IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

(Exercising its Admiralty Jurisdiction)

Case No: A66/2017

Name of ship: mv 'Rascal'

In the matter between:

Russel Chard — Applicant

and

Old Mutual Insure Limited — Respondent

Judgment

Lopes J:

[1] This is an application, in terms of rule 35(6) of the Uniform Rules of this Court, to compel the delivery of certain expert reports. The applicant is Russel Chard (Mr Chard) who is the owner of the mv 'Rascal' ('the vessel'), which partially sank in the Durban Marina, and sustained damage, including

damage to its engines. The following issues are common cause between the parties:

(a) A contract of insurance was concluded between Mr Chard and the respondent, Old Mutual Insure Limited ('Old Mutual'), (previously named Mutual and Federal Insurance Company Limited), in June, 2007. That contract was renewed from time to time. In March 2016 the contract was amended to cover the vessel in terms of a renewed schedule and Old Mutual's pleasure craft policy.

(b) The vessel partially sank on the 3rd January 2017, resulting, *inter alia*, in the vessel's engines being submerged in salt water.

(c) Mr Chard gave the necessary notifications to Old Mutual and claimed an indemnity for his loss as a result of the sinking.

(d) The sinking is an insured peril covered by the insurance policy.

(e) Mr Chard alleges that following the appointment of an assessor and a technician by Old Mutual, they negligently caused the damaged engines to be started and operated, without following the procedures for doing so where engines have been damaged by salt water immersion.

(f) On the 27th October 2017, Old Mutual tendered the sum of R1 589 272.06 in full and final settlement of Mr Chard's loss.

[2] The issue between the parties in the action is whether the vessel, as a result of the sinking, became a constructive total loss, or whether Old Mutual is only liable to pay to Mr Chard the reasonable cost of repair of the vessel, or the reasonable sound market value thereof, which Old Mutual contends is in the amount tendered.

[3] Pursuant to the sinking of the vessel, various experts were appointed by both parties to investigate the cause of the sinking. It is the Old Mutual's expert's reports which form the subject the matter of this application. Mr Chard claims, in terms of rule 35 (6) of the Uniform Rules of this Court, delivery of the following:

(a) The assessment report of the mechanical engineer, Johan Bekker;

(b) The assessment report of the investigator, Martin Blomeyer;

(c) The assessment report of the insurance assessor, DW Miller; and

(d) Correspondence between Old Mutual and DW Miller.

[4] Old Mutual maintains that it is not obliged to disclose any of the documents sought by Mr Chard because it is entitled to raise the defence of litigation privilege.

[5] Once the usual three sets of affidavits had been delivered, Old Mutual sought to clarify and amplify its answering affidavit in a further affidavit dated the 2nd May 2019. That affidavit, *inter alia*, discloses that only the assessment reports of Messrs Bekker (dated the 17th September, 2017), Blomeyer (dated the 10th April 2017 and the 2nd May 2017), and the correspondence between Mr Miller and Old Mutual after the 7th March 2017 remain in issue. Mr Chard did not oppose the admission of that affidavit, choosing instead to reply to it. Both sets of additional affidavits form part of the application papers.

[6] The relevant background to the production of the expert reports is not entirely clear, partly because of the confusing manner in which some of the emails are presented. The following, however, emerges from the affidavits:

(a) The vessel sank on the 3rd January 2017.

(b) A loss adjuster, Mr D W Miller was appointed by Old Mutual on the 17th January 2017. It is evident from the correspondence that he was going to investigate the state of the engines of the vessel, and Old Mutual avers that he was instructed to investigate the circumstances of the sinking, to consider the possibility of the unseaworthiness of the vessel, and to propose any appropriate adjustments to the claim.

(c) On the 24th January 2017 Mr Miller requested photographs of the extent to which the engines were submerged.

(d) On the 6th February 2017 Mr Chard sent an email to the deponent to Old Mutual's affidavits (Mr Ramtahar), informing him that he had met with Mr Miller and the technicians involved in inspecting the engines. Mr Chard raises the point that although the boat can be repaired, no guarantee can be given on the engines.

(e) On the 9th February 2017 Mr Miller emailed Mr Chard raising the issue of a guarantee for the repair of the engines. This also notified Mr Chard that the propeller of the vessel had been removed and that that could form the subject of a separate claim (possibly theft) by Mr Chard.

(f) On the 14th February 2017, Mr Chard expressed his concern at the procedure in examining and repairing the engines. His view was that the engines should have been removed and only opened on a work bench by suitably qualified and authorised Volvo engine technicians.

