




**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

**CASE NO: 2011/07680**

(1)	REPORTABLE: <b>YES</b>
(2)	OF INTEREST TO OTHER JUDGES: <b>YES</b>
(3)	REVISED. <b>YES 5/12/2011</b>
18/10/2011	
DATE	SIGNATURE

In the matter between:

**MAKATE, NKOSANA KENNETH**

Applicant/Plaintiff

and

**VODACOM (PTY) LTD**

Respondent/Defendant

---

**JUDGMENT**

---

**SPILG, J:**

**NATURE OF APPLICATION**

1. The Applicant, Mr Makate, instituted action proceedings against the Respondent, Vodacom (Pty) Ltd, for an order declaring that he had concluded a binding oral agreement with Vodacom represented by

Mr P Geissler, its Director of Product Development and Mr Muchenje, the head of its Finance Division. The Applicant also seeks an order for a statement and debatement of account together with payment of the amount to be found due.

2. The trial which had been set down for November 2010 was postponed pursuant to a formal application by the Applicant. The Applicant claimed that he was unable to proceed because the Respondent had failed to properly discover relevant documents necessitating a Rule 35(3) notice. The notice was served on 15 October 2010; it sought both discovery and inspection of documents (Rule 35(6) and (10) notices had previously been served). Subsequent to the postponement, and because not all the documents sought were produced, in May 2011 the Applicant brought an application under Rule 35(7) to compel the respondent to make further and better discovery of certain specified documents and to inspect them. The Rule 35(7) application was opposed and is now before me for adjudication.

## **BACKGROUND**

3. The issues in the main action are principally concerned with whether or not the Applicant was the originator of a product used by Vodacom known as "*Please Call Me*", and if so whether Vodacom had agreed to remunerate the Applicant. Vodacom effectively denies both these allegations in what can best be described as a rolled up plea to which objection has not been taken.
4. The Applicant faces formidable obstacles, not the least of which is documentation in the hand of Mr Alan Knott-Craig, the former CEO of Vodacom claiming that he originated the product. He is supported by Vodacom's Director of Product Development and Management, Mr Philip Geissler. If correct, the documentation is destructive of the Applicant's claim. Even if the Applicant can demonstrate that the product was not the

creation of Mr Knott-Craig a further difficulty is overcoming the defence that any rights attaching to a product originated by him during the course and scope of his employment with Vodacom belonged to it. In this regard the Applicant claims that he was employed in Finance and not in the Research and Development Department (“R&D”) of Vodacom. He also claimed that staff in R&D received additional remuneration for originating or devising products and that Mr Geissler had expressly agreed on behalf of Vodacom to remunerate him.

5. In his published biography “*Second is Nothing*”(with Eunice Afonse), Mr Knott-Craig wrote (at p154):

*“The Please Call Me idea happened by chance. Alan was leaning over the railing of the Vodacom building chatting to a colleague, Phil Geissler, when Phil pointed out one security guard trying to attract another’s attention, and because his buddy didn’t see him, the security guard called him on his cellphone. Alan immediately spoke to Leon about creating a Please Call Me service. Because the Please Call Me SMS sent was free, Vodacom made money by adding short advertisements just below the message, but the real money came from the return call. This concept generated hundreds of millions in revenue. By 2008, Vodacom generated 20 million Please Call Me requests daily”*

6. The colleague mentioned in the extract, Mr Geissler, sent an email to Mr Knott Craig on 25 December 2009 effectively corroborating the account. He wrote:

*“As discussed, I read latest book and agree in principle with the way Please Call Me was created on the 4<sup>th</sup> floor outside your office with two of Vodacom’s security guards playing a role of two ‘prepaid’ users without any credit on their phones communicating with each other.*

*The concept of 'Call Me' was refined inside your office minutes later and launched officially in late 2001.*

