

IN THE HIGH COURT OF SOUTH AFRICA /ES
(TRANVAAL PROVINCIAL DIVISION)

CASE NO: 11375/08

DATE: 18/6/2009

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

17/6/2009

DATE SIGNATURE

IN THE MATTER BETWEEN

ERF 16 BRYNTIRION (PTY) LTD

APPLICANT

AND

THE MINISTER OF PUBLIC WORKS

RESPONDENT

JUDGMENT

SERITI. J

A. INTRODUCTION

[1] This matter came to Court by way of an application in terms of Rule 30A of the Uniform Rules of Court. According to the notice of application in terms of Rule 30A the applicant is seeking an order in the following terms:

- "1. Ordering the respondent to deliver a full and complete record in terms of Rule 53 of the proceedings sought to be reviewed and set aside, in particular:

- 1.1 the three legal opinions referred to at page 42 of the record of proceedings delivered by the respondent on 12 August 2008;
- 1.2 a complete unedited copy of the Preliminary Design Report on the Security and Electronic Systems: November 2004 as referred to at page 42 of the record delivered by the respondent ..."

B. BACKGROUND

- [2] The applicant is the owner of a property situated at Erf 16, Bryntirion Estate Pretoria on which property there is a residential home. The applicant bought the property approximately in 1997 and over the years, the residential home was renovated and improved.
- [3] During September 2005 the Department of Public Works informed the applicant that it intends purchasing the property of the applicant, and the applicant had no intention of selling the property. On or about 3 January 2008 the respondent took a decision to expropriate the applicant's immovable property mentioned above.
- [4] On 28 February 2008 the applicant launched an application to review and set aside the decision to expropriate its immovable property. The respondent was called upon to dispatch to the Registrar of this Court the record of the proceedings and

decision sought to be set aside together with reasons that by law is required to give or desires to give.

- [5] In order to comply with Rule 53 the respondent made available record of the proceedings accompanied by two affidavits, one attested to by her and the other attested to by Mr Ronnie Kasrils, the then Minister for Intelligence Services of South Africa. In her affidavit, she stated that after being requested to file the record of proceedings with the Registrar, as some of the issues contained in the record relate to national intelligence and security, she referred the said documents to the Minister of Intelligence Services. A document titled "Department of Public Works, Bryntirion Estate Preliminary Design Report" on the security and the electronic systems ("the Bryntirion Report") was edited by the Minister of Intelligence Services.
- [6] The Minister of Intelligence edited the said report as he was of the opinion that the public disclosure of some of the information contained in the report, will compromise security of *inter alia* Presidential residence, Presidential Guest House and houses of some of the Cabinet ministers. The said report was compiled in consultation with the South African Police Service and the National Intelligence.
- [7] The documents that were placed before her to enable her to take the decision to expropriate the property were legal opinions, correspondence between the

Department and the applicant's attorneys and the consultants report. She obtained the legal opinions in order, as she puts it,

"to satisfy myself concerning the legal issues arising out of the possible expropriation ... I obtained the legal opinions to understand my legal rights and the legal position pertaining to the impasse in acquiring the expropriated property on amicable terms."

- [8] The record she disclosed contains all the correspondence, consultants reports and the edited Bryntirion Report. She did not disclose the unedited Bryntirion Report and the legal opinions as she said they are privileged documents.
- [9] As a result of the security concerns raised by the Minister of Intelligence Services, she has disclosed the "Bryntirion Report" in edited form in order to allow the applicant to see parts of the report, the disclosure of which would not pose any security threat.
- [10] The respondent further alleges that it is her mandate to ensure that public institutions, of which Bryntirion Estate is one, are secured from any threat, including threats that would prejudice national security. She has independently considered the Bryntirion Report and came to the conclusion that same needs to be edited. The Minister of Intelligence also came to the same conclusion after reading the said report.

[11] The Minister of Intelligence Services deposed to a supporting affidavit. In the said affidavit he states that he was sent *inter alia* the consultants reports. The Bryntirion Report represents a comprehensive analysis of the security status of the Bryntirion Estate and the proposed measures to improve the security of the Estate.