(g) On the 16th February 2017 a conference call was held between Mr Chard and Mr Miller. After that call, Mr Miller notified Mr Chard that:

(i) Mr Miller and Old Mutual had no problem with the carrying out of a diagnostic check of the engines;

(ii) If the engines were considered satisfactory after completing successful sea trials, Old Mutual would be informed that the engines had not sustained any long term damage;

(iii) There was the possibility of future electrical problems with the engines, which Old Mutual may wish to guarantee, and had apparently agreed to do;

(iv) Old Mutual had funded the initial investigations into the condition of the engines, and had made a request 'for the balance of the work to be carried out'.

(h) On the 21st February 2017 Mr Miller confirmed to Mr Chard that Old Mutual would pay for certain items of equipment required to start the engines in order to inspect and test them.

(i) On the 1st March 2017 Mr Chard wrote to Mr Miller and Old Mutual stating that he would appoint a private investigator to investigate the original sinking in Durban; the disappearance of his propeller; allegations that there been a break-in into the engine room causing damage to the vessel; and other allegations. In this letter, for the first time, Mr Chard indicated that he would follow the process all the way 'to prosecution'. What is not clear is whether this is an indication of an action against Old Mutual, or a criminal prosecution for malicious damage against 'a certain named individual'. On balance it appears to be a reference to the latter.

(j) On the 6th March 2017 Mr Chard appointed an investigator, Mr Shaun O'Brien, and requested Mr Miller's final assessment report and copies of all invoices for the work done on the vessel to date.

(k) Old Mutual engaged its own Specialist Investigation Unit, and Mr Blomeyer was appointed to investigate the claim. Mr Bekker was engaged to assist Mr Blomeyer. On the 7th March 2017, Mr Chard was first made aware that Old Mutual would not release Mr Miller's report to Mr Chard. In an email Mr Miller indicated that he had already discussed the matter with Mr O'Brien who would in any event, be aware of the contents of his report following their meeting. This did not refer to a copy of a document, but rather to what they had discussed.

(l) On the 8th March 2017 two representatives of Old Mutual, and Mr Chard, held a meeting at which it was agreed that a duly appointed Volvo engine agent would take over the work on the engine repairs, a diagnostic test would be carried out on the engines without delay, and Mr Miller would assist with the logistics and the provisions of necessary parts to the persons carrying out the test. It was also agreed that Mr Miller would be present during the test.

(m) On the 15th March 2017 Mr Blomeyer emailed Mr Chard, describing himself as a 'Claims Evaluator', employed in the 'Claims Support Services' department of Old Mutual. He stated that he would be present when the vessel's engines were stripped. He also undertook to keep Mr Chard updated as the matter progressed.

(n) Eventually, on the 16th March 2017 the vessel was taken out of the water for the engines to be removed and stripped, as anticipated.

(o) Mr Bekker, who is a mechanical engineer, also recommended that the engines be removed from the vessel and be stripped.

(p) Further correspondence was exchanged between the parties and Mr Gounden, who had been responsible for stripping and examining the engines, reported that because the engines has sustained serious damage, his advice was to replace them both.

(q) On the 20th April 2017 Mr Ramtahar emailed Mr Chard, stating that they were waiting for the final report from the SIU (Special Investigations Unit), after which Old Mutual would revert with a decision. Mr Blomeyer, reading in copy, was asked when the final report could be expected.

(r) In the emails exchanged between Mr Chard and Mr Ramtahar concerning the value of the vessel, the issue was raised whether the policy provided for a payment on the basis that the vessel might be a total constructive loss. It seems probable that at that stage Old Mutual must have been in possession of a report from Mr Blomeyer on the state of the engines.

(s) Summons was issued by Mr Chard against Old Mutual on the 29th August 2017. Old Mutual pleaded on the 11th October 2017.

[7] Mr *Voormoolen* SC submitted that the attitude of Old Mutual as disclosed in its answering affidavits is that all correspondence between and Mr Miller and Old Mutual after the 7th March 2017 is privileged. He submitted that litigation privilege protects communications between a litigant or his legal advisor, and a third party, only where such communications are made for the purpose of pending or contemplated litigation. In order to claim litigation privilege two aspects have to be established:

(a) the document must have been obtained or brought into existence for the purpose of the litigant's submission to a legal adviser for legal advice; and

(b) there must be pending proceedings or proceedings contemplated as likely at the time.

See: *Competition Commission of South Africa v Arcelormittal SA Ltd & others* 2013 (5) SA 538 (SCA), paras 20-21.

