



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/07680

In the matter between:

MAKATE,

Applicant/Plaintiff

and

VODACOM (Pty) LTD

Respondent/Defendant

SUMMARY

SPILG, J:

CIVIL PROCEDURE: BETTER DISCOVERY: RULE 35(7)

- *When court will go behind respondent's discovery affidavit;*
- *Document sought is not necessarily a complete source document but may require extrapolation of electronically preserved computer data through filtering or search processes;*
- *Respondent's documents reveal existence of monitoring the utilisation of the product that applicant claims he created and for which he seeks monetary compensation;*
- *If successful claim could run into millions. However uncertainty if certain data can be extrapolated- This part of application referred to*

oral evidence applying Swissborough v Gvt RSA 1999 (2) SA 279 (T) at 317E-G at 321E and G

- *Respondent argued that by separating issue of liability from quantum for later determination applicant not entitled to documents until after decision on merits. Generally a number of competing factors may have to be considered; including;*
 - - a. *documents may remain relevant for settlement purposes ; see Rule 37(6)(c) and its purpose;*
 - b. *whether documents may provide the applicant with highly confidential information in the Continental Ore case type situation;*
 - c. *whether it will immerses a litigant in an unnecessarily expensive discovery process or is otherwise used in terrorem for an ulterior purpose; eg. to out-litigate;*
 - d. *Caution expressed having regard to the volume of data captured and retained by electronic means as it exacerbates the risk for potential abuse. See Lord Jackson's Review of Civil Litigation Costs and developments regarding e-discovery in other jurisdictions*

ELECTRONIC DOCUMENT: DISCOVERY UNDER RULE 35(7)

- *An e-document is discoverable under Rule 35- see extended meaning under Rule 35(15) and global extension to definition of "document" by section 12 of Electronic Communications and Transactions Act 25 of 2002;*
- *An e-document covers electronic material, whether in the form of a communication or stored data, that is retrieved through a filtering process or a data search. These processes simply limit the amount of data, ie. documentation, actually extracted but the resultant data has not changed its characteristic from being a document under one of its defined meanings.*