dealt with by any agreement or understanding whatsoever. It is also clear that GOL considered the matter as its own J

problem, emanating from its own territory, and with which it wanted to deal itself in the manner which any A sovereign government would.
In the answering affidavit Mr Labuschagne refers to the parity of interest between the RSA and GOL in regard to the LHWP. He states that the interests of the two governments and the LHDA do coincide although they are not identical. Mr Labuschagne's statement is obviously correct. Both the RSA and GOL want the LHWP to be B completed. They also both want it to be completed as cheaply as possible. Whilst it is not yet clear whether the RSA or GOL would have to ultimately pay any compensation or damages awarded to first plaintiff, they would both want first plaintiff's claim to be dealt with at either no cost to either of them or at as little cost as possible. C Whilst this identity of interest clearly exists, it does not follow that there is a conspiracy between the RSA and GOL as contended for by the plaintiffs.
In the circumstances the plaintiffs have simply not established mala fides or a conspiracy of silence involving the D first defendant. Their attack on the first defendant's discovery affidavit based thereon can therefore not succeed.

Attack on the personal knowledge of the deponent to the discovery affidavit

Again based on Mr Labuschagne's evidence in Lesotho first plaintiff's counsel launched an attack on the personal E knowledge of the deponent to the discovery

affidavit. No regard can be had thereto. These issues have not been canvassed by the first defendant in its answering affidavit.

The claim to State privilege

The plaintiffs submit that the law in respect of State privilege is no longer that enunciated in Van der Linde v F Calitz 1967 (2) SA 239 (A) at 246H. It was there held that, in matters other than those relating to the security of the State or affecting the State in its diplomatic relations with other States or documents of a high degree of executive authority, the Court has a residual power to overrule a properly tendered objection to the disclosure or G production of official documents that would be damaging or prejudicial to the public interest. In exercising this discretion the Court was entitled to scrutinize the documents in question in private. It was stressed that the discretion would have to be exercised with great circumspection; that it would seldom be exercised and that it H would only be exercised where the Court 'buite twyfel oortuig is dat die beswaar nie geregverdig kan word nie' or where there were no reasonable grounds for supporting it (259H--260B). In an obiter dictum it was held that

'Die huidige is nie 'n geval waarin Staatsveiligheid, internasionale verhoudings of dokumente op 'n hoë vlak van uitvoerende gesag ter sprake kom nie' I

and that,

'*(d)*it kan wees dat die Hof 'n behoorlike geopperde beswaar in sulke gevalle sonder navraag moet aanvaar.'

(At 260E--F.) It is submitted, in the light of the Constitution and after an analysis of how the issue of State privilege is dealt with in other J

jurisdictions, that claims of State privilege should be approached in South Africa in the following manner: A

1. The Court is not bound by the ipse dixit of any cabinet minister or bureaucrat irrespective of whether the objection is taken to a class of documents or a specific document and irrespective of whether it relates to B matters of State security, military operations, diplomatic relations, economic affairs, cabinet meetings or any other matter affecting the public interest.
2. The Court is entitled to scrutinise the evidence in order to determine the strength of the public interest affected and the extent to which the interests of justice to a litigant might be harmed by its C non-disclosure.
3. The Court has to balance the extent to which it is necessary to disclose the evidence for the purpose of doing justice against the public interest in its non-disclosure.
4. In this regard the onus should be on the State to show why it is necessary for the information to remain D hidden.
5. In a proper case that Court should call for oral evidence, *in camera* where necessary, and should permit cross-examination of any witnesses or probe the validity of the objection itself.

In view of the decision to which I have come it is not necessary to consider this argument further. For purposes E hereof I accept the approach set out above.

The Court is obliged to balance or weigh up the extent to which it is necessary to disclose the evidence against the public interest in its non-disclosure. The purpose for which the discovery is sought is to prove a conspiracy F between the RSA and GOL to defraud the plaintiffs of their rights. The underlying case is that the RSA has exercised sovereignty over GOL, has infringed upon the sovereignty of GOL to such an extent that GOL has no real independence and is controlled by the RSA. As already appears from the judgment herein these are matters which this Court is unable to determine and are not in any event relevant to the issues raised in the action. G

The documents which the plaintiffs seek are irrelevant to the action. Accordingly, when weighing up the various interests, there is nothing in the counter-balance against the averments made by Minister Asmal and Minister Nzo H in the

discovery affidavit. The interest in non-disclosure clearly outweighs the interest in disclosure.

In the circumstances the claim in respect of the State privilege documents also falls to be dismissed.

Costs I

Plaintiffs' counsel did not argue against the reasonableness of the employment of three counsel. Regard being had to the magnitude and complexity of the matter, the employment of three counsel was reasonable. As far as the costs of resisting the application are concerned first defendant seeks a costs order on the attorney and own client scale. This is not justified and costs on the party and party basis will be awarded. J

Order A

The following orders are made:

1. The plaintiffs are jointly and severally ordered to pay the costs, including the costs consequent upon the employment of two counsel of: B
   1.1 first defendant's application to compel in terms of Rule 21(4), including the costs reserved on 16 May 1997;
   1.2 plaintiffs' counter-application to stay proceedings, including the costs reserved on 16 May 1997;
   1.3 plaintiffs' application to postpone the hearing on 13 May 1997, including the costs reserved on 16 May 1997. C
2. First defendant is ordered to pay the second plaintiff's and third plaintiff's costs in regard to the application for a separation of issues in terms of Rule 33(4) for determining of the issue that second and third plaintiffs' claims are not sustainable in law.
3. The first defendant's applications to strike out are upheld, to the extent set out in the body of this D judgment, and the plaintiffs are jointly and severally, the one paying the other to be absolved, ordered to pay the costs thereof on the scale as between attorney and client. The costs are to include the costs consequent upon the employment of three counsel.
4. The application is dismissed and the first, second and third plaintiffs are jointly and severally, the one E paying the other to be absolved, ordered to pay the costs of the application. The costs are to include the costs consequent upon the employment of three counsel.

Plaintiffs' Attorneys: Solomon, Nicolson, Rein & Verster Inc. Defendants' Attorneys: De Wet & Fourie. F