IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 07/882

In the matter between:

KEYLITE CHEMICALS Applicant

and

HARMONY GOLD MINING COMPANY LIMITED Respondent

J U D G M E N T

MBHA J:

A. INTRODUCTION

[1] The applicant seeks an order compelling the respondent to furnish the applicant with copies of all the records in the possession or control of the respondent, in respect of each of the following category, type and description

of records, within ten (10) days of the granting of such order

(a) the Harmony Gold Mining Company Limited General Conditions of Purchase in use on 25 September 2003 ("the General Conditions");

(b) all agreements relating to Harmony Gold Mining Company Limited tender G278 ("the Contract documents");

(c) all product complaint or quality reports in respect of Harmony Gold Mining Company Limited Contract VRB 206/0007/03 ("Reports")

[2] At the hearing of this matter, which was unopposed, counsel for the applicant advised the court that on 26 February 2007 the respondent furnished the applicant with the contract documents as requested in paragraph 1 (b) above.

[3] This application is in terms of Section 78 (2) (d) (i) of the Promotion of Access to Information Act 2 of 2000 ("the Act") which provides that a requester aggrieved by the decision of the head of a private body taken in terms of the provisions of this act, may, within thirty (30) days apply to a court for appropriate relief.

[4] A requester is defined in the act, in relation to a private body, in this instance the respondent, as any person making a request for access to a record of that private body.

B. BACKROUND TO THE APPLICATION

[5] On 25 September 2003 the applicant and respondent entered into a supply agreement ("the agreement") in terms of which the Applicant would supply the respondent with a range of cleaning materials and products comprising soaps, polishers and degreasers for general application in the respondent's mines. The agreement came into effect on 1 October 2003 and enjoyed a twelve month term.

[6] The conclusion of the agreement is evidenced by a letter transmitted by the respondent's procurement division to the applicant on or about 25 September 2003 entitled "Letter of Award". The letter states inter alia:

6.1 that the applicant and respondent are bound by the Harmony General Conditions of Purchase ("the General Conditions"); and

6.2 that an official detailed contract document will be forwarded to the applicant's offices in due course. According to a schedule attached to the Letter of Award, the annual value of the products to be supplied to the respondent amounted to R1,9 million.

[7] It is significant to note that in paragraph two of contract document referred to in paragraph 1 (b) above, which was only transmitted to the applicant's attorney on 26 February 2007, mention is made of the General Conditions as being incorporated into the agreement.

[8] The applicant alleges that notwithstanding repeated requests, the respondent has failed to furnish the applicant with a copy of the General

Conditions in operation during September 2003 when the parties concluded the agreement.

[9] The applicant alleges further, in relation to the prayer it seeks under paragraph 1 (c) above, that

> 9.1 In May 2004 the respondent's orders placed with the applicant declined drastically. At one of the various meetings held between the parties to address the problem, the respondent alleged that a number of complaints had been received regarding the products supplied by the applicant. However the respondent was unable to explain the nature or specificity of the said complaints.
>
> 9.2 The applicant established that the respondent was placing orders for the incorrect degreaser to be used in its mines. The applicant remedied the problem by suggesting the use of an alternative degreaser.
>
> 9.3 Despite the remedial action taken, respondent's orders placed with the applicant around June 2004 continued to decline drastically and ceased altogether thereafter. At all material times the applicant never received any written complaints from the respondent alleging the inferiority and/or unsuitability of the materials supplied to the respondent.
>
> 9.4 At the meeting held on 6 September 2004, the respondent gave to the applicant a letter of termination of the agreement. This termination letter dated 19 April 2004 makes reference to the agreement as

Contract VRB 206/0007/03; and

9.5 The respondent conceded that no formal communication was ever addressed to the applicant in relation to complaints received from its personnel about the applicant's materials and products.

[10] The applicant contends accordingly that in the absence of access to any product complaint or quality reports in respect of the applicant's products:

10.1 there are no means for the applicant to establish whether its products were in fact deficient;

10.2 the applicant is not in a position to improve the quality of its products and

10.3 Left attended, the applicant's reputation and goodwill it enjoys among customers through the quality products it provides will suffer.

