



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, BHISHO)**

Case No: 367/2017

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH,  
EASTERN CAPE PROVINCE**

**Appellant**

and

**AKTAR MOUSOMI**

**Respondent**

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**APPEAL JUDGMENT**

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**DAWOOD J**

**Introduction**

[1] This appeal arises from an interlocutory order granted by the court *a quo* incidental to an action in which the respondent (as plaintiff) instituted an action for recovery of damages against the appellant (sued on a vicarious liability basis).<sup>1</sup>

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<sup>1</sup> The main action. In the court *a quo*'s interlocutory proceedings, the respondent was the applicant and the appellant the respondent. The appellations 'plaintiff' and 'defendant' will be used interchangeably with 'respondent' and 'applicant', respectively and, where appropriate, with 'appellant' and 'respondent'.

## Factual background

[2] After pleadings had been closed in the main action, the defendant filed a discovery affidavit, *inter alia*, objecting to the production of the documents set out in the second part of the schedule to the affidavit claiming that the documents were privileged from production because of their nature as they are documents which came into existence and were made or obtained by the deponent to the affidavit<sup>2</sup> upon the launch of this litigation wholly or mainly for the purpose of obtaining and furnishing to his attorneys such evidence and information to enable them to conduct the action and advise him.

[3] Mr Bastile did not specifically mention the report of Dr Boon in the second schedule but merely made a broad sweeping statement of statements of witnesses and reports brought into existence prior to, in contemplation of and during the continuance of the main action.

[4] The plaintiff thereafter specifically requested *inter alia* the report in terms of her rule 35(3) notice.

[5] In his rule 35(3) and (6) replying affidavit, Mr Bastile stated that the report is a confidential internal privileged opinion which forms part of Part II of the second schedule in the previous discovery affidavit.

[6] The plaintiff then brought an application before the court *a quo* seeking the discovery of Dr Boon's report in terms of rule 35(3).

[7] In the affidavit filed in support of the application, the plaintiff's attorney, *inter alia*, stated:

'Prof Jeena the respondent's expert witness, specifically refers to Dr G Boon's report in her (sic) own expert report. . .

With respect, the respondent's contention to the effect that Dr G Boons report is confidential internal privileged opinion is baseless. . .

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<sup>2</sup> Mr Zekhaya Bastile.

A trial date has been allocated in this matter. Applicant is prejudiced in her on going preparations for trial by virtue of the Respondent's failure to timeously produce Dr G Boon's report as requested in the Rule 35(3) Notice.'

[8] No indication was given in the affidavit as to the report's relevance and precisely why or how the plaintiff would be prejudiced in the preparation for her trial.

[9] The application was opposed by the defendant, and in an affidavit deposed to by Ms Fundiswa Ncula<sup>3</sup>, *inter alia*, the following was stated:

- '5. This application is opposed on the ground that the report sought by the applicant is an incomplete fact-finding document and a document meant for circulation within the Department of Health in the Eastern Cape . . . The report was meant for the attention of the employees of the Department of Health, Eastern Cape. Dr Boon is a general paediatrician employed by the Department of Health Eastern Cape. . .
6. [Dr Boon's] report has the following markings and/or important features:
  - 6.1 It is addressed to and for the attention of Dr Gouws who is an employee of the Department.
  - 6.2 It is marked without prejudice.
  - 6.3 And it is also marked not for court purposes. It was subsequently sent to the State Attorney for advice on issues raised in the report.'

[10] Ms Ncula went on to say that Dr Boon's report is a privileged document.

[11] Ms Ncula referred to the affidavit of Prof Jeena where he says he did not utilize the report of Dr Boon. She stated that Prof Jeena did not waive the right of the defendant over the document or privileged rights and protection the defendant enjoys over the document.

[12] In his affidavit, Prof Jeena stated:

'I emphasize that I did not utilize the report sought by the applicant for purposes of formulating my opinion or compiling my report. It is indeed a document I had received though not utilized in the formulation of my report.'

[13] Indeed, save for the fact that that report was furnished to him, he made no mention of Dr Boon's report in his opinion, whereas he referred to Dr Pohl's affidavit in his report.

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<sup>3</sup> Ms Ncula.

[14] The averments made in Ms Ncula's affidavit do appear to be contradicting Bastile's affidavit, if one only has regard to paragraph 5 of her affidavit.

