**IN THE SOUTH GAUTENG HIGH COURT**

**JOHANNESBURG**

**Case No. 08/36580**

In the matter between:

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| **REPLICATION TECHNOLOGY GROUP** | First Applicant |
| **TEPERSON, SHIMON** | Second Applicant |
| **AZEVEDO, JOAQUIM TOPA** | Third Applicant |
| **PILLAY, KAMLESH** | Fourth Applicant |
| **TEPERSON, POYURS** | Fifth Applicant |
| **SHEIN, MERVYN** | Sixth Applicant |

**and**

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| **GALLO AFRICA LIMITED** | Respondent |

*In re:*

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| **GALLO AFRICA LIMITED** | Applicant |

and

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| **REPLICATION TECHNOLOGY GROUP** | First Respondent |
| **TEPERSON, SHIMON** | Second Respondent |
| **AZEVEDO, JOAQUIM TOPA** | Third Respondent |
| **PILLAY, KAMLESH** | Fourth Respondent |
| **TEPERSON, POYURS** | Fifth Respondent |
| **SHEIN, MERVYN** | Sixth Respondent |

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**JUDGMENT**

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**<u>Malan J</u>:**

[1] The respondent (Gallo) has launched contempt proceedings against the applicants. In support of its application it wants to use a number of documents and certain information derived from those documents, all of which came to Gallo's knowledge in consequence of the applicants' having disclosed them on discovery during an arbitration which preceded the present application. The applicants seek an interdict prohibiting Gallo from using those documents in the contempt proceedings and from using any information derived from them. The applicants, in addition, seek the striking out of all such documents and information from the founding papers in the contempt application. The parties have been involved in previous litigation in different capacities. The directors of the first applicant are the second to sixth applicants. Gallo is the applicant in the contempt application and the applicants are the respondents. Gallo is the claimant in the arbitration and the first applicant the defendant.

[2] On 5 April 2002 the first applicant and Gallo concluded an agreement of sale in terms whereof Gallo acquired the first applicant's shareholding in CDT, a company. Pursuant to the sale CDT became a wholly owned subsidiary of Gallo. Subsequently, a dispute developed between the parties regarding a restraint of trade provision in the sale agreement that led to an application in the High Court in which Gallo was the applicant and first applicant in this application, Shimon Henry Teperson and Next Video (Pty) Ltd were the

respondents. Gallo relies on three court orders in the contempt application, all of which emanate from these proceedings. The court orders were granted on 6 November 2007, 4 December 2007 and 20 February 2008 respectively. During August 2007 the first applicant launched proceedings against Gallo before the Competition Tribunal of South Africa. Those proceedings are not directly relevant in this application. During July 2008 Gallo launched the arbitration proceedings against the first applicant pursuant to clause 12 of the sale agreement. It is in the course of discovery in this arbitration that Gallo obtained the documents relied upon in the contempt application.

[3] It is common cause between the parties that the issues raised in the strike out application are essentially points of law. The central issue is whether Gallo is entitled to use the arbitration documents in the contempt application. Gallo contends:[1]

‘3.3.2 There is no statutory rule or common law in South Africa which supports the respondents' contention that documents disclosed pursuant to discovery in litigation be used only in the proceedings in which those documents were discovered.’

[4] The contempt application was launched, its foundation being solely information derived from documentation obtained by Gallo from the first

[1] Para 3.3.2 Answering Affidavit and cf para 6.21.1.

applicant through the discovery process in the arbitration proceedings.[2] The arbitration documents are essential for Gallo to prove a case of contempt against the first applicant. Without that evidence, the contempt application may well fail.[3]

[5] Discovery is a procedure whereby a party to an action may ascertain what documents and tape recordings relating to the matter in issue is in the possession of the opponent. A litigant is entitled to have disclosed to him the items discovered and to inspect and make copies of them.[4] It was stated in

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[2] Answering Affidavit para 6.1.

[3] Answering Affidavit para 3.2.5 at 177 and para 4.4 at 180.