[11] The applicant alleges that the access it seeks to the respondent's records will allow for the exercise or protection of certain of its right as follows:

11.1 Access to the General Conditions will assist the applicant in determining which of its contractual rights allegedly embodied and flowing from such General Conditions may have been implicated by the early cancellation, alternatively repudiation of the agreement by the respondent.

11.2 Access will also place the applicant in a position to decide which of its contractual rights can be enforced if at all and allow the applicant to decide if it should proceed or abandon the potential enforcement of its contractual rights against the respondent.

11.3 Access to the General Conditions will place the Applicant in a position to exercise its rights in terms of Section 34 of the Constitution Act 108 of 1996 to approach a court for a fair public hearing which includes the right to be able to formulate its claims if any against the respondent.

11.4 Access to reports under Contract VRB 206/0007/03 alleged in the respondent's termination letter will allow the applicant to protect its right to goodwill, good name and reputation in that it will assist the applicant in determining the extent to which its materials and products were deficient in quality and allow applicant to consider what steps it should take to improve the quality of its materials and products.

[12] As I have pointed out earlier, this application was unopposed. No answering affidavit was filed by the respondent and all of the applicant's allegations and claims remain uncontroverted.

C. DISCUSSION: THE APPLICABLE LAW

[13] The Act purports to give effect to the right found in 32 (1) (b) of the constitution which provides that everyone has the right of access to *"any information that is held by another person and that is required for the exercise of protection of any rights".*

[14] The exercise for the enforcement of rights of access to information must be asserted through the Act. It thus follows that in the present matter, applicant's request must be determined within the four corners of the Act.

[15] Section 50 of the Act entitles a 'requester' access to the records – which by definition, include any recorded information – in the possession of a private body if:

> (a) the information 'is required for the exercise or protection of any rights';
>
> (b) the 'requester' complies with the procedural requirements of the Act relating to a request for access to that record; and
>
> (c) access to the information requested cannot be refused except on any of the grounds provided for in sections 62 to 70.

[16] Before determining whether the applicant has satisfied the three

aforesaid requirements as laid down in Section 50 of the Act, I need to make two preliminary comments regarding other relevant contents of the Act.

16.1 Firstly the preamble to the Act clearly shows that it was intended to:

> 16.1.1 foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and
>
> 16.1.2 actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights. Unfortunately, as was noted in Claase, the objectives of the Act are being increasingly frustrated by an absence of common sense on the part of the parties bent on disregarding the aims of the Act. Combrinck AJA noted that one of the objects of the Act was to avoid the proliferation of litigation, rather than propagate it and that instead the Act was resulting in pre-trial litigation involving huge costs before the merits are heard in court.

16.2 Secondly, Section 7 (1) precludes reliance on the Act if the record sought (a) is sought for purposes of criminal or civil litigation (b) is so required after the commencement of proceedings and (c) is requested where the production of the record is provided for in any other law.

16.3 By including Section 7, the legislature clearly demonstrated a certain deliberate deference to the discovery process regulated by Rule 35 of The Uniform Rules of Court.

16.4 In this case Section 7 (1) is no bar to the applicant being afforded access to the requested records. In *MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd 2006 (5) SA 1 (SCA) at page 6H* the court made it clear that Section 7 (1) has to be read cumulatively and that in the event of one of the requirements not having been satisfied, no reliance can be placed on section 7 (1).

See also CC11 Systems (Pty) Ltd v Fakie & Others NNO (Open Democracy Advice Centre, as Amicus Curiae) 2003 (2) SA 325 at 334 E-G where the court held that before a litigant has instituted proceedings, even if he wants to do so, he is not prohibited from invoking the provisions of the Act in order to gain access to the records.

16.5 As the applicant has never instituted legal proceedings against the respondent other than this application, section 7 (1) is accordingly inapplicable to this case.

[17]

17.1 The applicant has complied with the prescribed procedures as required by Section 50 (1) (b) of the Act. A request for access to the record was duly served on the respondent in the prescribed form on 16 November 2006.

17.2 In relation to the provisions of Section 50 (1) (c) of the Act, none

of the grounds listed in Sections 62 to 70 are applicable in this case because the respondent has not filed any answering or opposing papers in support of a refusal of the request premised on the grounds listed in Sections 62 to 70. I am in doubt whether I can mero motu enquire into the application of Sections 62 to 70 with the respondent not having made a case at all to substantiate reliance on Sections 62 to70.