[15] She, however, referred to Mr Bastile's affidavit and further in her affidavit when specifically dealing with the issue of privilege stated that it is a privileged document, so the fact that it is incomplete or complete she nonetheless confirms that it is privileged.

[16] The fact that she was elaborating on the report and its purpose and who it was addressed to does not detract from the fact that she, too, claims that it is a privileged document.

[17] The plaintiff's criticism of the defendant's failure to discover Dr Boon's report adequately in Part II of the discovery affidavit has merit since no specific mention is made of his report therein.

[18] However, when his report was specifically sought, the plaintiff was made aware that it was one of the statements referred to as being privileged.

[19] The court *a quo* found, *inter alia*, that the expert reports given in the context of the litigation process and made available to outsiders (in this case Prof Jeena), must lose any privilege that may be claimed.<sup>4</sup>

[20] The court *a quo* went on to find that the mere *ipse dixit* of the party holding the document is not binding on the court. This is worse where a litigant simply classifies the document as privileged without laying any basis for such classification. The *onus* rests on that party to show why it is necessary for the information to remain secret. The respondent failed to do so.<sup>5</sup> The learned judge went on to find that there was no claim by the respondent that is in the public interest that the report be hidden. In any event, the court would be entitled to scrutinise such evidence in order to determine the strength of the public interest affected and the extent to which the interests of justice might be harmed by its non-disclosure. 'In the circumstances the court *a quo*

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<sup>4</sup> Para 14 of the court *a quo*'s reasons for judgment.

<sup>5</sup> Para 15 of the reasons for judgment.

could accordingly find no valid reasons for the refusal to discover the report of Dr Boon.

[21] In his notice of appeal, the appellant cited the following grounds of fact on which it based the appeal against the judgment of the court *a quo*:

- '(1) The Court erred in granting the respondent's application on the 18 March 2021. The discovery affidavit in terms of rule 35(3) and (6) filed by Mr Bastie is to the effect that Dr Boon's report is confidential internal privileged report which forms part of second schedule in the discovery affidavit.
- (2) The report of Dr Boon has the following markings on it:
  - 2.1 that it is addressed to and for the attention of Dr Gouws who is also the employee of the Department. It is marked without prejudice and is marked not for court purpose. It was subsequently sent to the State Attorney for advice on issues raised in the report. Therefore, for all intents and purposes, it is a privileged document which is not discoverable.
- (3) The report contains discussions between some employees of the Department and Dr. Boon. At no stage was it intended for court purposes. It is addressed to another employee of the Department – Dr. Gouws. The court erred in issuing an order that such a document is discoverable.
- (4) The statements and enquiries contained in the report by Dr. Boon were made at the instance of the applicant (defendant) on receipt of the summons in this matter. The report demanded by the respondent (plaintiff) is a witness statement and therefore not discoverable.
- (5) The contention by the respondent that the report of Dr. Boon was given to an outside expert (Prof. Jeena) must not stand. Prof. Jeena did not waive the privilege status of the document in any way. The document therefore remained privileged. He had no authority to waive such status on behalf of the applicant.
- (6) The order dated 18 March 2021 has the potential to prejudice and compromise the confidential internal communication between client (defendant) and State Attorney (the attorney). In any event, the applicant did not waive the privilege status of its document.
- (7) The issue the respondent relies on is that Prof. Jeena referred to Dr. Boon's report. The respondent does not mention what information has Prof. Jeena taken from or relied on Dr Boon's Report, particularly in circumstances where it is marked not for court and without prejudice. Critically, in circumstances where Prof. Jeena in his letter dated 8 January states:
 

"Even though, I was privy to Prof. Boon report that I received on the 19 September 2019 I did not use it in compiling my report dated 4 October 2019".
- (8) The characterization of Dr. Boon's report as a privileged document in the discovery affidavit should have created a departure point as to whether the respondent is entitled to a document characterized as such and if so under what circumstances. It is the discovery affidavit that characterized it as such not papers filed in support of rule 35(3) application.
- (9) Appellant at no stage did it issue rule 36 notices for examination of the respondent and as such owed no rule 36 expert report in terms of rule 36 (9)(a) and (b).
- (10) A pertinent legal principle in this matter is waiver of rights and a principle the respondent did not address at all due to its failure to adopt the departure point in paragraph 8 above.
- (11) The court is respectfully urged to uphold the appeal sought herein with costs of two counsel where engaged.'

