



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-006058

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: **07 March 2024** Signature 

In the matter between:

NETCARE MEDICAL SCHEME

Applicant

and

COUNCIL FOR MEDICAL SCHEMES

First Respondent

REGISTRAR FOR MEDICAL SCHEMES

Second Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is an interlocutory application to compel production of a document in terms of Rule 35(12) read with Rule 30A. The document sought is a legal opinion referred to in paragraph 7 of an answering affidavit deposed to by the Registrar of Medical Schemes on behalf of the first and second respondents signed on 25 October 2022 and delivered on 17 February 2023.¹

[2] The applicant is Netcare Medical Scheme (“the Scheme”), a medical scheme as defined in section 1 of the Medical Schemes Act 131 of 1998 (“MSA”).

[3] The first respondent is Council for Medical Schemes (“CMS”), a juristic person established in terms of section 3 of the MSA.

[4] The second respondent is the Registrar of Medical Schemes (“Registrar”), the executive officer of the CMS, obliged to manage the affairs of the Council in

¹ Para 7 and 8 of Answering affidavit by Sipho Kabane.

accordance with the provisions of the MSA, appointed in terms of section 18 of the MSA.

- [5] Whilst this is an interlocutory application, a summary of the main application's background may place matters in context.

B. BACKGROUND

- [6] The respondents had embarked in an ill-fated election process to replace some members of their board of trustees. This failure led the respondents to flout the provisions of the MSA and the rules resulting in an inquorate board.² This was because following the end of terms of 3 of the board members on 30 June 2022, the board was not properly constituted as required by section 57(2) of the MSA. It now had 6 appointed and 3 elected members of the board of trustees.

- [7] This situation endured for the period 24 June 2022 to 03 August 2022, during which period the applicant held elections and called a Special General Meeting ("the SGM") whereat the new election results would be presented in an effort to salvage and regularize the situation after the fact.

- [8] The respondents were not satisfied with this suggested approach and raised concerns that as the applicant's board was improperly constituted, it could not

² Section 57(2) of the Medical Schemes Act 131 of 1998 and the rule 18(1) of the scheme's rules.

lawfully and validly conduct the elections afresh. The applicant was advised as such and further to seek legal advice on this aspect.

[9] When they could not obtain the blessings of the respondents to effect an *ex post facto* approval of the irregular elections, the applicant then sought urgent legal advice. It is this legal advice that forms the basis of this dispute.

[10] The legal opinion was authored by a Senior Counsel and signed on 25 September 2022. The Registrar of Medical Schemes (second respondent) referred to the contents of the said opinion in paragraph 7 of his affidavit.

[11] It is this opinion that is central to this application to compel discovery. The application is brought in terms of Rule 30A of the Uniform Rules of Court, read with Rule 35(12). Alternatively, the Scheme submits that it is entitled to the document as a matter of fairness in terms of the common law, and in terms of the inherent powers of the High Court to regulate its proceedings.

C. THE PARTIES' RESPECTIVE SUBMISSIONS

[12] Mr Loxton SC for the applicant, submitted that mere reference to having a legal opinion amounted to an implicit waiver of litigation privilege. With reference to the Supreme Court of Appeal's decision in ***Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others***,³ he submitted further

³ *Infra* ft 4.

that by disclosing the contents of an opinion or using the contents for one's benefit results in the line being crossed and the whole opinion liable to be disclosed.

[13] The Registrar summarized the legal opinion in paragraph 7 of his answering affidavit as follows:

“...The opinion ...advised as follows:

7.1 The Council has no authority to grant the respondent's application for exemption in terms of section 8(h) of the MSA as the application was made ex post facto.

7.2 The applicant's/respondent's Board of Trustees, post 30 June 2022 is a nullity, notwithstanding the second round of, unlawfully called, elections that were held.

7.3 The Board of Trustees of the applicant/respondent was not properly constituted and in violation of section 57(2) of the MSA read with Rule 18(1), Rule 19 (1) and Rule 19(15) of the applicant's/respondent's rules.

7.4 The Council should consider the appointment of a curator pending the appointment and election of a new Board of Trustees.”

[14] Mr. Loxton SC further emphasised that no privilege is asserted in the answering affidavit at all. Privilege is asserted only when the respondents encountered the Rule 35 notice.

[15] The Registrar's affidavit was deposed to both in answer to an application for declaratory relief brought by the Scheme relating to measures taken by the Scheme to ensure compliance with the Medical Schemes Act No. 131 of 1998 ("the MSA"), as well as in support of a counter-application brought by the respondents. The counter-application seeks an order placing the Scheme under curatorship in terms of section 50 of the MSA and the appointment of a curator, one Mr Monyela, to take immediate control of the Scheme.