[4] *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa* 4ed (1997) by the late Louis de Villiers van Winsen, Andries Charl Cilliers and Cheryl Loots and edited by Mervyn Dendy 582. The policy considerations underlying discovery has been described in *Sunderland Steamship P and I Association v Gatoil International (The Lorenzo Halcoussi)* [1988] 1 Lloyd's Rep 180 (QB) 184: 'Our law ... recognizes that proper mutual discovery in litigation and arbitration is in the public interest in that it promotes settlements; it reduces [the chances of] a party being taken by surprise; and enables the Judge to decide the case in the light of contemporary documentary material which is often more valuable than the oral testimony. On the other hand, our law recognizes that no sensible civil justice system can be organized on the basis that time, money and inconvenience [are] irrelevant. Nevertheless, the scope of discovery ...is wide. It extends to documents having only a minor or peripheral bearing on the issues, and to documents which may not constitute evidence but which may fairly lead to an enquiry relevant to the issues. But a Court may, of course, refuse to order discovery to the extent that the discovery is not necessary for fairly disposing of the matter, and to the extent that it would be oppressive to order it' (cited by David Butler and Eyvind Finsen *Arbitration in South Africa Law and Practice* (1993) 143).

*Rellams (Pty) Ltd v James Brown and Hamer Ltd*[5] that '[g]reat weight … is given to these affidavits and they should not be drawn in so loose a manner as to leave any avenue of escape.' In *Van Vuuren v Agricura Laboratoria (Edms) Bpk*[6] the court remarked that '[b]lootleggingsverklarings is belangrike dokumente en die voorlegger moet bewustelik die nodige inligting verstrek welwetende dat hy met 'n plegtige verlyding van 'n belangrike document te make het wanneer die eedsverklaring gedoen word.' Moreover, in *Ferreira v Endley*[7] the following was stated: 'Discovery affidavits are very important documents in any trial and the party requesting discovery is entitled in terms of the Rules to have a full and complete discovery on oath.' South African law has often followed English law in matters concerning discovery. In *Lenz Township Co (Pty) Ltd v Munnick and Others*,[8] for example, it was stated:

> 'In evolving principles of privilege and freedom from discovery or production, our Courts have over the years with advantage been constrained to adopt principles laid down in English decisions on the question.'

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[5] 1983 (1) SA 556 (N) at 558 E. Also *Maxwell and Another v Rosenberg & Others* 1927 WLD 1 at 6.

[6] 1974 (2) SA 324 (NC) 327 H.

[7] 1966 (3) SA 618 (EC) 621 CD.

[8] 1959 (4) SA 567 (T) at 569 AB. See also *General Accident Fire and Life Assurance Corporation Limited v Goldberg* 1912 TPD 494 500; *Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) SA 556 (N) 563H – 564 A; *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) 744 G ff; *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W) 1099 AB.

[6] The applicants rely primarily on *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* contending that Schutz AJ accepted the English law notion of an implied undertaking by a litigant to whom discovery is made not to use the documents disclosed in other proceedings or for an ulterior purpose. It follows, they contend, that a similar rule also obtains in arbitration proceedings. Schutz AJ remarked:[9]

'The facts in *Riddick v Thames Board Mills Ltd* (1977) 3 All ER 677 (CA) do not require mention. However, this case also mentions the 'balancing act' which must be performed between competing public interests (*per* Lord DENNING MR at 687D - F). After holding that documents obtained by means of discovery should not be allowed to be used for any ulterior or alien purpose, such as bringing a libel action, Lord DENNING pointed out that were the law otherwise an order for discovery would be counter productive:

"In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed."

(At 687 i f.)

I agree with that statement.'

[7] *Crown Cork* dealt with a court's discretion to impose appropriate limits on the inspection of confidential documents during discovery, and the

[9] 1980 (3) SA 1093 (W) 1098 BE.

competing interests of litigants and public policy:[10] 'All that is in issue is whether there should be some measure of control exercised over inspecting and copying. Confidentially is the only ground of objection. The documents are admittedly relevant and no question of privilege arises.' The court recognised the inherent importance of the discovery process as one of the cornerstones of litigation and emphasized the importance and role of discovery.[11] It said:[12]

> 'It will be seen at once that two principles are in conflict. The one relied upon by the second plaintiff is that it has property in confidential documents, confidential in the sense that they are not the subjects of public knowledge and such that a reasonable businessman might wish to keep to himself ... and that merely because there is an action in progress they should not be available to a competitor for possible misuse, but that its proprietary rights should be protected. The other principle, relied upon by the defendants, is that no limits should be placed upon their procedural rights in terms of the Rules to make full use of the relevant documents in the second plaintiff's possession in order to present their defence without being hampered at all. It is rightly emphasised how important the steps associated with discovery –trial step. It is the pre-trial on the documentary evidence.'

Schutz AJ approved of English authority where the following was said:[13] 'The object of mutual discovery is to give each party before trial all documentary material of the other party so that he can consider its effect on his own case and his opponent's case, and decide how to carry on his proceeding or

[10] At 1095 EF.

[11] At 1095 H.

[12] At 1095 FG.