### Issues to be determined

[22] At the hearing of the appeal, the respondent persisted with its contention that the interlocutory order was not appealable and accordingly submitted that it is an issue to be determined. It will be dealt with briefly for the sake of completeness.

[23] The main issue to be determined is whether the respondent is entitled to the report of Dr Boon in circumstances where the appellant claims that it is a privileged document or witness statement.

### Appealability of an interlocutory order

[24] Mr *Kunju*, counsel for the appellant, submitted that, even though an interlocutory order may not be appealable under the traditional test, it may be appealable in terms of section 17(1) of the Superior Courts Act 10 of 2013.

[25] In *RTS Industries and Others v Technical Systems (Pty) Ltd and Another*,<sup>6</sup> the court held:

‘Whether or not an interim order is appealable is fact specific. This was affirmed in *South African Informal Traders Forum v City of Johannesburg*,<sup>7</sup> where the Constitutional Court held that when determining whether it is in the best interests of justice to appeal an interim order, the court must have regard to and weigh carefully all relevant circumstances. The factors that are relevant or decisive in a particular instance, will vary from case to case.’

[26] The Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*,<sup>8</sup> held, *inter alia*, as follows:

‘Whether this court should grant leave turns on what the interests of justice require. Whether it is in the interests of justice to hear and determine the matter involves a careful balancing and weighing up of all relevant factors. However, there is no concrete and succinct definition of the phrase “interests of justice” and what it really entails.’<sup>9</sup>

What is in the interests of justice will depend on a careful evaluation of all the relevant factors in a particular case. Herein there are two different hurdles as to whether this court should grant leave: (a) whether the Supreme Court of Appeal’s order is appealable; and (b) whether,

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<sup>6</sup> [2022] ZASCA 64 para 24.

<sup>7</sup> [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) para 20.

<sup>8</sup> [2022] ZACC 34; 2023 (1) SA 353 (CC); 2022 (12) BCLR 1521 (CC).

<sup>9</sup> *Ibid* para 34.

if the order is appealable, this court should entertain the merits of the appeal despite the fact that the Supreme Court of Appeal did not determine the merits of the appeal.<sup>10</sup>

Whether an interim order has final effect or disposes of a substantial portion of the relief sought in a pending review is merely one consideration. Under the common law principle as laid down in *Zweni*, if none of the requirements set out therein were met, it was the end of the matter. But now the test of appealability is the interests of justice, and no longer the common law test as set out in *Zweni*.<sup>11</sup>

The majority of the Supreme Court of Appeal erred in holding that the interests of justice did not render the impugned interim interdict a “decision” within the meaning of section 16(1)(a) of the Superior Courts Act. An interdict restricting free speech constitutes a grave intrusion on a constitutional right. Since there was a likelihood that the life of the impugned interim interdict, granted pending the outcome of the defamation trial, might be extended even longer than it had already existed, it was sufficiently invasive and far-reaching that it was in the interests of justice for the grant of the impugned interim order to be treated as a “decision”. The Supreme Court of Appeal in *Health Professions Council of South Africa* held that, where a litigant may suffer prejudice or even injustice if an order or judgment is left to stand, leave to appeal against orders or judgments made during the course of the proceedings should be granted. In determining whether the impugned interim interdict was appealable, the Supreme Court of Appeal was not exercising a discretionary power; it was making a value judgment. Accordingly, this court is entitled to make its own assessment and conclude that the impugned interim interdict was a “decision” and thus within the Supreme Court of Appeal’s jurisdiction.<sup>12</sup> (Footnotes omitted.)

[27] In *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others*,<sup>13</sup> the court held:

‘This court held that the belief that the execution order was not appealable was erroneous and that it was clear from cases such as *S v Western Areas Ltd & others and Khumalo & others v Holomisa* that what was of paramount importance in deciding whether a judgment was appealable, was the interests of justice.’

[28] In *Nova Property Group Holdings v Cobbett*,<sup>14</sup> the appealability of an order to compel discovery was considered. The court held that even though such an order was not appealable under the traditional test laid down in *Zweni v Minister of Law and Order of the Republic of South Africa*<sup>15</sup> that test, as held in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*<sup>16</sup> was not exhaustive. Referring to *Philani-Ma-Afrika*,<sup>17</sup> the court concluded that even though the interlocutory order was

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<sup>10</sup> Ibid para 35.

<sup>11</sup> Ibid para 43.

<sup>12</sup> Ibid para 46.

<sup>13</sup> [2017] ZASCA 47 para 20.