[8] Mr *Voormoolen* submitted that at para 22 of *Competition Commission*, the Supreme Court of Appeal left open the question whether it was enough for the litigation privilege to apply if the information conveyed to the legal adviser was for a 'definite' purpose or whether our common law should be developed to accord with other jurisdictions which require that such information be the 'dominant purpose' of obtaining legal advice. In this regard Mr *Voormoolen* invited me to extend our common law on the basis that the present state of affairs does not promote the spirit and purpose and objects of the Bill of Rights contained in our Constitution. In terms of our common law, the purpose of conveying the information to the litigant or their legal advisor must be for obtaining advice. It must be for a 'definite

purpose' (but not the only purpose or the dominant purpose). Only then, is the information protected from disclosure.

[9] Mr *Voormoolen* submitted that Old Mutual bore the onus of establishing the requirement of legal privilege, and in this case had not demonstrated that the purpose of conveying the information was either for a definite purpose or the dominant purpose of obtaining advice with regard to intended litigation. He drew attention to the fact that in Old Mutual's answering affidavit Mr Ramtahar stated:

> '16. As such, it was reasonably foreseeable that upon the repudiation of the claim or *alternatively* the admission thereof via a tender for payment of a lesser amount, the Applicant was prone to challenge either such decision through the forum of litigation. Thus, the reports were procured for the purposes of not only investigating the claim, but also in respect of substantiating the repudiation of the claim or *alternatively* justifying the payment of a lesser amount and, in turn to form the basis of a legal defence. Litigation was clearly contemplated especially in light of the stance adopted by the Applicant. The Applicant has confused the timing of the issue of Summons with the contemplation of litigation and in this regard the reports were prepared in contemplation of litigation.
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> 17. Having regard to the aforegoing, the reports were commissioned for the sight of the Respondent's legal advisers and considering the

> circumstances surrounding the incident, litigation was likely contemplated as early as January 2017, when the loss adjuster was first appointed by the Respondent'.

[10] In Old Mutual's answering affidavit, Mr Ramtahar also draws attention to the fact that both parties had reserved their legal rights in correspondence exchanged as early as May 2017. He submits that in the circumstances it is clear that litigation was contemplated as early as January 2017 and by the latest in May 2017.

[11] Mr *Voormoolen* submitted that the answering affidavits give no indication of the nature of the legal advice sought, or how the reports that were proffered by the various experts are linked to that advice. Mr *Voormoolen* invited me to accept that, although the purpose for which reports had been obtained have variously been described as the dominant purpose, the sole purpose or a definite purpose by various courts, I should hold that the 'real purpose' of conveying the information to a legal representative must be to obtain legal advice with regard to likely or contemplated litigation. In other words the real purpose for obtaining a report from an expert must be to obtain legal advice from a legal representative. Only then will legal privilege attach. In the instance where

an expert report is obtained, and then later given to a legal representative, the legal privilege does not attach.

[12] Mr *Voormoolen* referred to the trends in England, Wales and Australia where those jurisdictions incline to the view that if a report is prepared for more than one purpose, unless the dominant purpose is the obtaining of legal advice, the documents are not privileged. He submitted that a good example of where legal privilege would attach is where an insurance company instructs attorneys to defend a claim, and the attorneys themselves appoint assessors. However, even then it may not necessary be for the purpose of litigation, but is perhaps likely to be so. These jurisdictions also examine the facts in order to make a determination on an objective basis, and do not merely rely upon the averment of the participants.

[13] Mr *Voormoolen* stressed the importance of the basis for privilege which is that litigants must be free to make a clean breast of matters to their legal representative. If privilege is to be claimed, then the onus is on the party claiming privilege to establish it.

[14] Mr *Voormoolen* drew attention to the importance of the dates upon which the various persons who produced reports were appointed. He stressed that the persons were appointed to advise Old Mutual on aspects of the

claim, at a time when litigation was not contemplated. The fact their reports may have been delivered at a later stage – ie. September 2017 in the case of Mr Bekker, does not mean the litigation only had to be anticipated at that stage. It is the time when the experts are appointed, when the litigation is contemplated that is relevant to determining the privilege. That determination depends, in turn, upon the purpose of the appointment: was it to help determine the claim? Or was it in contemplation of litigation, and with the object of obtaining legal advice?

[15] Mr *Wallis*, who appeared for Old Mutual, agreed that for the defence of litigation privilege to succeed, the two requirements set out in *Competition Commission* must be satisfied.