[16] The respondents have withheld the legal opinion on the basis that the legal opinion is "not necessary for the Applicant to prepare its answering affidavit", contains privileged information and is confidential. In answer to the application to compel discovery the attorney for the respondents alleges that the legal opinion was legal advice given by "a Senior Counsel in his professional capacity", in confidence, in the process of or contemplation of litigation.

[17] Mr. South SC submitted on behalf of the respondents that when one refers to the gist of an opinion, it does not amount to a waiver. Reference was then made to ***Anglo American South Africa Limited v Kabwe and Others In Re Kabwe and Others v Anglo American South Africa Limited***⁴ where Windell J as she then was, referred to Wallis J 's remarks in ***Contango*** and held that:

⁴ Anglo American South Africa Limited v Kabwe and Others In Re Kabwe and Others v Anglo American South Africa Limited (3277720) 2021 ZAGPJHC 504 (26 October 2021)

"there is no presumption that the disclosure of the gist of legal advice will inevitably amount to conduct incompatible with asserting privilege in relation to the advice itself" and there is *"no automatic waiver as a result of partial disclosure"* of privileged material. Whether there has in fact been implied waiver of privilege must be decided based on the facts of each case."

[18] With reference to the Supreme Court of Appeal decision of ***Contango Trading SA and Others v Central Energy Fund SOC Ltd and Others***⁵ Mr Loxton SC submitted that it is trite that ordinarily legal opinions attract legal advice privilege, but that such privilege may be waived - for example, by disclosing the opinion or relying upon it.

[19] The decision to place the Scheme under curatorship taken on 31 October 2021, after receipt of the legal opinion, and was allegedly taken "in the light of the legal opinion." The legal opinion is accordingly integral to the decision which is the subject of the counter-application.⁶

[20] The legal opinion is required so that the Scheme can properly answer and reply to the allegations which refer to and purport to set out the advice given in the legal opinion. It is impossible for the applicant to admit or deny facts because it does not have the opinion to use as a reference point.

⁵ *Contango Trading SA and Others v Central Energy Fund SOC Ltd and Others* 2020 (3) SA 58 (SCA) at [41]

⁶ Registrar's Affidavit par. 8; quoted at FA pp.9-10 par. 16.

[21] The Scheme submits that both in terms of Rule 35(12) and the principles relating to legal privilege and the waiver of that privilege as a matter of justice and fairness, which Rule 35(12) gives effect to, the Scheme is entitled to consider for the purposes of its answering and replying affidavits, the legal opinion and the advice given in the legal opinion itself (rather than the Registrar's summary thereof), the facts relied on for the purposes of the legal opinion, and any assumptions relied on or qualifications made to the opinion.

[22] The references to the legal opinion by the Registrar himself make it clear that the legal opinion is relevant to the dispute between the parties and the decisions taken by the respondents, including the decision to appoint a curator to manage the affairs of the Scheme which is the subject of the counterclaim. Absent the legal opinion itself, it is not possible to ascertain whether the Registrar's allegations correctly reflect the advice given, or whether the advice given was qualified, based on a correct assessment of the facts, or correctly given. The facts in this regard are relevant to the dispute between the parties, the decisions taken by the respondents and the relief sought by the respondents in the counter-application.

Rule 35 (12) and legal privilege

[23] The general principles relating to rule 35 (12) and the production of documents referred to in affidavits are well established:

[24] *“To sum up: It appears to me to be clear that documents in respect of which there is a direct or indirect reference in an affidavit or its annexures, that are relevant, and which are not privileged, and are in the possession of that party, must be produced. Relevance is assessed in relation to rule 35(12), not on the basis of issues that have crystallised, as they would have had pleadings closed or all the affidavits filed, but rather on the basis of aspects or issues that might arise in relation to what has thus far been stated in the pleadings or affidavits and possible grounds of opposition or defences that might be raised, and on the basis that they will better enable the party seeking production to assess his or her position and that they might assist in asserting such a defence or defences.”*⁷

[25] A court considering an application under rule 30A to compel production of a documents sought pursuant to rule 35(12) enjoys a discretion *“in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case.”*⁸ The discretion with which the court is vested is narrowly circumscribed, once the applicant has established the requisite elements set out in the rule the scope to refuse relief is limited.⁹

D. THE LEGAL PROVISIONS AND ANALYSIS

⁷ Democratic Alliance and Others v Mkhwebane and Others 2021 (3) SA 403 (SCA) at [41].

⁸ Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited [2022] 2 All SA 299 (SCA) at [31]

⁹ Caxton *supra* at [38].

[26] Legal professional privilege is categorized into two forms. The first is communications between clients and their attorneys for the purposes of obtaining legal advice or in the context of litigation, these are privileged. The second concerns anything exchanged between attorneys and clients in the context of litigation, this is covered by what is called litigation privilege.