<sup>14</sup> [2016] ZASCA 63; 2016 (4) SA 317 (SCA); [2016] All SA 32 (SCA) 317 (SCA).

<sup>15</sup> [1992] ZASCA 197; [1993] 1 All SA 365 (A).

<sup>16</sup> [1996] ZASCA 2; 1996 (3) SA 1 (SCA).

<sup>17</sup> *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA).

not appealable under the traditional test laid down in *Zweni*, it was appealable in terms of s 17(1) of the Superior Courts Act.<sup>18</sup>

[29] The Supreme Court of Appeal at the time of granting leave must have been alive to the arguments pertaining to the appealability of interlocutory orders as this was argued in the court *a quo* and was one of the reasons for the court *a quo* refusing leave to appeal and necessitating the defendant/appellant's approach to the Supreme Court of Appeal to seek leave.

[30] The fact that the Supreme Court of Appeal granted leave to appeal is not without significance; in my view, it was an intimation that they considered this matter appealable and were satisfied that indeed the appellant had made out a case that it was in the interest of justice for the appellant to be granted leave to appeal the interlocutory application.

[31] The appeal is accordingly properly before this Court, despite the respondent persisting with this point in argument and in its heads of argument.

### **Entitlement to Dr Boon's 'report'**

[32] Rule 35(3), which is at the heart of this appeal, reads:

'If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape

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<sup>18</sup> Also see *Minister of Police and Another v Gqada* [2023] ZAECMKHC 69 paras 15-16, where the court held:

'The test in *Zweni* is easier stated than applied, hence in *Cronshaw and Another v Coin Security Group (Pty) Ltd* the question regarding when a decision is 'interlocutory', and thus not appealable, or 'final', and thus appealable is 'a question that has vexed the minds of eminent lawyers for many centuries, and the answer has not always been the same. The question is intrinsically difficult, and a decision one way or the other may produce some unsatisfactory results'.

The common law test for appealability has since been denuded of its somewhat inflexible nature. Unlike before, appealability no longer depends largely on whether the order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All of this is now subsumed under the constitutional 'interest of justice' threshold.'

recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known.<sup>19</sup>

### Requirements of the rule

[33] Herbstein and Van Winsen<sup>20</sup> state as follows—

'Even if such a direction has been made, before a party can rely on rule 35(3) she or he must invoke the provisions of rule 35(1) and receive a discovery affidavit in accordance with rule 35(2).

In *Swissborough Diamond Mines v Government of the RSA* Joffe J reviewed the authorities relating to rule 35(1), (2) and (3) and requirement of relevance. He quoted with approval the principle stated by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co.*

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

Joffe J then stated that the broad meaning ascribed to relevance is circumscribed by the requirements in both subrules (1) and (3) of rule 35 that the document or (tape) recording must be one "relating to" (35) (1) or which "may be relevant to" (35) (3) any matter in question', which in turn is determined from the pleadings. He also stated that in determining the issues raised by the pleadings regard would not be had to requests for further particulars for purposes of trial and further particulars furnished in response thereto as requests for particulars for trial are made "after the close of pleadings" and the request for particulars would therefore relate to the pleaded issues and would not raise further or new issues between the parties.

Where the documentation sought to be discovered was not relevant to any of the issues raised in the affidavits in an application, the application for discovery was refused.<sup>21</sup> (Footnotes omitted.)

[34] In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*<sup>22</sup> the court said the following—

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<sup>19</sup> See *The MV Urgup: Owners of The MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999 (3) SA 500 (C) at 515—

'These subrules are both intended to cater for the situation where a party knows or, at the very least, believes that there are documents (or tape recordings) in his opponent's possession or under his control which may be relevant to the issues and which he is able to specify with some degree of precision. In the case of Rule 35(3) the intention is to supplement discovery which has already taken place, but which is alleged to be inadequate. Rules 35(3) and (14) do not afford a litigant a licence to fish in the hope of catching something useful.'

<sup>20</sup> Herbstein and Van Winsen *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009).

<sup>21</sup> *Ibid* at 814-815.