*I hope this helps with media queries.*

*Merry Christmas*

*Philip"*

7. By contrast the Applicant relies in his particulars of claim on a number of admitted documents emanating from Vodacom acknowledging that he had originated the product and undertaking to discuss remuneration. This appears from certain emails between Mr Muchenje, Mr Geissler or the Applicant, the salient portions of which read:

*"From: Lazarus Muchenje*

**Sent:** ... December 19, 2000

**To:** Kenneth Makate

**Cc:** ...; Philip Geissler; ...

**Subject:** Buzzer product

*Ken,*

*The company is going to introduce a product similar in concept to the buzzer project soon. So well done for coming up with the buzz idea.*

*We appreciate your innovative ideas*

**Lazarus Muchenje**

*Executive Head of Income Financial Control Division*

-----

***“From: Philip Geissler***  
***Sent: 26 December 2000***  
***To: Lazarus Muchenje; Kenneth Makate***  
***Subject: RE Buzzer product***

*I will keep you guys in the loop*

***Philip Geissler***  
***Director***  
***Product Development and Management***

-----

***“ From: Kenneth Makate***  
***Sent: ... January 18, 2001***  
***To: Philip Geissler; ...***  
***Subject: Buzzer product***  
*How are we doing on this .... Any developments so far (We still have to meet)*

Mr Geissler then requested the Applicant to provide a name for the service (*“What do you think we should call it? I need a name.”*) and the Applicant replied by suggesting the name *“Voda-Back”*, and added *“Lastly as per our verbal conversation, I think we should start talking about “REWARDS”, can you please notify me when can this be feasible.”* The response by Mr Geissler on 6 February 2001 reads:

*“ Thanks. I will pass this on to the Adv people.*

*As for rewards. All staff are expected to assist the company to achieve its goals. That is part of normal business. As for you and your assistance. Once the product is launched (and assuming its successful) I will speak to Alan. You have my word.*

*Thanks again”*

Presumably “Alan” is Alan Knott Craig who it is common cause wrote, or vetted, the passage in his biography set out earlier which details how he originated the idea, the authenticity of which was corroborated in Mr Geissler’s Christmas Day message mentioned earlier.

8. In an internal email sent a few days later on 9 February 2001 to all staff members, the authorship of which is admitted, Mr Geissler states:

*“ Vodacom is launching a new product this weekend (Sunday Times) that will hopefully stimulate call traffic on the network as well as assist some of our subscribers who do not have balance on their VodaGo accounts to be able to communicate with family and friends.*

*Kenneth Makate from our Finance Dept came up with this idea a few months ago and brought it to the Product Development Division. We wish to thank Kenneth for bringing his idea to our attention.*

*The way it works:*

*You send what is called a USSD message to another person asking the other person to call you back. The other person must have a Vodacom cellphone but can use any telephone to return the call.*

*The USSD command is \*140\*0821111111# (Send or Call)*

*A standard SMS will be sent to the other person asking that person to “Call Me”.*

*Please try it and let us know what you think of it*

*Regards*

*Philip Geissler*

*Director Product Development & Mgt”*

By way of explanation, USSD is an acronym for “*Unstructured Supplementary Service Data*”, a technology found in all GSM phones and networks.

9. In one of Vodacom’s magazines a half page was devoted to “*Call Me*” and included a photograph of the Applicant. The article, which forms part of the particulars of claim, repeated much of the contents of Mr Geissler’s internal email to staff.
10. Other documents produced by Vodacom reveal that on 22 January 2001 a confidential product development report on the “*Call Me*” service provided three possible revenue models ranging from a worst case to best case scenario. The document was circulated to senior management for approval. The Finance Director expressed his reservation that the product might change call patterns and that it was not possible to predict the extent to which the “*Call Me*” service would off-set potential losses. He was concerned that the pre-paid customer base was not clearly understood, that there could be a long term detrimental effect and advocated for a more cautious initial approach. The Finance Director recommended “*that a closed user group be established in order to determine changing calling patterns.*” He also attached a document which provided estimates of use by prepaid Vodacom subscribers.
11. At this stage there is no evidence indicating whether or not the subsequent internal email of Mr Geissler was intended to establish such a group. Nonetheless the desirability of monitoring the effect of the product and whether it’s revenue returns would off-set potential losses appears from the document itself, which anticipates the need for the following reporting requirements at paragraph 2.4:

