IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.: AR515/11

In the matter between

UAP AGROCHEMICALS KZN (PTY) LTD **FIRST APPELLANT**

PHILAGRO SOUTH AFRICA (PTY) LTD **SECOND APPELLANT**

And

NEFIC ESTATES (PTY) LTD **RESPONDENT**

JUDGMENT

MOKGOHLOA J

[1] The respondents brought an application to compel the appellants to discover documents claimed to be privileged. The court *a quo* found in favour of the respondent and ordered the appellants to pay the respondent's costs on the scale as between attorney and own client. The appellants appeal against the whole judgement and costs order, leave having been granted by the Supreme Court of Appeal.

[2] The respondents, Nkwaleni farmers, instituted action against the appellants for damages sustained to their citrus trees after they had treated the fruit with Meothrin, an insecticide supplied by the first appellant and manufactured by the second appellant. The appellants appointed experts to investigate the cause of the damage but the appellants refused to make the expert reports available to the farmers.

[3] The appellants defended the action and delivered their discovery affidavits. The discovery affidavits listed each document in respect of which the appellants claimed privilege which included the expert reports. The respondent challenged the appellants' claim of privilege and brought an application to compel the production of certain of the privileged documents. The application was made on two grounds:

(a) that the documents were not privileged; and

(b) the parties had concluded an agreement that expert reports would be made available to the respondent for inspection.

[4] The court *a quo* found in favour of the respondent on the first issue and did not deal with the second.

[5] In this appeal, the respondent argues that the appeal must fail because:

(a) the order is not appealable;

(b) the documents are not privileged;

(c) the denial of the agreement can be rejected on the papers.

Appealability

[6] Section 20(1) of the Supreme Court Act 59 of 1959 provides that an appeal will lie only against a judgment or order.

[7] In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I - 533A **Harms AJA** (as he then was) defined 'judgment or order' as follows:

> 'A "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the claim in the main proceedings.'

[8] In *National Director of Public Protections v King* 2010 (3) All SA 304 (SCA) the court dealt with the question of appealability where a party seeks to

attack on appeal against an order made before the proceedings have run their full course. **Nugent JA** said the following at 321I -322E:

> '[50] There will be few orders that significantly affect the rights of the parties concerned that will not be susceptible to correction by a court of appeal. In *Liberty Life of Africa Ltd v Niselow* (in another court), which was cited with approval by this Court in *Beinash v Wixley* 1997 (3) SA 721 (SCA), I observed that when the question arises whether an order is appealable what is most often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. I said that two competing principles came into play when that question is asked. On the one hand, justice would seem to require that every decision of a lower court should be capable not only of being corrected but of being corrected forthwith and before it has any consequences, while on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice.
>
> [51] In this case it was said on behalf of Mr King that the order is not appealable because it is interlocutory. Whether that is its proper classification does not seem to me to be material. I pointed out *Liberty Life (supra)* that while the classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle....'

[9] The question whether an order dismissing an application to compel further discovery is appealable, was argued before Patel J in *Santam Ltd and Others v Segal* 2010 (2) SA 160 (N). The learned judge stated the following at para 6:

'[6] The gravamen of this appeal is whether the dismissal by Choudree AJ of the application to compel further discovery constitutes a decision that is appealable. Before I advert to this point it is salutary to restate the purpose of discovery. In *Air Canada v Secretary of State for Trade* [1993] 2 AC 394 at 445-446, it was held:

> "Discovery is one of the few exceptions to the adversarial character of our legal process. It assists parties and the court to discover the truth. By so doing, it not only helps towards a just determination; it also saves costs. A party who discovers timeously a document fatal to his case is assisted as effectively, although less to his liking, as one who discovers the winning card; he can save himself and others the heavy costs of litigation.'"

[10] The honourable judge continued and referred to his other judgment delivered in *Maccsand CC v Macassar Land Claims Committee and Others* [2005] All SA 469 (SCA) where he stated:

> '"[8] Prior to its amendment by section 7 of the Appeals Amendment Act 105 of 1982, section 20(2) (*b*) of the Supreme Court Act 59 of 1959 ("the Act") provided that an appeal could be brought against an interlocutory order with leave of the court granting it. A court's decision whether to grant leave or not was premised on the distinction between simple interlocutory orders, which were appealable with leave, and interlocutory orders which had a final and definite effect on the main action which were appealable without leave. . . Section 20(1) of the amended Act creates a right of appeal from a 'judgment or order' only."'

The court continued and stated:

> "[12] It is settled law that in determining whether a decision is appealable not merely the form of the order must be considered but also, and predominantly, its affect."