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

[35] In *The MV Urgup: Owners of the MV Urgup*<sup>23</sup> the court had this to say—

‘As to the alternative relief claimed by the respondents which, as I have said, would in effect be an order in terms of Uniform Rules 35(3) or (14) compelling the applicant to make available for inspection and copying the documents listed in annexure A to the notice of motion, this may be dealt with. These subrules are both intended to cater for the situation where a party knows or, at the very least, believes that there are documents (or tape recordings) in his opponent’s possession or under his control which may be relevant to the issues and which he is able to specify with some degree of precision. In the case of Rule 35(3) the intention is to supplement discovery which has already taken but which is alleged to be inadequate.’

[36] Nel AJ pointed out in *Mofokeng v Standard Bank of South Africa*<sup>24</sup> that—

‘In *Herbstein & Van Winsen*, Civil Practice of the High Courts and the Supreme Court Appeal of South Africa it is stated as follows:

“It has been held that the court will generally regard the discovery affidavit as conclusive against the party seeking relief, as to both the possession of documents or (tape) recordings and the relevance of their contents. The party who seeks further discovery has the onus of establishing facts which raise a strong possibility that there are further relevant documents or (tape) recordings.”

A party seeking an order that documentation or recordings sought in terms of Rule 35(3) Notice must be provided, must show that there are reasonable grounds for believing that the documentation or recordings are in the opposing party’s possession or under its control.

In *Herbstein & Van Winsen* it is recorded that the requirement of “reasonable grounds” or “grounds for suspicion” has been held to mean that the Court must be satisfied to a degree of conviction approaching practical certainty.

In the circumstances, a Court must be satisfied that despite what is set out in the affidavit of the other party, reasonable grounds exist for the Court to order the production of the documentation, or the recordings sought.’

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<sup>22</sup> 1999 (2) SA 279 (T) at 321; *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

<sup>23</sup> *The MV Urgup: Owners of the MV Urgup* above n 19 at 515; *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W).

<sup>24</sup> [2022] ZAGPJHC 49 paras 29-32.

[37] Ponnann JA referred to a series of cases dealing with the incidence of the onus in *Centre for Child law v Hoerskool Fochville and Another*<sup>25</sup> in the following terms:

‘University City Studios held (at 748A) that:

“[this] being an application, I would say that the onus is to be discharged on the usual basis, i.e., that the applicant bears the overall onus of satisfying the Court that the respondent is obliged to produce the document . . . Where the respondent files an opposing affidavit . . . and either denies relevance or avers that he is on ground of privilege not obliged to produce a document . . . the applicant would, to succeed, have to satisfy the Court on a balance of probabilities that the document is indeed relevant or not privileged.”

In *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C), Friedman J disagreed with this *dictum*. He took the view that the rule should be interpreted as follows:

“[P]rima facie there is an obligation on a party who refers to a document . . . to produce it. That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so . . . Similarly, a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production. As it would not necessarily be within the knowledge of the person serving the notice whether the document falls within the limitations I have mentioned, the onus would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document.”

Friedman J’s approach found favour with Thring J in *Unilever plc v Polagric (Pty) Ltd* 2001 (2) SA 329 (C). [Ponnann JA then held as follows:] For my part, I entertain serious reservations as to whether an application such as this should be approached based on an *onus*. Approaching the matter based on an *onus* may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the disharmony on the point. That notwithstanding, it is important to point out that the term *onus is not to be confused with the burden to adduce evidence (for example that a document is privileged or irrelevant or does not exist)*. In my view, the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that *a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.*’ (Own emphasis.)

[38] The case of *TNM v Member of the Executive Council For Health: KwaZulu-Natal*<sup>26</sup> is relevant to the present proceedings since the facts appear to be similar. The judgment accordingly will be set out in some detail. The Court held *inter alia* as follows:

‘It is common cause that one Dr Batchelder, a specialist obstetrician, was requested to advise the respondent on the claim against her. He produced a report on the matter (the desired report). This *report was one of many documents furnished by the respondent to one Dr Hall, a paediatric specialist*, for the purposes of obtaining her *advice on the claim*. Dr Hall

<sup>25</sup> [2015] ZASCA 155; 2016 (2) SA 121 (SCA) [2015]; 4 All SA 571 (SCA) para 18.

<sup>26</sup> [2020] ZAKZPHC 56 paras 2-12. Also see *Peacock v SA Eagle Insurance Co Ltd* 19991 (1) SA 589 (C).

likewise provided the respondent with a report. Neither of these persons examined the applicant or the minor child.