“ *Number of the SMS-MT sent with a break down indicating the type of users i.e. pre-paid or post-paid (contract) users.*

*The list of subscribers that have made use of the service on a daily basis “*

Under the paragraph headed “*Interconnect*” it was noted that the current implementation does not cater for sending requests to any other Public Land Mobile Network (“*PLMN*”) except the Vodacom network and accordingly no direct impact on interconnect charges or business processes was envisaged in the original model.

SMS-MT is the acronym for a Mobile Terminated Short Message System. In the context of these passages it appears to refer, at least, to the number of text messages transmitted by a user on the Vodacom network to the cellphone of another Vodacom customer.

12. The case made out by the Applicant in his particulars of claim is that in about November 2000 he originated a product that would allow a prepaid airtime subscriber who had run out of airtime to send a free sms message to the person he wished to call requesting the recipient to return the call. This necessitated the creation of a line that would identify and permit the onward transmission through the system of a free sms message to the intended recipient who may or may not be a Vodacom subscriber. If the recipient then made a call back to the sender revenue would be generated in cases where the recipient was a Vodacom subscriber or where part of the call went through the Vodacom cell telephony system (commonly known as a switching fee). The Applicant alleges that he discussed this with senior Vodacom personnel.

The proposed service product was originally given the name “*Buzz*” then changed to “*Call Me*” and is now known as “*Please Call Me*”. The service will be referred to in this judgment as ‘*Call me*’. The Applicant contends that he spoke to, and concluded an agreement in relation to his concept with, Mr Muchenje who headed Vodacom’s Finance Division (and was his immediate superior) as well as the Director of Product Development, Mr



Geissler. He avers that subsequent to concluding the agreement the “*Call Me*” product was launched and generated income for Vodacom.

13. In partial response to Vodacom’s defence that any invention or idea of an employee during the course of employment enured to it, the Applicant averred that a Mr Pambos Soteriades, described as a manager in the employ of Vodacom, had subsequently patented the product in Greece and that Soteriades and Knott Craig are personally receiving financial reward from the product’s use. These averments were made in paragraph 38.4 of the reply and form part of Vodacom’s application to strike out. Irrespective of its status, Vodacom has not been afforded an opportunity to respond and its evidential value (even assuming that Vodacom could have filed a further affidavit) is questionable without corroboration.

## THE ISSUES

14. *Ms McManus*, on behalf of Vodacom resists the Rule 35(7) application on the following grounds;

- a. Vodacom does not have the documents identified in items 1 to 5, 12, 16 and 17 of the Rule 35(3) notice.

In broad terms these are documents which would reflect the number of calls induced by the “*Call Me*” SMS-MT text message and the revenue so generated as well as the contracts concluded with third parties regarding the utilisation of the “*Call Me*” product, Vodacom’s incentive policy for innovations, contracts between Schlumberger Sema (Pty) Ltd and Atos Origin regarding the “*Call Me*” concept and documentation served on ICASA (the mobile service regulator) regarding the “*Call Me*” concept prior to its launch;

- b. Item 13 is irrelevant. This is the KPMG Forensic Audit Report of August 2008;
- c. In any event these documents are not relevant to the main claim which is confined to the existence of the contract and its terms. The documents sought are only relevant to quantification which is a contingent claim dependant on the outcome of the main claim.

15. A number of other items referred to in the Rule 35(3) notice were not included in the Rule 35(7) application. Mr *Magano* on behalf of the Applicant indicated that these were excluded because Vodacom had undertaken to provide them but different documents were in fact forwarded. The items requested were therefore re-introduced.

## APPLICABLE PRINCIPLES

16. The contents of a discovery affidavit are regarded *prima facie* to be conclusive with regard to the existence of documents and accordingly a court will be reluctant to go behind the affidavit. See *Swissborough Diamond Mines v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 317E-G .