[13] *Church of Scientology of California v Department of Health and Social Security* [1979] 1 WLR 723 (CA) 733 CE.

whether them on at all ... Another object is to enable each party to put before the Court all relevant documentary evidence, and it may be oral evidence indicated by the documents ...' He continued that,[14] 'the public interest demands that the truth be discovered' and referred with approval to *Riddick v Thames Board Mills Ltd*[15] where Lord Denning said that '[t]he reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, ie in making full discovery.'[16] Schutz AJ[17] cited *Halcon International Inc v The Shell Transport and Trading Co and Others*[18] and said:[19]

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[14] At 1096 AB.

[15] [1977] 3 All ER 677 (CA) at 678.

[16] At 687g-8a Lord Denning added: 'The [document] was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further that the course of justice requires. The courts should, therefore, not allow the other party, or anyone else, to use the documents for an ulterior or alien purpose. Otherwise, the courts themselves would be doing injustice ... In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, or for bringing a libel action, or for any other alien purpose.'

[17] At 1098 E.

[18] (1997) RPC 79 121.

‘It is also unnecessary to deal with *Halcon International Inc* ... save to quote the following useful summary (*per* Megaw LJ at 121):

“But it is in general wrong that one who is thus compelled by law to produce documents for purposes of particular proceedings should be in peril of having these documents used by the other party for some purpose other than the purpose of those particular legal proceedings and, in particular, that they should be made available to third parties who may use them to the detriment of the party who has produced them on discovery.”‘

[8] The arbitrator in the arbitration between the parties has rights of inspection of any and all the books and records of either party to any dispute.[20] Mr De Bruyn on behalf of the applicants submitted that any rules of a procedural nature, whether Rules of Court or rules of discovery in an arbitration, must comply with the Constitution.[21] Rules of discovery constitute an inroad into an individual and a corporation’s right to privacy in terms of s 14 of the Constitution. It was further suggested that the judgment in *Crown Cork*, although predating the Constitution, accords with the protection in s 35(5) providing that ‘[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.’

[19] At 1098 EG.

[20] Clause 12.2.2 of the sale agreement.

[21] *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC) para 16.

[9] Discussing the position in litigation in England, Paul Matthews and Hodge M Malek[22] remark:

'The courts have long since recognised that any party on whom a list of documents is served or to whom documents are produced on discovery or pursuant to an order of court impliedly undertakes to the court that he will not use them or any information derived from them for a collateral or ulterior purpose, without the leave of the court or consent of the party providing such discovery. This is part of the wider principle that "…private information obtained under compulsory powers cannot be used for purposes other than those for which the powers were conferred."'

The rationale for the imposition of the implied undertaking is the protection of privacy:[23] 'Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking has been to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party's

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[22] *Disclosure* (2007) at 451. The latter citation is from *Marcel v Metropolitan Police Commissioner* [1992] Ch 225 at 237 (and see *Esso Australia Resources Ltd v Plowman* [1995] HCA 19; (1995) 128 ALR 391; (1995) 69 ALJR 404; (1995) 183 CLR 10 paras 41-2). The implied undertaking was first clearly articulated in *Alterskye v Scott* [1948] 1 All ER 469 (Ch D) 470 F ff. The *Civil Procedure Rules 1998/3132 Part 31* (see *Sweet and Maxwell United Kingdom Law in Force* (1998) provide in Rule 31.22 '(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where – (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public; (b) the court gives permission; or (c) the party who disclosed the document and the person to whom the document belongs agree.'

[23] Matthews and Malek 453.

documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings ...' However, it is also suggested that the implied undertaking is owed not only to the court but also to the party providing discovery since the latter is entitled to release his opponent from this undertaking by consenting to a collateral use. A further basis for the rule is the promotion of full discovery. The interests of the proper administration of justice require that there should be no disincentive to full and frank discovery.[24] The learned authors continue:[25]

> 'Usually, if not invariably, the use of documents disclosed in one action for the purposes of another action will be a collateral or ulterior purpose, even where the parties to both actions are identical and where the causes of action are identical. If a party begins an action based upon documents disclosed in other proceedings, the action is liable to be struck out as an abuse of the process of the Court.'

[10] An exception would occur where documents disclosed in one action are used in separate proceedings, the sole purpose of the separate proceedings being the furtherance of the party's case in the original action.[26] Proceedings for contempt of court in breaching an order or an undertaking are not

[24] Matthews and Malek 454.

[25] At 459.

[26] Matthews and Malek 459.