Dr Hall's report was served on the applicant. It referred *to the fact that Dr Hall had been furnished with the desired report. This was its only reference.* The applicant requested a copy of the desired report which was refused. The refusal gave rise to the present application, said to have been brought under Uniform rule 35(3) of the Uniform Rules of Court, in which the applicant seeks the following orders:

- “1. The Respondent is directed to serve a copy of Dr Batchelder's report in the above matter within 15 days of this order.
2. The Respondent is to pay costs of this application on an attorney and client scale.”

The respondent raises, in essence, two grounds of opposition. The first is a point *in limine*. That, since the respondent has not filed her discovery affidavit under Uniform rule 35(1), the application is premature. As such, Uniform rule 35(3) cannot be invoked. The *second is that privilege attaches to the desired report and that this privilege has not been waived.* I shall deal with each in turn.

...

The words “disclosed as aforesaid” probably imply prior discovery under Uniform rule 35(1). However, it is clear that, if she did discover, the respondent would not include it since it amounts to a witness statement. These are expressly excluded in Uniform rule 35(2)(b):

“Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.”

...

The substantive defence is that the report is privileged. The factual basis for this was laid in the answering affidavit, to which the applicant did not deliver a reply. Various averments have been made. These include that it is a witness statement and that it was obtained for the purposes of litigation. More specifically, it is averred that the respondent “sought and obtained the advice of Dr Batchelder in making his assessment of the [applicant's] claim.” It is also averred that the respondent does not intend utilising Dr Batchelder as an expert witness and, accordingly, is not even obliged to give notice in terms of Uniform rule 36(9)(a) or a summary in terms of Uniform rule 36(9)(b). In fact, it is said that, despite the report of Dr Hall having been made available to the applicant, the respondent does not intend to call her as a witness.

Early authority establishes that *litigation privilege attaches to a document given “in contemplation of litigation” and “for the purpose of submission to the party's legal adviser”*.<sup>27</sup> The factual averments of the respondent place the desired report into this category. In argument, the *applicant conceded that this was the case.*

But the applicant submits that, *because the desired report was furnished to a third party, Dr Hall, and is referred to in the report of Dr Hall, the privilege attaching to it was waived.* A waiver may be express or implied. *No case is made out for any express waiver.* In *S v Tandwa & Others*,<sup>28</sup> the court distinguished between what it called an implied waiver and an imputed waiver:

“Implied waiver occurs . . . when the holder of the privilege with the full knowledge of it so behaves that it can objectively be concluded that the privilege was intentionally abandoned.

<sup>27</sup> *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494 at 504. See also *Competition Commission of South Africa v Arcelormittal South Africa Limited & Others* 2013 (5) SA 538 (SCA) para 21.

<sup>28</sup> *S v Tandwa & Others* 2008 (1) SACR 613 (SCA) para 18.

Imputed waiver occurs where – regardless of the holder’s intention – fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment.”

This distinction has now been criticised in *Contango Trading SA & Others v Central Energy Fund Soc Ltd & Others*<sup>29</sup> as follows:

“Drawing the threads of both local and foreign authorities together, four things emerge that must be considered cumulatively. The first is that there is no difference between implied waiver and a waiver imputed by law. They are different expressions referring to the same thing. The second is that such a waiver may be inferred from the objective conduct of the party claiming the privilege in disclosing part of the content or the gist of the material. The third is whether the disclosure impacts upon the fairness of the legal process and whether the issues between the parties can be fairly determined without reference to the material. Finally, the fourth is that there is no general overarching principle that privilege can be overridden on grounds of fairness alone. The rule is “once privileged, always privileged” and it is a fundamental condition on which the administration of justice rests. Only waiver can disturb it.”

In *Contango*, an affidavit put up in the litigation by the Central Energy Fund had referred to two opinions provided to it by Senior Counsel. The reference was limited to the following statement:

“Although the advice received from senior counsel is legally privileged and is not, I submit, capable of discovery, given where we are now, suffice it to say that the senior advocates agreed with the outcome of the CEF legal review.”<sup>30</sup>

The court held that the privilege, which admittedly at least initially attended on the obtaining of those opinions, had not been waived. The test for an implied waiver was said to be:

“Implied waiver, as all the cases on the subject show, arises where the conduct of the person concerned is objectively inconsistent with the intention to maintain confidentiality and, if permitted, will unfairly fetter the opponent’s ability to respond to the case or defence advanced in reliance on the privileged material.”<sup>31</sup>

It went on to hold that, in the circumstances of that matter, even where specific reference had been made to the nature of the advice given in the opinions, no waiver had been shown. It held that, “[n]o reliance was placed on the content of the opinions in support of the case that had been set out in some detail. . .”<sup>32</sup> and further that “[t]hey did not incorporate the contents of the opinions into their case in a way that compelled the appellants to provide a response to those contents without having had sight of them”. It was held that the application for their disclosure under Uniform rule 35(12) had been correctly dismissed.