The courts require a sufficient degree of certainty that the documents exist (see *Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd* 1971 (4) SA 589 (T) and *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749G-H( *a degree of conviction approaching practical certainty*)).

This is hardly surprising. The consequence of a court order being *de facto* impossible to implement exposes the offending party to contempt proceedings for not procuring something he did not have in the first place and exposes the order to ridicule. Accordingly it is necessary to be

circumspect before directing production in the face of a denial of a document's existence.

17. Nonetheless it is also recognised that a party cannot rely on his denial under oath of a document's existence if, for instance, *mala fides* can be shown (*Swissborough* at 321E), or the discovery affidavit itself, a document referred to in discovery, the pleadings or an admission evidences the document's existence to the requisite degree ( *Federal Wine* at 749G-H). Similarly statutory or professional obligations, such as tax legislation or basic accounting requirements , regarding the retention of the records may also suffice if no acceptable explanation is provided for their non-production.
18. Where *mala fides* is raised then the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G apply. It remains open for an applicant "to seek a referral of the dispute of fact for oral evidence or even trial". For both propositions see *Swissborough* at 321E.
19. The relevancy of a document may also involve determining whether the ambit of the issues in dispute (including the legitimate testing of credibility on a non-collateral issue or the existence of other pertinent documents) is misconceived by the respondent. In such a case the existence of the document is already established and the enquiry is more concerned with a legal determination of whether the extent of the issues in dispute has been properly comprehended. The consequence is that the respondent's say so under oath does not necessarily play as dominant a role (However compare *Marais v Lombard* 1958 (4) SA 224 (E) at 227G which holds that the respondent's affidavit remains *prima facie* conclusive . *Marais* was mentioned by Joffe J in *Swissborough* at 317E-F to support the general proposition regarding the conclusive nature of a discovery affidavit).

In any event, it is open for the court to scrutinise the document in order to determine relevance and impose suitable safeguards against unnecessary public disclosure where issues of confidentiality arise.

20. There are two more issues that require consideration. The first is to determine the adequacy of the identification of the desired documents in the Rule 35(3) notice where the document sought is not the source document but is an extrapolation of electronically preserved computer data on a disc through a filtering, or series of filtering, processes.

The other is whether it is sufficient to exclude documents on the grounds that they are not now relevant since they do not arise at the liability phase but only at a resumed hearing should the claimant party be successful on the merits of the case: In particular whether the other party should have discovery of documents that may only now be relevant for purposes of settlement negotiations. These issues will be dealt with when considering the specific document to which objection is taken on the grounds that they are only relevant to a contingent issue.

21. I proceed to consider each of the documents which are the subject of the Rule 35(7) notice by reference to their subject matter.

## **DOCUMENTS RELEVANT TO QUANTUM ONLY**

22. The Applicant requires discovery and inspection of the following documents;

- a. the annual records reflecting all *"Please Call Me"* product calls since the beginning of 2000 to date;
- b. the annual records reflecting the total number of calls made in response to the *"Please Call Me"* message (ie the *"induced calls"*)

through the Respondent's facilities since the beginning of 2000 to date;

- c. the documents reflecting the annual revenue generated by the Respondent as a result of the induced calls, from the beginning of 2000 to date;
- d. a list of all contracts entered into by the Respondent's with third parties which regulate the use of the "*Please Call Me*" product by third parties, indicating their names and the contract date;
- e. documents reflecting the Respondent's policy for incentivising its employees for new ideas and inventions

23. The Applicant also requested copies of the last mentioned contracts and an electronic copy of the annual records mentioned earlier. These requests properly form the subject the Applicant's Rule 35(10). Although the point was not taken, it would be more correct to have requested discovery of each of the contracts, as a list might not have been maintained or the computer software may not be programmed to extract such a list.