‘collateral’ to the action in which they are launched.[27] In *Dadourian Group International Inc v Simms*[28] it was remarked:

’12. To clear one point out of the way at the start, the use by DGI of these transcripts of cross-examination would not involve any departure from the undertaking every litigant gives not to use documents obtained in one set of proceedings for the purposes of some other proceedings or otherwise for a collateral purpose. In *Crest Homes PLC v Marks* [1987] AC 829, the House of Lords confirmed that the proper policing and enforcement of observance of orders made in an action is an integral part of the action, just like any other step taken by the claimant in the proper prosecution of his claim. Accordingly proceedings for contempt of court are not collateral to the action in which they were launched. It follows that DGI did not need a release from its undertaking not to use documents obtained in the action for a collateral purpose. A release from this undertaking may require special circumstances: see per Lord Oliver in *Crest Homes plc v Marks* at page 860. The reason why DGI needed the permission of the court was that, as a term of the court’s orders for cross-examination of Mr and Mrs Dadourian, DGI gave an undertaking to the court that it would not use the transcripts of evidence in any way without the permission of the court.’

In his speech to the House of Lords Lord Oliver of Aylmerton in *Crest Homes plc v Marks and others*[29] said:

‘The purpose of an *Anton Piller* order is, primarily, the preservation of evidence which might otherwise be removed, destroyed or concealed but it operates, of course, also as an order for discovery in advance of pleadings. It is clearly established and has recently been affirmed in this House that a solicitor who, in the course of discovery in an action, obtains possession of copies of documents

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[27] Matthews and Malek 459.

[28] [2006] EWCA 1745.

[29] [1987] 1 AC 829 (HL) 853 G ff.

belonging to his client's adversary gives an implied undertaking to the court not to use that material nor to allow it to be used for any purpose other than the proper conduct of that action on behalf of his client ... It must not be used for any "collateral or ulterior" purpose ... Thus, for instance, to use a document obtained on discovery in one action as the foundation for a claim in a different and wholly unrelated proceeding would be a clear breach of the implied undertaking ... It has recently been held ... and this must ... clearly be right – that the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it be embodied in a copy or stored in the mind. But the implied undertaking is one which is given to the court ordering discovery and it is clear and is not disputed by the appellants that it can, in appropriate circumstances, be released or modified by the court.'

His Lordship continued:[30]

'It has been submitted that proceedings for contempt of court are always to be regarded, for the purpose of the implied undertaking on discovery, as "collateral" to the action in which they are launched, so that even if the 1985 order had been made in the 1984 action it would still have been necessary to seek the leave of the court to use the material thus discovered for the purposes of the motion for contempt in that action. My Lords, I find myself quite unable to accept that submission. The proper policing and enforcement or observance of orders made and undertakings given to the court in an action are, in my judgment, as much an integral part of the action as any other step taken by a plaintiff in the proper prosecution of his claim. The normal procedure where the contempt complained of is that of a party to the action is to apply for committal by motion in that action as an incidental step in the action. There is, in my judgment, nothing "collateral" or "alien" about enforcement of the court's order in the action in which discovery is obtained and I do not entertain any doubt at all that documents disclosed on discovery in the action can perfectly properly be used for the purpose of taking such a step without in any way infringing this implied undertaking and without the necessity of obtaining the prior leave of the court.'

[30] At 860 E-H.

[11] Canadian courts have adopted the principle of the 'implied undertaking' of confidentiality followed by the English courts so that documentary and oral evidence disclosed during discovery can be used only for the purposes of the litigation in which it was obtained, unless leave of the court is obtained.[31] The principle was affirmed in *Juman v Douchette*.[32] The appellant in this matter was a childcare worker who provided such services at her home. A civil action based on negligence was instituted against her after a child in her care suffered a seizure and later a brain injury. The police also investigated the matter. Prior to discovery the appellant moved to prevent the police from accessing the discovery. The Supreme Court held that both the documentary and oral information obtained on discovery, including information thought by one of the parties to disclose criminal conduct, were subject to the undertaking. Binnie J formulated the rule that[33]

'both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some form of criminal conduct, is subject to the implied undertaking. It is not to be used by the other parties except for the purpose of that litigation, unless and until the scope of the

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[31] See Richard B Swan 'The Deemed Undertaking: A Fixture of Civil Litigation in Ontario' 2008 *The Advocates' Journal* 16 with reference to the incorporation of the common-law rule in Ontario Rule 30.1.01(3): 'All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceedings in which the evidence was obtained.'

[32] [2008] 1 SCR 157.

[33] Para 4.

undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.'

He said that[34] '[t]he root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination.' He found that there were good reasons to support the implied or, as he called it, 'a court-imposed', undertaking:

'[24] In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable...