The crisp question determining an implied waiver, thus, *is whether the furnishing of the report to Dr Hall and her mention of it in her report “is objectively inconsistent with the intention to maintain confidentiality and, if permitted, will unfairly fetter the opponent’s ability to respond to the case or defence advanced in reliance on the privileged material.”*<sup>33</sup> The reference of Dr Hall to her having received the report *makes no disclosure at all of its contents or even conclusion*. The reference is *substantially less than that in Contango to the opinions*. In the latter case, it was said that the opinions supported the review. In the present

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<sup>29</sup> *Contango Trading SA and Others v Central Energy Fund Soc Ltd and Others* 2020 (3) SA 58 (SCA) para 48.

<sup>30</sup> *Ibid* para 39.

<sup>31</sup> *Ibid* para 51.

<sup>32</sup> *Ibid* para 54.

<sup>33</sup> *Ibid* para 10.

matter all that is said *is that the desired report was provided to her. There is no reference at all to the content or findings of the desired report. It cannot be said that, even if Dr Hall is called as a witness, the respondent is in any way relying on the desired report.* The applicant will not be required to respond to the desired report without sight of it. The failure to produce it cannot in any way prejudice the applicant in addressing the respondent's defence to the action.

In these circumstances, it is my view that the applicant has not made out a case that the respondent has waived the privilege. This means that the application cannot succeed.' (Own emphasis.)

[39] In *Contango Trading SA and Others v Central Energy Fund Soc Limited*,<sup>34</sup> the Supreme Court of Appeal held:

'The rule is "once privileged, always privileged" and it is a fundamental condition on which the administration of justice rests. Only waiver can disturb it.'

[40] Also at paragraph 29 the Supreme Court of Appeal in *Contango* stated:

'In *ArcelorMittal* we explained that litigation privilege has two requirements: The first is that the document must have been obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice; and second, that litigation was pending or contemplated as likely at the time.'<sup>35</sup>

[41] In the *MEC for Health, North West Province v Dumisani*,<sup>36</sup> the court agreed that expert reports are privileged:

'So too, are reports produced by experts at the request of attorneys for the specific purpose of litigation, covered by litigation privilege.

...

However, documents provided to the expert on which the expert relied for purpose of arriving at the conclusions contained in his/her report are treated differently. However, privileged those documents might have been, that privilege is lost once the expert's report is provided to the other side in terms of Rule 36 (8). This is however different from where the report of the expert does not contain information based on a document supplied by the attorney. Such report of the expert is privileged unless the privilege is waived. There is no indication that same is applicable in this matter.' (Own emphasis.)

[42] A litigant is not obliged, either before or during a trial, to disclose any document which was brought into existence for purposes of litigation.

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<sup>34</sup> Above n 29 para 48.

<sup>35</sup> *Ibid* para 29.

<sup>36</sup> *MEC for Health, North West Province v Dumisani, MR oo BM; In Re: Dumisani, obo BM v MEC for Health, North West Province* [2019] ZANWHC 28 paras 12-14.

[43] The most important class of documents falling into this category are the statements of the litigant's witness.<sup>37</sup> In this regard, recourse to the discovery affidavit of the defendant shows that witness statements are not discoverable.

[44] A commentary under Uniform rule 35(3) at D1-472 in Erasmus *Superior Court*<sup>38</sup> it is said that the courts are reluctant to go behind a discovery affidavit which is regarded as conclusive save where it can be shown either (i) from the discovery affidavit itself; (ii) from the documents referred to in the discovery affidavit; (iii) from the pleadings in the action; (iv) from any admission made by the party making the discovery affidavit; or (v) the nature of the case or the documents in issue – that there are reasonable grounds supposing that the party has or has had other relevant documents in his possession or power or has misconceived the principle upon which the affidavit should be made.

[45] In *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*,<sup>39</sup> the Constitutional Court held:

'The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of section 35 of the Constitution, and for that reason it is to be taken very seriously indeed.'