24. The Respondent raises two objections. The first is a principled one, namely that discovery relevant only to an accounting is premature since that part of the claim is contingent upon a court first pronouncing in favour of the Applicant on whether he was the originator and whether there was an express (or possibly implied) agreement as to remuneration.

25. Ms McManus submits that documents relevant to an accounting need not be discovered until the question of liability is first resolved and relies on *Continental Ore Construction v Highveld Steel and Vanadium Corp Ltd* 1971 (4) SA 589 (W). In that case the question before the court was

whether the ordinary principles that discovery must be made in respect of every relevant issue pleaded, even where the issue of the quantum of the claim whether for profits or arising from damages, either under contract or delict, is contingent upon the plaintiff first proving the existence of the disputed contract or proving a basis for attaching liability upon the defendant. The point arose because it was evident that the issue regarding the existence of the contract would be separated and determined first while the defendant contended that the documentation sought was highly confidential relating to its business relationships and would, if revealed, give the plaintiff a competitive advantage.

26. In *Continental Ore* Margo J after referring to a number of earlier South African cases indicated that Rule 35(7) had expressly been modified to afford the court a discretion to order discovery in a particular case (at 594H) and proceeded to consider cases that had dealt with its application. The court however made it clear at p595E that deferment of discovery “*will only be justified in the exceptional case, where the Court will not oblige the defendant to contest the issue on which the discovery is claimed until the plaintiff has succeeded on the primary issue*”.

27. The court in *Continental Ore* then considered the appropriateness of adopting English authority on deferring discovery in relation to a contingent issue, and at 595 H-596A the following passage by Willmer LJ in *Buchanan-Michaelson v Rubenstein and Others* (1965) 1 WLR 390 (CA) at 384D-E was cited, a case where the Court of Appeal of its own motion deferred discovery;

*"The documents to which the application relates are documents which, as I see it, would be relevant only to the amount which the plaintiff might be entitled to recover if, but only if, he proves the contract which he has sought to set up. Only if he proves that contract will he show that the defendants... are accountable parties."*

28. A reading of the subsequent passages in *Continental Ore* indicates that the issue is case specific and involve considerations such as the prejudicial nature of the information if it is revealed to the Applicant. Accordingly one cannot with respect read the earlier passage at p595E of the judgment, which I have extracted, as an unqualified statement in every case where a contingent and severable issue for later determination arises.
29. There are of course other considerations such as immersing a litigant in an expensive discovery process where innumerable documents would be required. By the same token it should not be overlooked that court procedures are not there only to secure the resolution of disputes through a judgment pronounced by a court of law after hearing evidence. On the contrary the majority of cases are resolved through settlement and Rule 37(6) (c), relating to the holding of a pre-trial conference, expressly requires the parties to at least discuss the possibility of settlement after pleadings have closed and discovery made.

The settlement process would clearly be inhibited by precluding a genuine settlement if one of the parties withheld documents peculiarly within its possession which are not necessarily confidential but which allow the other party to fairly appreciate the value of his claim if successful. It would be wrong for court procedures to encourage settlement if one of the parties is entitled to withhold material information for an informed decision to be made on the advisability of settling or not and on what basis. The Rules did not intend that a party settles blind while the other knows exactly what the downside is if it loses on the merits. It also may encourage technical defences to the merits and force settlements where one of the parties has the financial resources to out-litigate the other. In short the question of whether or not discovery should be deferred in exceptional circumstances has regard to broader considerations such as those that may impact on the possibility of settlement and what bests serves the interests of justice in a particular case.