[11] The appellants argued that once the documents in respect of which they claim privilege have been handed over to the respondent, the contents

thereof will become known to the respondent and there is nothing that can be done to extract that knowledge from the mind of the respondent. I agree. Consequently, the order to hand over privileged document has a final effect. It cannot be altered by the judge granting it or another judge, and it is therefore appealable.

Privilege

[12] For privilege to operate the information must have been obtained for the purpose of obtaining professional legal advice and must be obtained for the purpose of obtaining that advice with reference to actually pending or contemplated litigation. (*Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and marketing and Others* 1979 (1) SA 637 (CPD))

[13] In *United Tobacco Companies (South) Ltd v International Tobacco Co (SA) Ltd* 1953 (1) SA 66 (T) at 67E privilege was claimed for the reports on the ground that they had been made 'in anticipation and in contemplation of the litigation now pending' and as evidence and as information as to how evidence could be obtained for the use of the defendant's legal advisers to enable them to conduct the defendant's defence to the action and to advise the defendant thereon. The court accepted that litigation was contemplated and that the reports were made for submission to the company's legal advisers, but rejected the claim of privilege on the ground that the privilege does not apply to a communication between a principal and his agent in the matter of the agency giving information on the facts and circumstances of the very transaction which is the subject matter of the litigation. The court held that a likelihood of litigation is required not a mere possibility.

[14] In *General Accident, Fire and Life Assurance Corporation Ltd v Goldberg* 1912 TDP 494, Mason J insisted that privilege could attach to statements from agents only if litigation was 'likely or probable'.

[15] The appellants submitted in their answering affidavit that they appointed their attorney of record on 28 May 2004. According to the appellants, this was the time they had reasonably contemplated the likelihood

of litigation. The respondent does not dispute this. Therefore, all documents created after the appointment of the attorney (i.e. 28 May 2004) are privileged as they have been created as part of the exercise to gather information so that the attorney could provide legal advice. The order to compel the appellants to discover such documents is therefore wrong. Furthermore, the respondent's attorney demanded payment of the sum of R3 490 918 from the appellants in a letter dated 22 September 2004. This demonstrates that litigation was contemplated and the respondent did not in their application and at the hearing of the application request production of the documents created after 22 September 2004. This is evident from the respondent's founding affidavit when it stated that any reports, investigations and results received prior to September 2004 cannot be privileged. This means the respondent had accepted that documents created after September 2004 are privileged.

[16] What remains are the documents created during the period 12 January 2004 to 17 May 2004 i.e. items 1 – 18 in the Second Schedule of the appellants' discovery affidavit. In the answering affidavit, the appellants submitted that:

[16.1] The second appellant was initially questioned about the efficacy of Meothrin during October 2003. The initial enquiry was followed up by a further telephone call regarding possible resistance to thrips.

[16.2] On 1 December 2003 the second appellant was requested to visit the Nkwalini Valley because of a problem regarding non-payment of the first appellant's account.

[16.3] On 2 December 2003 the second appellant's representative visited the Nkwalini Valley and visited three farms including the respondent's farm. During the second appellant's visit to the Nkwalini Valley 'it became apparent...that the problem with thrips was far larger than Symons had until then explained. On inspecting the orchards where a thrips problem was present I realised that there was going to be a substantial culling of fruit.' This is not challenged by the respondent.

[16.4] The observations made during the 2 December 2003 visit to the Nkwalini Valley were conveyed to the second appellant's managing director on 3 December 2003. The second appellant's managing director expressed the view that 'there was a very serious problem on the horizon' and that 'he believed there was a very real likelihood of the farmers submitting claims to the second defendant for the damage to their citrus crops and that they would probably litigate in regard to those claims.'

[17] The respondent argued that the experts were appointed before the insurer accepted the appointment. According to the respondent, the insurer cannot claim privilege in respect of documents obtained before it had given an indication that the claims might fall under the policies.

[18] The appellants submitted on the other hand that the view held by the second appellant's managing director was not a view expressed in a vacuum. According to them, this was based on the nature and extent of the damage to the crops, which damage was extensive and irreversible; the fact that the Nkwalini Valley was devoted to growing export citrus; and the probability that the claims would probably be very significant and could not be resolved on a commercial basis without regard to liability.

[19] On 3 December 2003 the second appellant reported the events to its insurance brokers who, in turn, reported the events to the second appellant's insurers on 8 December 2003. The underwriting manager of the insurer allocated the claim to its claims' manager. On 11 December 2003 the insurers instructed a specialist firm of insurance loss adjusters. According to the appellants, the specialist insurance loss adjusters were instructed so that the matter could be assessed and legal advice sought. The claims' manager reported the matter to the board of directors of the appellants' insurers.