[25] The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality ... The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.

[34] Para 20.

[26] There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production.

[27] For good reasons, therefore, the law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature) ...'

[12] In arbitration proceedings the principle has developed in England that there is an implied obligation[35] on both parties not to disclose or use for any

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[35] The obligation is implied 'as attaching as a matter of law. It seems to me that, in holding that as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the Court is propounding a term which arises "as the nature of the contract itself implicitly requires"... ' (*Ali Shipping Corporation v Shipyard Trogir* [1977] App LR 12/19 (CA) para 33 relying on *Scally and Others v Southern Health and Social Services Board and Another* [1992] 1 AC 294 (HL) 307 where it was said: 'A clear distinction is drawn ... between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definite category of contractual relationship.'. In *Emmott v Michael Wilson & Partners Ltd* [2008] 2 All ER 193 (CA) para 106 it was remarked that the rule 'is in reality a substantive rule of arbitration law reached through the device of an implied term'.

purpose any documents prepared for and used in an arbitration or disclosed or produced in the course of the arbitration. Matthews and Malek[36] remark that

> 'a practice has grown up which is analogous to the implied undertaking on discovery. Arising out of the fact that arbitrations are intended to be private and confidential, the principle has developed that there is an implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence has been given by any witness in the arbitration.'

[36] At 474. See *Dolling-Baker v Merrett* [1991] 1 All ER 890; [1990] 1 WLR 1205 (CA) where at 1213 D Parker LJ said: 'As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must ... be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witnesses in an arbitration, save with the consent of the other party, or pursuant to an order or leave of the Court. The qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer ... that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is an obligation of an implied obligation arising out of the arbitration itself. When a question arises as to production of documents or indeed discovery by list or affidavit, the Court must ... have regard to the existence of the implied obligation, whatever its precise limits might be. If it is satisfied that, despite the implied obligation, disclosure and inspection is necessary for a fair disposal of the action, that consideration must prevail. But in reaching a conclusion, the court should consider, amongst other things, whether there are other and possibly less costly ways of obtaining the information which is sought which do not involve any breach of the implied undertaking.'

[13] In English law the limits of the obligation of confidentiality are in the process of development but four instances may be stated where disclosure is permissible:[37] First, where there is express or implied consent; second, where there is an order or leave of the court; third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and, fourth, where the interests of justice require disclosure, and perhaps also where the public interest so requires.

[14] This general approach in England to discovery in arbitration proceedings has not been followed in Australia. In *Esso Australia Resources Ltd v Plowman*[38] Mason CJ distinguished between the private nature of arbitrations and confidentiality holding that, while arbitrations are private, the evidence disclosed in arbitration proceedings is not confidential.[39]. The court reasoned[40] that no obligation of confidence attaches to witnesses who appear in arbitration hearings who are at liberty to tell others what they know of the proceedings. Furthermore, arbitration orders and, indeed arbitration proceedings often come before the courts, for example, by way of review; in applications to make an award an order of court; or by way of an application to recuse or remove the arbitrator; or through the determination of a preliminary point of law, all of which necessarily results in the publication of the

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[37] *Emmott v Michael Wilson & Partners* [2008] 2 All ER 193 (CA) para 107 at 215*hi* where it was remarked that the fact that disclosure may be made pursuant to a court order 'does not mean that the court has a general discretion to lift the obligation of confidentiality.' See para 9 above.

[38] [1995] HCA 19; (1995) 128 ALR 391; (1995) 69 ALJR 404; (1995) 183 CLR 10.

[39] Paras 34 and 35.

[40] Para 31.

arbitration proceedings. Moreover, there are often circumstances in which parties are obliged by statute to disclose matters arising out of the arbitration (for example, for insurance purposes). Parties wishing to ensure confidentiality of the arbitration proceedings must therefore specifically contract to that end.[41]. Mason CJ said:[42]

‘33. An obligation not to disclose may arise from an express contractual provision. If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement. Importantly, such a provision would bind the parties and the arbitrator, but not others. Witnesses, for example, would be under no obligation of confidentiality.

34. Absent such a provision, it is difficult to resist the conclusion that, historically, an agreement to arbitrate gave rise to an arbitration which was private in the sense that strangers were not entitled to attend the hearing. Privacy in that sense went some distance in bringing about confidentiality because strangers were not in a position to publish the proceedings or any part of them. That confidentiality, though it was not grounded initially in any legal right or obligation, was a consequential benefit or advantage attaching to arbitration which made it an attractive mode of dispute resolution. There is, accordingly, a case for saying that, in the course of evolution, the private arbitration has advanced to the stage where confidentiality has become one of its essential attributes so that confidentiality is a characteristic or quality that inheres in arbitration.