30. A court must however remain alert to potential abuse of the discovery process. This may arise if the procedure is utilised *in terrorem* to debilitate a respondent by requiring it to incur exorbitant expense and tie up large numbers of qualified staff and lawyers. The greater use of electronic documentation (“e-documents”) whether as a means of communication (such as e-mails) or as a means of storing information (such as computer databases or central servers) exacerbates the risk of potential abuse. The issue has received the attention of many jurisdictions and has spawned specialist in the field of discovery (or disclosure) of electronic material. Lord Jackson in his *Review of Civil Litigation Costs (Preliminary Report)* of May 2009 vol 2 at para 1.1 (which was prepared at the request of the Master of the Rolls) summed it up as follows:

*“the existence of a vast mass of electronic documents presents an acute dilemma for the civil justice system. On the one hand, full disclosure of all electronic material may be of even greater assistance to the court in arriving at the truth than old style discovery of documents. On the other hand, the process of retrieving, reviewing and disclosing electronic material can be prodigiously expensive. Certain short cuts are available, such as the use of keyword searches. However, the sheer volume of potentially disclosable electronic material which is now generated in the course of a project means that disclosure is now becoming an even more expensive process than formerly.”*

31. In the present case the main issues relate, firstly to whether the Applicant is the originator of the product or the idea for the product and if so whether there was an undertaking by Vodacom to remunerate him either on a specific basis based on an implied or tacit term of reasonable remuneration to a person in the position of the Applicant employed in that type of industry (compare *Middleton v Carr* 1949(2) SA 384 (A) at 386 last



para; *N Goodwin Design (Pty) Ltd v Moscak* 1992(1) SA 154 (C) at 166E-G and *Genac Properties (JHB) Pty Ltd v NEC Administrators CC* 1992(1) SA 556 (A) at 577G-578C), or whether he was not entitled to any additional remuneration because he was working for Vodacom at the time and as a result, any innovation on his part (irrespective of the fact that he happened to work in accounts) immediately became the property of the company which employed him.

32. Earlier I set out the conflicting versions of how Knott-Craig, supported by Geissler, claimed to have originated the product while Vodacom's own internal documentation emanating *inter alia* from Geissler gives credit to the Applicant. This is relevant to determine whether the discovery of documentation regarding the quantum of the claim ought to be deferred because the case falls within the type of exceptional situation alluded to in *Continental Ore*. I am satisfied by reference to these admitted documents (albeit that their contents are not admitted by Vodacom) that the claim is *bona fide* made and that the Applicant is not seeking to abuse the discovery process. Moreover the possibility of settling the case before the hearing cannot be ruled out, even if from a respondent's perspective it is precipitated by reason of the production. This is not a case where considerable cost and effort may have to be incurred in a manifestly pointless exercise.
33. The second issue raised by Vodacom in regard to this category of documents (ie. those relevant only to *quantum*) is that it does not have these documents. This raises the question of the veracity of the Vodacom's denial and whether the court can go behind it with certainty.
34. There are a number of difficulties in accepting at face value the contents of the respondent's affidavit denying the existence of the documentation sought. The first is that the deponent fails to qualify himself as having sufficient knowledge of the documentation possessed by Vodacom, bearing in mind that the documentation may only be in electronic format.

On its own that would be insufficient. However it is apparent from paragraph 2.4 of the confidential product development report of 22 January 2001 (see para [11] above) that Vodacom's executives considered that they could extract from its database a "*list of subscribers that have made use of the service on a daily basis*" with a breakdown of whether the user was on a pre-paid or term contract. It is evident that the dedicated USSD command exclusive to initiating a "*Call Me*" request (\*140\*0821111111# - see para [8] above) would be capable of ready monitoring and that each sms utilising that dedicated code with at least the time of despatch, and to whom directed, would be retained on Vodacom's database and capable of ready extraction.

This does not require expertise in the field. One's own cellphone account and an elementary understanding of the data it contains suffice. Accordingly I am satisfied that at least one key component of the documentation sought is readily accessible and stored on Vodacom's database and, subject to a consideration of whether it constitutes a document for purposes of Rule 35, must be discovered

35. The question of whether Vodacom's database can extrapolate the calls made by their subscriber's in response to a "*Call Me*" sms is more problematic based on what may be perceived to be "common knowledge" to which a judicial officer is confined, whatever his or her specialised knowledge is perceived to be.