[20] It is clear that by 1 December 2003 the damage causing event had already occurred. It had been suggested that the second appellant's product was the cause of the damage, and some of the farmers had identified a

possible external manifestation of the problem with the second appellant's product, that there were colour differences between the batches of the product. I am satisfied on the facts that objectively, there were clear indications of the likelihood of litigation since December 2003. The insurance company assessed the risk of litigation and concluded that it was likely. Therefore, the reports were commissioned for submission to the appellants' attorneys to advise and assist on the contemplated litigation.

Agreement

[21] In its founding affidavit the respondent alleged that during January 2004 the Nkwalini farmers met the appellants at Nkwalini farmers' Club. The second appellant was represented by John Mansfield and Henk van Der Westhuizen. Mansfield suggested that experts be appointed to investigate the issue. According to the respondent, it is at this meeting that an oral agreement was concluded. The terms of which, were that the appellants would appoint experts to investigate the nature and extent of the losses suffered by the Nkwalini farmers and that the investigation reports and results would be made available to the farmers.

[22] The appellants deny the conclusion of the oral agreement alleged by the respondent. In the answering affidavit, the appellants stated that the only visit to the Nkwalini reserve where Mansfield and van Der Westhuizen were present together was on 11 March 2004 and it was at Fleurdale farmstall, Eshowe. On 18 March 2004 they visited various farmers. According to the appellants, the respondent had confused dates. The respondent accepted in the replying affidavit that it had confused the dates. It then stated that the alleged agreement was concluded on 6 April 2004.

[23] I find it necessary at this stage to refer to the correspondence exchanged between the parties before and after the meeting of 6 April 2004.

[24] On 2 April 2004 the second appellant sent the following letter to the chairman of the Nkwalini Citrus Grower's Association:

'Having considered all the information at hand, we regret we must advise that in our opinion Meothrin was not the cause of the damage suffered by certain members of your Association.'

'There is one aspect that we cannot deal with at present. We do not expect there is resistance by Nkwalini citrus thrips to Meothrin. This opinion is also held by John Symans and others to whom we spoke. Our attempts to devise a way of testing Nkwalini thrips for resistance with the A.R.C. have been unsuccessful. There are other alternative methods now under consideration.

We propose the appointment of an experienced independent citrus consultant to investigate your area and inspect the problems. To this end we have taken the liberty of approaching such consultant and trust this will meet with our approval.'

[25] Shortly after the 6 April 2004 meeting, the respondent sent a letter signed by van Rooyen, the deponent to the respondent's founding and replying affidavit. The letter states:

'My comments were as follows:-

1. Product was tested by SABS and proven to be on spec, although only active ingredient was tested for.
2. Nkwalini definitely did not have drought in 2004.
3. How did John Mansfield determine that the thrips levels were higher than previous years? I believe it is impossible to determine the year on year thrips level factually.
4. Nefic Estate's cleanest orchards are surrounded by natural vegetation.
5. Nefic Estate' only irrigates with under tree sprinklers and there is a huge variation in the level of thrips damage throughout the orchards. John Mansfield's view on this aspect is absolute nonsense.
6. Meothrin is marketed for its knockdown ability and length of thrip control, normally a minimum of 6 weeks. Nefic and other Estates found reinfestation 1 day after spraying Meothrin.

> In general this presentation was absolute nonsense and once again the Chemical Company responsible is trying to push the blame back to the farmers and once again the farmers must carry the cost of the product cost of the corrective sprays and the cost of the damage to the fruit.'

[26] On 7 April 2004 the second appellant sent another letter to the chairman of the Grower's Association. The letter recorded the following:

> 'We wish to place on record our appreciation for the opportunity you gave writer to state our case" on the captioned subject last week...
> We are in favour (as proposed in our letter dated 5 April) of calling in an independent citrus consultant. It was suggested that CRI (Shaun Moore) be approached; we are just not sure of the position that CRI in such matters. We will request Mr Bruwer and Mr Chris Kellerman to visit the affected farms.'

[27] Symons, on behalf of the first appellant addressed a letter on 19 May 2004 to van Rooyen:

> 'I have received correspondence from Brian Kerrin of Beyers and Kerrin C.C. Insurance Loss Adjusters as a follow up to his and Messrs Kellerman and Bruwer's visit to Nkwalini concerning the Meothrin non-performance issue.
>
> He advised me that investigations into the various complaints are still underway by Philagro and others and that we will be advised of the outcome of the investigations in due course. In the meanwhile and irrespective of the cause or responsibility, it is important that an exercise be conducted to ascertain the extent of the damage to each and every orchard.'