[46] If from the pleadings and the nature of the case the court regards it as probable that the party making discovery has other relevant and disclosable documents in his possession, it may order production thereof.<sup>40</sup>

## Conclusion

[47] *Apropos* the document by Dr Boon, here is my conclusion:

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<sup>37</sup> Zeffert Evidence 732-746 and D1-468 to 469 Erasmus *Superior Court Practice* service 5 (2017).

<sup>38</sup> *Practice* service 7 (2018).

<sup>39</sup> *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) para 183.

<sup>40</sup> *Rellams* above n 22 and *Webster v Webster* 1992 (3) SA 729 (ECD) at 734A-B.

- (a) It is a document compiled by an employee of the appellant.
- (b) It was compiled after action had been instituted against the appellant by the respondent.
- (c) Mr Bastile alleges that it is confidential internal privileged opinion and Ms Ncula also confirms this in addition to stating that it is an incomplete fact-finding document and a witness statement.
- (d) Dr Boon did not treat the plaintiff or the minor child and is not employed at this hospital.
- (e) The document, despite being furnished to Prof Jeena, was not utilised by him.
- (f) It was clear that the opinion was requested from Prof Jeena by the state attorney and one of the documents he received was an expert opinion by Dr Boon. Prof Jeena however in his confirmatory affidavit<sup>41</sup> states:  
'I emphasize that I did not utilize the report sought by the applicant for purposes of formulating my opinion or compiling my report. It is indeed a document I had received though not utilised it in my report.'
- (g) The furnishing of the report alone does not vitiate or nullify the privilege, nor could it be said to have been waived.
- (h) It is unclear who furnished this report to Prof Jeena although the request for the opinion emanated from the State Attorney.
- (i) Prof Jeena in any event did not utilize the document and has stated this in unequivocal terms and accordingly there has been no waiver of privilege by the document being made available to him. The test for waiver goes beyond furnishing it to a third party. The authorities are clear that it would be deemed waived if it was utilised by the third party, which it was not in this case.
- (j) The document did not lose its privilege.
- (k) The respondent is accordingly not entitled to its disclosure.
- (l) The court *a quo* accordingly with respect ought to have dismissed the application on the basis that it was a privileged document.
- (m) This Court is not privy to the contents of the document, and neither was the plaintiff/respondent to expect the plaintiff in those circumstances to set out the basis upon which it considers the document relevant in the circumstances would result in an injustice. However, this document was obtained after litigation and that Dr Boon was not the treating physician.

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<sup>41</sup> That appears at page 72 of volume 1 at paragraph 4.

- (n) Even if one were to accept that the document was relevant, one would still need to consider the issue of whether the document was privileged or not.
- (o) The plaintiff/respondent disputed that the document was privileged predominantly on the basis that it was made available to Prof Jeena who is not an employee of the hospital and thus it lost whatever privilege it may have had.
- (p) The authorities are clear that the privilege is that of the client and the facts of this case do not demonstrate that this privilege was waived.
- (q) The plaintiff/respondent accordingly is not entitled to the report of Dr Boon.

[48] There is no reason why costs should not follow the result both in respect of the application before the court *a quo* and this Court. This case turns on facts in the context of rule 35(3). It does not constitute the testing of one's constitutional rights in the *Biowatch* context.<sup>42</sup> The case, however, does not warrant the involvement of two counsel. The record is not voluminous and the issues are not complex.

### **Order**

[49] In the circumstances, the following order is made:

- 1. The appeal is upheld with costs.**
- 2. The order of the court a quo is set aside and substituted with the following order:**

**'The application in terms of rule 35(3) is dismissed, with costs.'**

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**F B A DAWOOD**  
**JUDGE OF THE HIGH COURT**

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<sup>42</sup> *Banda v Minister of Police* [2021] ZAECGHC 55 paras 65 and 66 and the authorities cited therein with approval.

I agree.

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**S M MBENENGE**  
**JUDGE PRESIDENT OF THE HIGH COURT**

I agree.

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**M MAKAULA**  
**JUDGE OF THE HIGH COUR**

## Appearances

Counsel for the appellant: *V Kunju SC (with him, N D Ngadlela)*

Instructed by: The State Attorney, East London  
C/o Shared Legal Services  
Office of the Premier  
King Williams Town

Counsel for the respondent: *N K Siyo*

Instructed by: Matiwane Attorneys  
Queenstown  
C/o Gordon McCune Attorneys  
King Williams Town

Heard: 20 March 2023

Delivered: 15 June 2023