It is evident that at least the identity of the cellphone number to which the initiating sms was directed would be known and that again constitutes common knowledge by reference to cellphone service provider's monthly statement to a subscriber. The question whether, and if so what, assumptions are made regarding which return call can be attributed to the initiating sms is not self evident. At the least one would expect an assumption to be made by reference to a time limit within which the return call is expected to be made. Nonetheless whether the basis is determined

by reference to data that can be extracted or is an actuarial estimate is not known and it would be dangerous to speculate. The information is peculiarly within the knowledge of Vodacom although the ability to monitor in an informed way remains evident from the documentation referred to in the previous paragraph.

36. In *Swissborough* the court at p 321G accepted that in an appropriate case an applicant could seek a referral of the dispute to oral evidence or to a separate trial. Caution needs to be exercised before an issue relating to discovery is referred to the hearing of oral evidence. A court may wish to balance the expedition of allowing the existence or otherwise of the document to be tested during the main trial against the prejudice of being unable to properly prepare for the trial itself. The present case will not allow for that process since the main hearing will be confined to the merits of the claim and in any event it is in my view in the interests of the proper and expeditious finalisation of the case that the question of the extent of the data that can be retrieved is determined where already one of its elements (ie. the number of initiating smses, when made and to whom) are readily accessible.

37. There are other documents sought which fall within the same category where serious doubt exists as to the veracity of Vodacom's denial regarding whether the documentation exists. In particular it is difficult to comprehend why documentation which did exist has been lost or destroyed when Vodacom is an electronic documentation oriented enterprise and one would expect communications and documentation to have originated on desktop computers within Vodacom. There appears to be no sound reason for the removal of such files, nor is the issue addressed at all.

One also gets the distinct impression that the deponent has concentrated exclusively on the existence or otherwise of a hardcopy of the document

and has either not considered looking for the originating electronic document or considers that the request does not cover it.

I accordingly consider it necessary to consider whether an electronic document is covered by the provisions of the Rule 35 discovery process. In this regard the key provision is Rule 35(15). It was amended together with a number of other sub-rules in 1987 (Government Notice 2164 of 27 November 1987) to require the discovery of “tape recordings” in addition to documents. Rule 35(15) identified a tape recording for the specific purposes of both Rules 35 and 38 to include (ie. not necessarily limited to but at least forming part of the same *genus* as) “ *a sound track, film, magnetic tape, record or any other material on which visual images, sound or other information can be recorded.* It is evident that a hard disc drive or even a flashstick would constitute material on which information can be recorded.

38. It may be contended that the manner in which the Rule was amended limited the scope of what could constitute a document, because it introduced the term tape recording and only extended its meaning, as opposed to simply extending the meaning of a “*document*” to incorporate all these other forms or means of recordal. In *Le Roux v Hon Magistrate Mr Viana* [2007] SCA 173 (RSA), the SCA pointed out at para [10] that the “*Concise Oxford English Dictionary (10<sup>th</sup> edition revised) defines ..... a document as ‘a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record’.*

To the extent that the amendment to Rule 35 (1) in 1987 dealt with advances in the storage of data it did so by reference to the term “*tape recording*” instead. While this at first sight may be a distinguishing feature of *Le Roux*, which was called on to interpret the meaning of the word “*document*” in section 69(3) of the Insolvency Act 24 of 1936, as pointed out by Mlambo AJA this clearly is the modern understanding of the term used by the legislature (or in this case, the delegated power) and fits within

the purpose and object of the use of the term then adopted. Certainly electronic data recordal fits within the term “*tape recording*” in its extended Rule 35(15) form.

In any event section 12 of the Electronic Communications and Transactions Act 25 of 2002 provides that insofar as a data message is concerned, such a message, provided certain requirements are satisfied, would constitute a document for the purposes of Rule 35. Section 12 reads:

*“A requirement in law that a document or information must be in writing is met if the document or information is-*

- (a) in the form of a data message; and*
- (b) accessible in a manner usable for subsequent reference.”*

See also sections 14, 16 and 17 of that Act. See also *Le Roux* at ftn 1 to para [15].

