IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: 10133/2015P

In the matter between:

TNM **APPLICANT**

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH: KWAZULU-NATAL **RESPONDENT**

Heard: 15 October 2020.

Delivered: 15 October 2020.

ORDER

The application is dismissed with costs.

JUDGMENT

GORVEN J

[1] This application is an interlocutory one. It forms a part of an action brought by the applicant against the respondent. She has sued the respondent on behalf of her minor child for damages arising from her birth.

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

[3] Dr Hall's report was served on the applicant. It made reference 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.'

[4] 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.

[5] Uniform rule 35(3) provides:

'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 him to make the same available for inspection in accordance with sub-rule (6), or to state on oath within 10 days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.'

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 failure to disclose the report would undoubtedly prompt precisely the present kind of application. It seems to me that, for this reason, the merits of the application should determine the outcome rather than this dilatory point.

[6] 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.

[7] 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'.[1] The factual averments of the respondent place the desired report into this category. In argument, the applicant conceded that this was the case.

[8] 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*,[2] 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. Imputed waiver occurs where – regardless of the holder's intention – fairness requires that the court conclude that the privilege was abandoned. Implied

[1] *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494 at 504. See also *Competition Commission of Soiuth Africa v Arecelormittal South Africa Limited & Others* 2013 (5) SA 538 (SCA) para 21.
[2] *S v Tandwa & Others* 2008 (1) SACR 613 (SCA) para 18.

waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment.'

[9] This distinction has now been criticised in *Contango Trading SA & Others v Central Energy Fund Soc Ltd & Others*[3] 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 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.'[4]

[10] 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

[3] *Contango Trading SA and Others v Central Energy Fund Soc Ltd and Others* 2020 (3) SA 58 (SCA) para 48.
[4] Op cit para 39.

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.'[5]

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. . .'.[6] 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.

[11] 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.'[7] 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 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

[5] Op cit para 51.
[6] Paragraph 54.
[7] See para 10 hereof.

prejudice the applicant in addressing the respondent's defence to the action.

[12] 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. Costs must follow the result. The respondent sought to persuade me that a punitive costs order should be granted against the applicant but not case has been made out for this.

[13] In the result, the application is dismissed with costs.

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GORVEN J

DATE OF HEARING:	15 October 2020
DATE OF JUDGMENT:	15 October 2020
FOR THE APPLICANT:	MA Oliff instructed by Justice Reichlin Ramsamy, locally represented by AK Essack, Morgan Naidoo & Company.
FOR THE RESPONDENT:	RK Ramdass instructed by Norton Rose Fulbright South Africa Incorporated, locally represented by Cajee Setsubi Chetty Inc.