I am accordingly satisfied that the requirements of Section 50 (1) (b) have also been met.

17.3 I now turn to the requirements of Section 50 (1) (a).

17.3.1 In determining the requisite standard of proof when deciding access to records in terms of Section 50 Combrinck AJA in Claase v at page 5 paragraph 8, found that an applicant need only put up facts which prima facie, though open to some doubt, establish that he has a right which access to the record is required to exercise or protect.

17.3.2 *In Cape Metropolitan Council v Metro Inspection Services (Western Cape) cc and Others ("Metro Inspection Services") 2001 (3) SA 1013 (SCA) at paragraph 28* Streicher JA considered the expression "required" in Section 50 (1) (a) and said:

"Information can only be required for the exercise or protection

of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information… an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right."

17.3.3 Streicher JA's dictum is, in my view, apposite to applicant's attempt to gain access to all complaints in respect of applicant's products supplied to the respondent.

17.3.4 In Metro Inspection Services the first respondent had sought to gain access to written complaints received by the council. These written complaints were compiled following allegations that the first respondent had submitted fraudulent claims to the council in the collection of arrear levies on behalf of the council.

17.3.5 As in the instant matter, the first respondent sought particulars of the allegations as set out in the written complaints. First respondent's intention, as in the instant case was to protect its right to reputation. In deciding whether the record was required for the exercise or protection of any rights Streicher JA said, [at paragraph 29]
"The right which the first respondent wishes to protect is its right to a good name and reputation. It denies that it submitted fraudulent claims. In order to protect its good name and reputation it obviously has to have particulars of the specific allegations made against it. It follows that the Court a quo

correctly ordered that the first respondent be given access to the aforesaid documents."

17.3.6 In Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 (SCA) ("Clutchco") at 491 J to 492 A Comrie AJA said the phrase "reasonably required" most accurately reflects the legislature intent in Section 50 (1) (a) provided it is understood to connote a substantial advantage or element of need.

17.4 I am satisfied that the applicant has made out a case showing that the requested records are "required" for purposes of section 50 (1) (a) or reasonably required as phrased by Comrie AJA in Clutchco. Unlike the requester in Clutchco, whose modus operandi lacked the requisite specificity, the applicant in this matter has laid the proper foundation for its request without making the kind of broad and general assertions that seemed to have irked Comrie AJA in that case. In this regard Comrie AJA said the following [at paragraph 18]

"In my view the respondent failed to lay such a foundation. His complaints were not of a serious nature and no detailed criticism of the auditors was advanced. In addition the respondent's proposed modus operandi was lacking in specificity. He claimed that access to the books of first entry would enable him to 'reconstruct' them and that the reconstructed version would enable him to place a proper value on his shares. These broad and general assertions were not supported by, for example, an affidavit by an experienced accountant or auditor. I conclude that the respondent failed to show that the access which he sought was required for the exercise or protection of the rights which he asserted."

17.5 In my view the applicant in the instant case, has in its founding affidavit:

17.5.1 illustrated the rights it seeks to enforce and/or protect;

17.5.2 defined the records it requires access to; and
17.5.3 has demonstrated how access to the requested records would assist to allow it to exercise and/or protects its rights.

17.6 Having said all of that, does the application of Section 50 (1) (a) permit the applicant what amounts to a right to pre-action discovery? In Unitas Hospital v Van Wyk & Another 2006 (4) SA 436 (SCA) Brand JA, writing for the majority at 445 H said that the deference shown by the Act to rules of discovery shows that the Legislature had no intention to allow prospective litigants to avoid rules of discovery which he labelled to be measures of control, by compelling pre-action discovery under Section 50 as a matter of course.

17.7 Brand JA acknowledged however, that reliance on Section 50 is not automatically barred because the information sought would eventually become accessible under the rules of discovery. He said that pre-action discovery under Section 50 must remain the exception rather than the rule and that it must be available only to a requester who has shown the “element of need” or “substantial advantage” of access to the requested information, referred to in Clutchco, at the pre-action stage.

17.8 In arriving at this formulation, the court in Unitas took a narrow approach that essentially enquires into whether a potential litigant can formulate its claim without access to the record. If so, the exception would not be applicable. This in fact determined the outcome in Unitas. The respondent had sought access to a hospital report in the

possession of the appellant for purposes of bringing a civil action against the hospital.