39. It is necessary to add that information stored on a computer’s hard drive or remote server is extracted by means of commands which can either limit the data by means of a search request for corresponding data or through a filter process (most commonly found in basic off- the shelf personal use accounting packages) by reference to date, subscriber and innumerable other programmed criteria. I am satisfied that it still retains the characteristic of a document or tape recording, the filtering or search function simply limiting the amount of data retrieved into a relevant form for its purpose.
40. I am accordingly satisfied that an e-document, ie. electronic material whether it be in the form of a communication or stored data that is retrievable through a filtering process or a data search, is discoverable under Rule 35 procedures. Even if it were not so it would be open to utilise the provisions of Rule 35 (7) in order to ensure that the discovery process achieves its objective in the electronic age. The caution expressed earlier about the need to ensure that discovery remains within acceptable limits,

having regard to the volume of data captured and retained by electronic means has received consideration in other jurisdictions in the form of specific discovery procedures for electronic material. I have attempted to be cognisant of these concerns. In the present case they do not arise.

41. I have considered that a referral to oral evidence of certain defined issues is appropriate. I also consider that the other usual limiting provisions contained in what has come to be referred to as the *Metallurgical* type order are unnecessary.

## **KPMG FORENSIC AUDIT**

42. I considered the document and am of the view that only the contents of paragraphs 4. 5 and 4.7 are relevant having regard to a matter in question as determined by the pleadings.

## **ORDER**

43. On 23 September 2011 I consequently made the following order;

*1. The Defendant is directed to make further discovery within 15 days of:*

*a. The records reflecting all "Please Call Me" product calls since the beginning of 2000 to date;*

*b. Paragraph 4.5 and 4.7 , being pages 25 to 37 and 39 to 49 (but excluding the contents of paragraph 4.8 on the last mentioned page) of KPMG's Forensic Investigation Report dated 3 November 2008;*

- c. *The contract between Vodacom and Cellfind;*
- d. *The signed and approved scorecard and Performance agreement of the Plaintiff during 1999 and 2000.*

2. *The issues of;*

- a. *whether there exists a record that can be extrapolated from the defendant's data base of ;*
  - i. *the total number of calls made annually in response to the "Please Call Me" message (ie the "induced calls") through the Defendant's facilities since the beginning of 2000 to date;*
  - ii. *the annual revenue generated by the Defendant as a result of the induced calls, from the beginning of 2000 to date;*
- b. *whether any written contracts have been entered into by the Defendant with third parties which regulate the use of the "Please Call Me" product by third parties, and if so with whom and when in each instance;*
- c. *whether the following documents exist for the period 1999 to 2000;*
  - i. *the Key Performance Area in respect of the Plaintiff;*
  - ii. *the Key Performance Incentive in respect of the Plaintiff;*
  - iii. *the Incentive Bonus Targets in respect of the Plaintiff;*

*iv. the Key Performance Incentive in respect of the Product Development Department for managerial level employees;*

*v. the Key Performance Incentive in respect of the Product Development Department for non-managerial level employees;*

*(d) whether documents exist reflecting any policy for incentivising the defendant's employees for new ideas and inventions;*

*(e) whether any written contract governs the development, maintenance and upgrade of the "Please Call Me" concept between Schlumberger Sema (Pty) Ltd and Atos Origin*

*are referred to oral evidence.*

- 3. The evidence shall be that of any witness whom the parties or either of them may elect to call with rights of subpoena and production of documents under subpoena.*
- 4. The costs of the application are reserved for determination after the hearing of oral evidence.*

---

DATE OF HEARING:	24/08/2011
DATE OF ORDER:	23/10/2011
DATE OF JUDGMENT:	18/11/2011
DATE REVISED:	5/12/2011



## LEGAL REPRESENTATIVES:

FOR APPLICANT:

ADV F MAGANO

R MASILO ATTORNEYS

FOR RESPONDENT:

ADV A McMANUS

LESLIE COHEN AND ASSOCIATES