35. Despite the view taken in Dolling-Baker and subsequently by Colman J in Hassneh Insurance, I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing

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[41] Judgment, par. 33 and 34.

[42] [1995] HCA 19; (1995) 128 ALR 391; (1995) 69 ALJR 404; (1995) 183 CLR 10.

an obligation on each party not to disclose the proceedings or documents and information provided in and for the purpose of the arbitration.

36. The appellant's argument was designed to establish that an agreement to arbitrate contains an implied term that each party will not disclose information provided in and for the purposes of the arbitration. The argument was that the implication was to be made as a matter of law in all private agreements for arbitration unless presumably the agreement provided otherwise. There is a clear distinction between implying a term in a contract as a matter of law and implying a term in order to give business efficacy to a contract. ...

37. It follows that the case for an implied term must be rejected for the very reasons I have given for rejecting the view that confidentiality is an essential characteristic of a private arbitration. In the context of such an arbitration, once it is accepted that confidentiality is not such a characteristic, there can be no basis for implication as a matter of necessity.'

Mason CJ did not consider it necessary to define the exceptions to any implied undertaking forbidding disclosure.[43]

[15] There appears to be no direct authority in Canada that the 'implied undertaking' rule applies to arbitration.[44] The submission has nevertheless been made that:[45]

[43] See para 38.

[44] Richard B Swan 'The Deemed Undertaking: A Fixture of Civil Litigation in Ontario' 2008 *The Advocates' Journal* 16 20 with reference to *Tanner v Clark* (2003) 63 OR (3d) 508 (CA).

‘although one could argue that arbitrations are contractual proceedings and that it is for the parties to expressly stipulate in their arbitration agreement what use can be made of evidence disclosed at any stage of an arbitration, the fundamental nature of an arbitration is that of a private process. Even in the absence of an express provision, there is no compelling reason why the protection of an implied obligation of confidentiality should not apply to all evidence produced in such a proceeding (even at the hearing stage), unless subsequently filed with a court. Since an implied undertaking in a civil action is given to the parties and the court is backed by the court’s contempt power, it follows that this obligation should not, strictly speaking, be characterized as an implied “undertaking” in the context of an arbitration. *A more appropriate characterization is that of an implied obligation of confidentiality, arising as an implied term of the arbitration agreement*. The different characterization (ie, not an undertaking to the court), and the different context would also have an impact on the potential remedies available for breach’ [my italics].

[16] There is no legislative basis for the privacy and confidentiality of arbitration proceedings in South Africa.[46] An arbitration agreement may

[45] Swan 20.

[46] David Butler and Eyvind Finsen *Arbitration in South Africa Law and Practice* (1993) 213-4 and see Des Williams in J William Rowley QC *Arbitration World Jurisdictional Comparisons* 2ed where the following is stated in the chapter on South Africa (para 19): ‘The Arbitration Act does not provide for confidentiality of arbitration proceedings. However, even if the arbitration agreement does not expressly provide that the arbitration proceedings are confidential, such a term will be implied ... A party may not disclose information about the arbitration to an outsider without the consent of the other party to the arbitration, except for the purpose of court proceedings arising from the arbitration. The question whether information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings against the same parties will therefore depend on whether the subsequent proceedings arise from the arbitration. In practice, a party will often be able to obtain information disclosed in arbitration proceedings through the discovery and disclosure proceedings that are available in the subsequent proceedings.’

expressly provide that the proceedings and the award are private and confidential, but it has been submitted that 'even in the absence of an express provision to this effect, such a term will be implied.'[47] The term suggested seems to be a term *implied* by law as being one of the *naturalia* of the agreement to arbitrate.[48] Courts have the inherent power to develop the law by implying a term into particular types of agreements thereby formulating a new rule of law. This will be done cautiously and on grounds of policy.[49] One

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[47] Butler and Finsen 213.

[48] See above para 12.