17.9 What counted against the respondent was that although she did not have access to the report, she enjoyed access to its author Dr Naude who would most likely act as a witness on her behalf at the trial. It was therefore found that she would be able to formulate her cause of action without having access to the report. The respondent was assisted in the formulation of her claim by seven medical specialists, six of whom, including the author of the report, were involved in the treatment of her late husband during his period of admission at the hospital. The seventh witness was both a qualified orthopaedic surgeon and an admitted advocated. Unlike in the instant matter, the respondent in Unitas thus had sufficient channels of information at her disposal to formulate her claim.

17.10 As an example of an exceptional case, Brand JA referred to Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T). Van Niekerk had a report by experts which did not identify who was responsible for the damage to his equipment. The City Council, on the other hand, relied on a report which apparently exonerated it from responsibility. Brand JA then found that it was quite understandable that without the report, Van Niekerk would not be able to identify the right defendant.

17.11 I am of the view that in the instant matter, the applicant is in the

same category as Van Niekerk. Unlike in Unitas where Brand JA found that the information was available to her, the same cannot be said in the instant matter. The applicant has no other source of information at its disposal to obtain the requested records.

17.12 The applicant has shown that without access to the General Conditions, it has no other way of establishing whether any valid reasons existed for the respondent to rely on clause 5.1 that purportedly afforded it the opportunity to cancel the agreement prematurely. Perhaps more pointedly the applicant is entitled to know whether the General Conditions as a matter of fact, afford the respondent the right to early cancellation of the agreement.

17.13 Without access to the General Conditions the applicant cannot properly consider whether the respondent could be liable. Access would allow the applicant to determine if the respondent could be exonerated and if not, what steps it should take to ensure that in future, it has superior quality and/or performance controls in place. The following passage from Van Niekerk at 848 F-G is apposite.

"*In the present case, there can be no doubt that having sight of the electricity department's report would assist the applicant in either proceeding with or abandoning his claim against the respondent. The report will disclose why the respondent considers that the report exonerated it of negligence. It may also reveal information which would advance the applicant's claim. Either way, disclosure will promote an early settlement of the dispute and bring the envisaged litigation, by settlement or abandonment, to a short, sharp end.*"

17.14 In confirming the exception of Van Niekerk, the court in Claase adopted the approach that the substantial advantage of element of need would be present where the contents of the report would be decisive in determining whether the requester has a cause of action. The crisp question in Claase lied therein that access to SAA's records would either confirm Claase's contentions that they had committed breach of contract, or they would support SAA's case in which event Claase undertook not to proceed with the proposed litigation.

17.15 Accordingly, access to the records would, as per Combrinck AJA (at paragraph 9) "bring a short and sharp end to the dispute". Applying this test to the instant matter, access to the General Conditions would reveal whether the respondent was indeed entitled to rely on clause 5.1 of the General Conditions. If so, that would bring to an end any hope of the applicant to institute a contractual action against the respondent. If not, the applicant may want to consider proceeding against the respondent.

17.16 Without access to the General Conditions the applicant cannot even attempt to set out the essence of its cause of action, let alone formulate and articulate a proper case against the respondent. If made to obtain the requested records through discovery, the applicant would be prejudiced because it would then be too late to broaden or narrow the scope of issues for trial as the case might be.

17.18 I find that the applicant has satisfied the requirements of Section 50 (1) of the act.

I accordingly make the following order:

1. The respondent is to furnish the applicant, within ten (10) days of receipt of this order by the respondent, with copies of:

1.1 all records of the Harmony Gold Mining Company Limited General Conditions of Purchase in use on 25 September 2003 ("The General Conditions").

1.2 All product complaint or quality reports in respect of Harmony Gold Mining Company Limited Contract VRB 206/0007/03 ("Reports")

2. The respondent is ordered to pay the costs of this application.

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B H MBHA
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	ADV C BESTER
INSTRUCTED BY	GARRATT MBUYISA NEALE INCORPORATED
COUNSEL FOR RESPONDENT	NO APPEARANCE
INSTRUCTED BY	
DATE OF HEARING	1 MARCH 2007
DATE OF JUDGMENT	28 MARCH 2007