[16] The intention of the party requesting the document is decisive of the party's intention, and not the intention of the party creating the document. A court will not lightly go behind the averments in a party's affidavit in order to investigate with regard to that party's intention when the report was requested. For these submissions Mr *Wallis* relied on *Competition Commission*.

[17] Mr *Wallis* relied on *Re Highgrade Traders Ltd* [1984] BCLC 151 (CA) for authority that where there is a duality of purpose by the insurer

wishing to obtain the advice of their legal representatives, and also to ascertain the cause of the insured event, the privilege would attach.

[18] Mr *Wallis* denied that any development of the common law is necessary in circumstances where *Competition Commission* had been decided well after the Constitution, and foreshadowed no such shortcoming or need for development. He submitted that litigation had been suggested by Mr Chard as early as January 2017, when the loss adjustor was appointed, and at the latest by May 2017.

[19] Mr *Wallis* submitted that the law as set out in *A Sweidan and King (Pty) Ltd & others v Zim Israel Navigation Co Ltd* 1986 (1) SA 515 (D) at 519 does not require a 'real purpose', and accepts that a document may be privileged where litigation is not the sole or dominant purpose for its creation. He pointed out that Booysen J rejected the 'dominant purpose' argument and referred to a 'definite purpose'. This judgment was approved in *Competition Commission* para 24, and by Vahed J in *Ascent Mining Services CC v Richards Bay Minerals* (3412/2011) [2014] ZAKZDHC 17 (2 May 2014) para 48.

[20] The South African authorities may be viewed from:

(a) *General Accident, Fire and Life Assurance Corporation, Ltd v Goldberg* 1912 TPD 494. Here a claim of privilege was refused. At that stage our rules were taken directly from the English rules, and our courts were guided by decisions of the English Courts given on those rules – information obtained by or for a professional legal advisor for the purpose of advising a client as to the prosecution or defence of an action, or for advising the client on whether a claim should be made or defended, is privileged. The purpose of the rule is to protect attorney/client privilege. With regard to the contemplation of litigation, Mason J stated at 504:

> 'It is not a question whether a man is very nervous or suspicious that there may be litigation, and that if he is so nervous and suspicious he is to be protected in respect of the document, whereas if he is not nervous and suspicious he is not to be protected. There must be really some contemplated litigation, some fact to indicate that litigation is likely or probable. It must not be a mere possibility which there is nothing to lead one to believe would be converted into reality according to the facts of the case.'

(b) In *Sweidan*, Booysen J accepted that as long as the production of the report was, *inter alia*, for the definite purpose of receiving legal advice in pending or contemplated litigation, it mattered not that there may have been other purposes for preparing the report. It need not be 'at least the sole or primary purpose' as long as it is for a definite purpose.

(c) In *Competition Commission*, para 30 Cachalia JA, quoting from *United Tobacco Companies (South) Ltd v International Tobacco Company of South Africa* 1953 (1) SA 66T at 72H, reinforced the view that courts 'will not lightly go behind averments in an affidavit to the effect that the likelihood of litigation was contemplated when the document was procured'. The point was also emphasised that it is the intention of the person under whose authority a document is requested which is important, and not the intention of the person who actually prepares the report.

[21] In *Competition Commissioner*, Cachalia JA stated:

> '[20] Litigation privilege is 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.

[21] Litigation privilege has two established 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.

[22] There is some uncertainty as to whether documents prepared for litigation must have submission to legal advisors as their sole purpose, substantial purpose, definite purpose or dominant purpose. A suggestion that the document must have been prepared substantially for that purpose was rejected as having been based on a misreading of earlier authority. In *A Sweiden and King v Zim Israel Navigation*, Booysen J said it suffices if it is a definite purpose, whether there are other purposes or not. He considered that the weighty authority of the House of Lords in the seminal case of *Waugh v British Railways Board*, which adopted the dominant-purpose test, did not accord with our practice. The dominant purpose test has since been applied in Canadian and Australian courts. And the parties appear to adopt it in their submissions.

[23] It is, however, not always apparent what the definite or dominant purpose is. In *Waugh*, where the two purposes of a document carried equal

> weight, the court found that no dominant purpose attached to the document and it was therefore not protected by litigation privilege. But the courts have also looked at these separate or dual purposes as part of a single overarching purpose related to litigation. So where, in *Re Highgrade Traders Ltd*, insurers had commissioned reports to establish the cause of a fire that had destroyed an insured's business the Court of Appeal was not prepared to find separate purposes. Instead it said the following:
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> > "What then is the purpose of these reports? The learned judge [a quo] found duality of purpose because, he said, the Insurers wanted not only to obtain the advice of solicitors, but also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable." (Footnotes omitted).