[49] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 374 BG; *Van Nieuwkerk v McCrae* 2007 (5) SA 21(W) 26 DJ; *Ex parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W) 226 J – 227 E and *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 28 where the following was said: 'Unlike tacit terms which are based on the inferred intention of the parties, implied terms are imported into contracts by law from without. Although a number of implied terms have evolved in the course of development of our contract law, there is no numerus clausus of implied terms and the courts have the inherent power to develop new implied terms. Our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith ... Once an implied term has been recognised, however, it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties ... It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalysts in the process of legal development.' See the discussion by Schalk van der Merwe and Gerhard Lubbe '*Bona Fides* and Public Policy in Contract' (1991) 1 *Stellenbosch Law Review* 91 100-1.

of the policy grounds favouring the suggested rule is the promotion of full and frank discovery but this does not mean that the term must invariably be implied as one of the *naturalia* in all arbitration agreements.[50] Whether a *tacit* term entailing an obligation to keep confidential documents disclosed during an arbitration can *necessarily*[51] be imported into the arbitration agreement is a different question. The considerations underlying both the suggested implied term and the tacit term could well overlap. However, to import a tacit term is a factual matter to be determined by the approach of the 'officious bystander'. The answer to the question in this matter is not that clear or obvious,[52] - accepting the existence of such a rule in civil litigation as Schutz AJ did by implication in *Crown Cork*.[53] Both the agreement of sale[54] and s 31 of the Arbitration Act 42 of 1965 contemplate that an award of an arbitrator may be made an order of court. The Arbitration Act further provides that a court may remove an arbitrator from office on good cause shown.[55] Sections 20 and 21 of the Arbitration Act contemplate numerous applications which the parties to an arbitration may make to court, including in relation to points of law which may be determined by way of a

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[50] Cf paras 7, 9 and 11 above.

[51] Cf *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 532-3; *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO* 2006 (3) SA 488 (SCA) paras 19-20.

[52] On the distinction between 'implied' and 'tacit' terms see Schalk van der Merwe, LF van Huyssteen, MFB Reinecke and GF Lubbe *Contract General Principles* (2007) 3ed 278 ff; and cf *Hassneh Insurance Co of Israel and Others v Steuart J Mew* [1993] 2 Lloyd's Rep 243 (QB).

[53] See para -7 above.

[54] Clause 12.3.3.

[55] Sections 13(2) and 13(3).

special case presented to the court. It seems to follow that the Arbitration Act does not treat arbitration proceedings as being inherently confidential. There is nothing in the Arbitration Act that suggests that arbitration proceedings are confidential. The agreement of sale is, similarly, silent on the question. The parties could have agreed on a term providing for the confidentiality of the proceedings had they wanted to. They did not.[56] Moreover, arbitrators may be called to give evidence as to matters which occurred during the course of the arbitration.[57] The Commercial Rules of the Arbitration Foundation of South Africa (under which a significant proportion of arbitrations take place (although not this one)) deal specifically with the question of confidentiality and provide only that the Registrar and Secretariat, but not the parties themselves, are bound by obligations of confidentiality in relation to the arbitration. Even that is subject to the qualification 'save as is required by law or for the exercise

[56] Cf, by way of analogy, *Schoeman v Constantia Insurance Co Ltd* [2003] 6 All SA 642 (SCA) '[23] 'It appears that there is no authority in the Roman-Dutch law for the implication ex lege of what is in essence a penal term. Nor, in my opinion, is there a compelling social need for the adoption of such a doctrine as an incident of the common law. That its adoption would serve the ends identified in the English cases is of course so but if the cost of doing so would be that cases would arise in which great inequity would be the consequence, that is good reason to hesitate. [24] When there is added to that *the fact that insurance companies are masters of their own policies in the sense that they are free to unilaterally devise them, the insured has no say in the process, and that it is a simple matter to include an appropriate clause to protect the insurer against fraudulent claims by providing for forfeiture, there does not appear to be any pressing need for the law to provide such protection*' (my emphasis).

[57] DT Zeffertt, AP Paizes and A St Q Skeen *South African Law of Evidence* 5ed (2003) 661.

of a party's rights in a court of law': Arbitrations under the rules of AFSA are to be private, not necessarily confidential.[58]

[17] However, I need not determine whether the English 'implied undertaking', whether its source be an implied or a tacit term of the arbitration agreement, forms part of South African law. Even if I accept that the English rule has been accepted in South Africa, there are a number of exceptions to

[58] The AFSA Rules provide: 21.2.1 'The arbitration proceedings shall be conducted in private, and a party shall be entitled to require the arbitrator to exclude there from any person whose presence is not reasonably required by another party.' 21.2.2 'Save as is required by law, or for the exercise of a party's rights in a court of law, the Secretariat and the Registrar shall, unless the parties in writing notify the Secretariat otherwise, maintain confidentiality in regard to any matter being dealt with or dealt with by the Foundation.'

the rule just as there are exceptions to a banker's obligation of secrecy.[59] Two of these are particularly relevant. First, disclosure is permitted when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party.[60]. In the current context, the use of the arbitration documents to found a cause of action for contempt of court against another arbitrating party would be 'reasonably necessary'. Second, English law permits disclosure of arbitration evidence and documents where it is in the interests of justice to do so.[61] Although it has been said that leave of