[28] On 22 September 2004 the respondent's attorney addressed a letter of demand to the first appellant.

> 'Our instructions are that none of our clients' claims or figures have been disputed by yourselves to date but no proposals have been put forward by yourselves as to a possible resolution to the problem caused by the non performance of Meothrin.'

[29] On 28 September 2004 the Nkwalini Citrus Grower's Association sent a letter to the first appellant. The letter reads thus:

> 'We are writing this letter on behalf of our growers in order to inform UAP Agrochemicals KZN, and the suppliers of the chemical Meothrin, namely Philagro SA (Pty) Ltd, that the following farms and members of the NCGA intend laying damages claims in the near future. These claims are as a result of citrus Thrips damage suffered due to the non-performance of Meothrin in the Nkwalini Valley.
>
> The earliest reported incident of the non-performance of Meothrin, according to our records, was November 2003 followed by a visit by Mr Henk Van Der Westhuizen of Philagro SA (Pty) Ltd in December 2003.
> To date we have had numerous visits by and correspondence with representatives of Philagro SA, Henk Van Der Westhuizen and John Mansfield, citrus consultants and Mr Brian Kerrin of the insurance loss adjusters'

[30] It is interesting to note that in all these letters there is no mention of an agreement that the experts report would be provided nor is there a request for production of such report. The first request for production of the report was made on 9 June 2005 by the respondent's attorneys. However, even though there was a request for production of the report, there was no reference to an agreement that the report would be provided.

[31] Another disturbing feature in the respondent's version is that the terms of the alleged alleged agreement differ from farmer to farmer. Its version is that the investigation reports and results would be made available to the farmers once the investigations had been completed. The following farmers, who deposed to the supporting replying affidavits, stated their version of the agreement as follows:

Gerrit Zaayman stated:

> 'I attended the meeting at the Nkwalini Farmers' Hall. I recall that, after various suggestions, Mansfield insisted that Philagro/UAP would appoint assessors to investigate the cause of the problem at no cost to the growers. We insisted that we required insight into the results of these assessments and he confirmed that they would be disclosed to us.'

Sean McNally on the other hand stated:

> 'I attended the meeting at the Nkwalini Farmers' Hall. I remember that Wally Lathan suggested engagement of representatives from CRI to do an investigation into the nature and extent of the citrus/thrips problem. Mansfield disagreed and stated that they would appoint their own assessors at no cost to the growers and that, on completion of the assessment, the growers would have access to the assessment documents.'

Timothy Wafer stated that Mansfield said that they (the farmers) would be kept fully informed of the result of the investigation.

[32] It is clear that there is no consistency amongst the farmers as to what was agreed at the meeting on 6 April 2004. Furthermore, Van Rooyen, the deponent to the respondent's founding affidavit, did not know when the alleged agreement was reached. He was forced to concede his error after having sight of the version put up by the appellants. It is therefore significant to note that the correspondence exchanged before and after the meeting of 6 April 2004, and the version put up by various farmers (*supra*), do not support the respondent's allegation that there was an agreement that expert reports would be made available for inspection to the respondent.

[33] Against this background of inconsistent versions of the farmers, Mr Marais, for the respondent, argued that it is common cause that a meeting took place and that certain disclosures were made at that meeting. According to Mr Marais, the nature, date, place and what was discussed and agreed at the meeting can be resolved after the hearing of oral evidence. I do not agree. A party who alleges that there was a meeting and that certain disclosures

were made at that meeting, must state the date and place of that meeting and also what was agreed in that meeting. On the other hand, the appellants deny the existence of the agreement. Their version is supported by correspondence exchanged between the parties before and after the date of the meeting of 6 April 2004. On the *Plascon Evans* rule, I find that the version of the appellants is more probable than that of the respondent. In my view, the respondent failed to show that there was an agreement between the parties that the expert reports will be made available for inspection.

ORDER

1. The appeal is upheld with costs, consequent upon the employment of two counsel.
2. The order granted by the court a quo is set aside and substituted by the following:

'The application is dismissed with costs'.

MOKGOPHLOA J

K PILLAY J

I agree

KRUGER J

I agree and it is so ordered

COUNSEL

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Instructing Attorneys	:	Truter James De Ridder Inc c/o Mason Inc 3rd Floor, Fedsure House 251 Church Street Pietermaritzburg Ref: Mr M Du Plessis
Date of hearing	:	3 August 2012
Date of Judgment	:	20 November 2012