[22] Although the adoption of the suggestion of a 'real purpose' is, to my mind, an attractive one, in the circumstances of this matter, I do not believe that it is necessary for me to expand our common law in order to arrive at a decision. The South African law seems decisive of this matter, and it is not necessary to rely on foreign authorities.

[23] At the outset of the involvement of Old Mutual there seems only to have been a willingness on its part to co-operate in trying to resolve the

claim. Even the raising of the spectre of unseaworthiness does not seem to have been seriously considered as a candidate for litigation.

[24] Even after the appointment of Mr Blomeyer as a specialist investigator in early March 2017, and his attendance at the examination of the engines, there appears to be no intention or contemplation of litigation. Only when Old Mutual declines to share information with Mr Chard is any hint of a triable dispute visible. Even then, the hitherto approach of Mr Chard, and even his expressions of tough negotiating do not seem to have been done with the prospect of litigation in mind, but rather the obtaining of the best deal he could. In reaching these conclusions I do not believe that I am going behind the averments of Mr Ramtahar. This is simply because, despite his conclusions, he never really addresses the matter of when and why litigation was contemplated, and what areas of advice were sought for comment on by Old Mutual's legal advisors. He had every opportunity (including his supplementary affidavit) to do so, but did not.

[25] With regard to Mr *Wallis's* reliance on *Highgrade*, that matter is distinguishable from the present circumstances. In *Highgrade*, the insurers suspected arson and requested a report to that end within four days of the fire. The circumstances of a recent increase in insurance cover, the difficult financial position of the company and the industry, and the initial report of

the fire led inevitably to that conclusion. In the present matter the circumstances were not similarly suspicious. The initial appointment of the loss adjustor is not in any way indicated to have been for the purpose of notifying legal representatives in order to obtain advice for contemplated litigation. There does not appear to be any suggestion of a duality of purpose in this matter until at least the 7th March 2017.

[26] After the proposed meeting of the 8th March 2017 involving Govie Govender taking over the work on the Volvo engines, a diagnostic test was to be conducted in the presence of both Mr Miller and Mr Blomeyer. This did not in any way connote animosity between the parties, but rather a spirit of co-operation and a will to compromise. It is only when sharp differences arise as to the interpretation of the policy that matters became more heated. Indeed, Mr Blomeyer agreed with the approach to be adopted. It seems clear that both he and Mr Miller were keen to obtain the views of the Volvo engine experts. There seems little doubt that this must have filtered down to Mr Bekker, the mechanical engineer.

[27] According to the email of Mr Ramtahar, Old Mutual was still waiting for the report of Mr Blomeyer on the 20th April 2017. At this stage there is no evidence of contemplated litigation. The source of the litigation itself ultimately appears to have been the incorrect interpretation of the policy by

Mr Ramtahar, which he later conceded, as set out in the plea. It also appears improbable that Old Mutual considered litigation up to at least the 23rd May 2017 because it had by that stage concluded that it was obliged to compensate Mr Chard as only quantum was in dispute and Old Mutual anticipated that it would become the owner of the vessel.

[28] A further indication that litigation was not contemplated lies in Old Mutual’s plea, where it records that Mr Chard’s claim is premature because Old Mutual had not decided (presumably at the date of issue of summons) that it would repudiate the claim. In those circumstances Old Mutual has not satisfied the two requirements for invoking litigation privilege – that the reports were obtained for the purpose of obtaining legal advice, in circumstances where litigation was likely or reasonably anticipated.

[29] In the circumstances Mr Chard is entitled to an order in terms of prayers 1.1, 1.2, 1.4, and 3 of the Notice of Motion. With regard to the question of costs, I see no reason why the costs should not follow the result.

[30] A dispute is raised in the affidavits regarding the existence of a voice recording of the meeting on the 8th March 2018 (as opposed to the video recording previously discussed in communications) in the possession of Mr Ramtahar. I was not addressed on this aspect, nor asked to make an order in

this regard. Suffice to say, had I been asked to do so I would have ordered the disclosure of any voice recording as well.

[31] I accordingly grant an order in terms of prayers 1.1, 1.2, 1.4, 2 (including the costs of Senior Counsel), and 3 of the Notice of Motion dated the 7th June 2018.

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Lopes J

Date of hearing:	29th July 2019.
Date of judgment:	30th September 2019
For the applicant:	Mr AV Voormoolen SC (instructed by Shepstone & Wylie).
For the respondent:	Mr P Wallis (instructed by Clyde & Co).