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[59] See para 13 above and *Malan on Bills of Exchange, Cheques and Promissory Notes in South African Law* 4ed (2002) para 212 at 378 ff. In a concurring judgment in *Esso Australia Resources Ltd v Plowman* [1995] HCA 19; (1995) 128 ALR 391; (1995) 69 ALJR 404; (1995) 183 CLR 10 para 6 Brennan J held that 'in an arbitration agreement under which one party is bound to produce documents or disclose information to the other for the purposes of the arbitration and in which no other provision of confidentiality is made, a term should be implied that the other party will keep the documents produced and the information disclosed confidential except (a) where disclosure of otherwise confidential material is under compulsion of law; (b) where there is a duty, albeit not a legal duty, to the public to disclose; (c) where disclosure of the material is fairly required for the protection of the party's legitimate interests; and (d) where disclosure is made with the express or implied consent of the party producing the material.' Cf, in this respect, *Tournier v National Provincial and Union Bank of England* (1924) 1 KB 461 473 and *Hassneh Insurance Co of Israel and Others v Steuart J Mew* [1993] 2 Lloyd's Law Reports 243 (QB) 248-9.

[60] *Ali Shipping Corporation v Shipyard Trogir* [1977] App LR 12/19 (CA) para 36.

[61] *Ali Shipping Corporation v Shipyard Trogir* [1977] App LR 12/19 (CA) para 38.

the court is required before disclosure may be made,[62] in an application for contempt of court this should not be required.[63]

[18] Contempt of court is the unlawful and intentional disobeiance of a court order violating the dignity, repute or authority of the court.[64] Disobedience of a civil order constitutes contempt when the breach of the order was committed 'deliberately and mala fide'.[65] In contempt proceedings only the existence of the order; its service on the respondent and non-compliance with the order need to be established. Once these three requisites are satisfied an evidential burden rests on the respondent to establish reasonable doubt as to whether or not non-compliance was wilful and mala fide. In the absence of such evidence, all the requisites of the offence will have been established.[66] Contempt is not 'an issue inter partes: it is an issue between the court and the party who has not complied with a mandatory order of court.'[67] It was said that[68]

'[i]n the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking

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[62] *Juman v Doucette* [2008] 1 SCC 157 para 6.

[63] *Crest Homes PLC v Marks and Others* [1987] 1 AC 829 (HL) 860 GH.

[64] *Fakie v CCII Systems (Pty) Ltd*; 2006 4 SA 326 (SCA) para 6.

[65] *Fakie* para 9.

[66] *Fakie* paras 22, 23 and 38.

[67] *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) 673 DE cited in *Fakie* para *38.*

[68] *Fakie* para 8.

enforcement has a manifest private interest in compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.'

Moreover, in contempt proceedings it would be appropriate to regard the position of the respondent 'as closely analogous to that of an accused person' granting him or her the protection an accused in a criminal trial is entitled to.[69]

[19] The applicants sought to introduce the merits of the contempt application into the answering affidavit in the strike out application. On behalf of the applicants it was submitted that the admissibility of the relevant evidence requires to be decided prior to the applicants becoming obliged to deal with it. The notice of motion contains the alternative prayer that the applicants be directed to deliver their answering affidavit in the contempt application within ten days of my order. This is an unusual request for a litigant is normally required to 'plead over' and deal with the disputed allegations.[70] The reasons advanced for the request for an adjournment to file the answering affidavit in the contempt application are not particularly impressive. Nor has the delay been adequately explained. In ordinary motion proceedings I would have refused the application for an adjournment. However, these are proceedings for contempt of court and a refusal of the request would be tantamount to convicting an accused without a fair hearing.

[69] *Fakie* para 25.

[70] *Gore v Amalgamated Mining Holdings* 1985 (1) SA 294 (C) 296.

[20] The following order is made:

(a) The application to strike out is dismissed with costs including the costs of two counsel;

(b) The applicants are directed to file their answering affidavit or affidavits in the contempt application within ten days of this order; the Rules of Court to apply thereafter.

**Malan J**

**Judge of the High Court**

Counsel for applicants: WJ De Bruyn and M Welz

Attorneys for applicants: Tugendhaft Wapnick Banchetti

Counsel for respondent: P Ginsburg SC and G Marriott

Attorneys for respondent: Webber Wentzel

Date of hearing: 6 March 2009

Date of judgment: 15 April 2009