[27] Litigation privilege is therefore one of two components of legal professional privilege, the other being the privilege that attaches to communications between a client and his attorney for the purpose of obtaining and giving legal advice. Litigation privilege, with which we are concerned in this case, protects communications between a litigant or his legal advisor and third parties, if such communications are made for the purpose of pending or contemplated litigation. It applies typically to witness statements prepared at a litigant's instance for this purpose. The privilege belongs to the litigant, not the witness, and may be waived only by the litigant.¹⁰

[28] Langa CJ describes the right to legal professional privilege in the following terms:

"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

¹⁰ Competition Commission of South Africa v ArcelorMittal South Africa Ltd and Others (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) (31 May 2013) para 20 quoted verbatim.

has changed over time. It is now generally accepted that these communications should be protected in order 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.”

[29] In ***Competition Commission v ArcelorMittal SA & Others***, the Competition Commission had obtained a legal opinion with a view to prosecuting cartelists, in other words, litigation.¹¹ It later invited one of the respondents to make a leniency application.¹² The question then arose whether the Commission waived its privilege by referring to the leniency application in its referral affidavit, as the respondents contended it did.¹³

[30] In the ultimate analysis, Cachalia J held that the leniency application was privileged, but that the Commission waived its privilege by referring to it in the referral affidavit. The court held that:

“Waiver may be express, implied or imputed. It is implied if the person who claims the privilege discloses the contents of a document or relies upon it in its pleadings or during court proceedings. It would be implied too if only part of the document is disclosed or relied upon. For a waiver to be implied the test is objective, meaning that it must be

¹¹ ArcelorMittal para 28 and 31.

¹² Ibid para 29.

¹³ *Supra* para 35.

*judged by its outward manifestations; in other words, from the perspective of how a reasonable person would view it ...*¹⁴

[31] The judgment in ***Cantango Trading SA v Central Energy Fund SOC Ltd***¹⁵ was concerned with the claim for production of two opinions furnished to the respondents by senior counsel. The opinions were referred to in the founding affidavit on behalf of the CEF and SFF in a review application to set aside sales contracts for the disposal of 10 million barrels of South Africa's strategic oil reserves to various companies of which the three applicants were part of. In his affidavit, the deponent on behalf of the CEF and SFF had very guardedly referred to the two legal opinions in the context of explaining the delay that had bedevilled the review application, asserting that the opinions are privileged and not subject of disclosure. No reliance was placed on the content of the opinions in support of the case that had been set out in some detail in the first three hundred odd paragraphs of the founding affidavit. The court held that the two legal opinions were privileged and accordingly, the CEF and SFF were not obliged to disclose them.

[32] The court then analysed the requirements for an implied waiver of privilege based on the objective conduct of the party vested with the privilege.

¹⁴ Competition Commission v ArcelorMittal SA & Others *supra* para [33].

¹⁵ *Cantango Trading SA v Central Energy Fund SOC Ltd* [2019] ZASCA 191.

[33] The decisions in ***Acelormittal*** and ***Contango*** are distinguishable on the facts.

[34] In the present case, the deponent on behalf of the respondents gave a detailed description of events in his answering affidavit, laying out the genesis of the mishaps on the applicant's part and the resultant conundrum. He was then advised to seek legal advice¹⁶ which he did. Having obtained the legal opinion from senior counsel, he set out to act on it. He states so himself in the affidavit at paragraph 10 thereof, stating that “...*The legal advice obtained could not be ignored, lest the first and second respondents be found wanting in discharging their regulatory functions.*”

[35] It is apparent from the said answering affidavit that the legal advice sought by the respondents was in broad terms since it is nowhere stated that it was for contemplated or envisaged litigation.

[36] Paragraph 7 of the affidavit tabulates four specific actionable points arising from the legal advice as listed. They are already quoted in paragraph 13 above.

[37] Paragraph 8 narrates the advice to place the applicant under curatorship. One can only assume that the decision to launch a counter-application therefore flows from the said legal advice contained in the legal opinion.

¹⁶ Answering affidavit para 5.

[38] At no point was privilege asserted in the answering affidavit, this differs with the situation in the **Contango** case.

[39] In light of the caselaw traversed and analysed above, I find that imputed waiver¹⁷ of privilege has occurred. In the result the legal opinion has lost the shield of privilege and should be disclosed to the applicants.

[40] The applicants have made a persuasive case for the relief sought. There are no reasons justifying a departure from the normal rule that costs should follow the cause.

[41] The following order is made:

- (i) The First and Second Respondent are directed to produce for inspection and copying the opinion signed on 25 October 2022 which is referred to in paragraph 7 of the Second Respondent's answering affidavit in the main application and founding affidavit in the counter application, deposited to on 17 February 2023, within five days of the grant of this order;
- (ii) The First and Second Respondents are directed to pay the costs of this application, including the costs of two counsel.

¹⁷ “...there is no difference between implied waiver and a waiver imputed by law. They are different expressions referring to the same thing.” – *Contango Trading v CEF* para [48].



J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 03 October 2023

Date of Judgment: 07 March 2024

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 07 March 2024.