He further states that the Bryntirion Report allows a reader to determine the vulnerability of the security of the Estate and enables the reader to assess the strengths or weaknesses of the proposed enhanced security. The disclosure, in an unedited form of the Bryntirion Report will compromise the security of the business of the state. After reaching the above conclusion, he personally edited the Report in such a manner as to allow the applicant to see as much as possible of the Report, but at the same time, not compromise security of the State.

C. FINDINGS

[12] In the written heads of argument, the applicant contends that the legal opinions are not privileged and in the alternative, if they are privileged applicant contends that its rights in terms of sections 32 and 33 of the Constitution and in terms of Rule 53 should have precedence over the respondent's claim to privilege. It is also submitted on behalf of the applicant that it is entitled to the unedited Bryntirion Report in order to enable the applicant to protect its rights.

Our law recognises the principle that communication between legal advisor and client is privileged if the legal advisor was acting in a professional capacity at that

time. See *S v Safatsa & Others* 1988 1 SA 868 (AD) at 885J-886G; *Mandela v Minister of Prisons* 1983 1 SA 938 (AD) at 957H-958A.

In *Zuma v National Director of Public Prosecutions & Others* 2009 1 SA 1 (CC) at 79 (para [185]) the Court said:

"It should, however, be emphasised that the common law right to legal professional privilege must be claimed by the right-holder or by the right-holder's legal representative."

- [13] The applicant's counsel during oral argument submitted that there is no allegation by the respondent that the legal professionals were consulted in confidence and consequently the respondent's defence of legal privilege must fail. I do not agree with this submission. The Minister obtained legal opinions, which she used when considering the expropriation in order to understand the legal implications of the step she intended taking. I cannot imagine that she did not consult her legal advisors in confidence.

There is no justifiable reason to interpret the provision of Rule 53 in such a manner that it overrides the well recognised principle of legal profession privilege. In *HL & H Timber Products v Sappi Manufacturing* 2000(4) All SA 545 (SCA) at p560C-D (para [5]) FARLAM, AJA, as he then was, said:

"The presumption against amending or altering the common law no more than is necessary ... is well known and if Parliament had intended to go as

far as Nienaber JA suggests there was nothing to prevent it from making its intention on the point plain."

My view is that the applicant's reliance on Rule 53 to force the respondent to disclose the legal opinions is misplaced.

The respondent's counsel, correctly so, submitted that Rule 53 falls to be interpreted subject to the common law rights to legal professional privilege.

- [14] The respondent refused to disclose the unedited Bryntirion Report on the basis that such a disclosure might compromise state security. The then Minister of Intelligence Services in his affidavit stated that after considering the said report, he came to the conclusion that the disclosure of the Bryntirion Report in its unedited form will compromise the security of the business of the State.

In *The South African Law of Evidence* – D T Zeffertt, A P Paizes and St Q Skeen – 2003 (formerly Hoffman and Zeffertt) at 648, whilst dealing with State privilege the following is stated:

"... the position that once applied at common law and which was reflected by an *obiter* of Steyn CJ in *Van der Linde v Calitz* to the effect that a properly tendered ministerial objections would be final and decisive in matters affecting the safety of the state, its diplomatic relations with other states and very important executive documents: the court would be obliged

either to exclude the evidence *mero motu* or to accept a properly tendered objection."

- [15] In his heads of argument, the respondent's Counsel summarised the salient features of a claim of state privilege at common law as stated in *Van der Linde v Calitz* 1967 2 SA 239 (A). The decision to claim privilege must be made by the political head of the relevant department and the political head must, as far as possible, take into account public interest, give sufficient information to enable the Court to decide whether it should exercise its residuary powers.

When exercising its residuary powers, the Court must do it in such a manner as to avoid causing the damage that the claim to state privilege intended to avoid.

- [16] The then Minister of Intelligence Services personally considered the Bryntirion Report, formed a view that the disclosure thereof will compromise the security of the business of the state, edited the Report and made the edited report available. He further said-

"In editing the Bryntirion Report, I have attempted to balance the applicant's right to the information for purposes of his review, with genuine security concerns flowing from unedited disclosure. Although the report has been edited, I have attempted to ensure that the applicant can be left in no doubt as to the legitimate concerns which are at stake and which appear from the documents forming part of the record."

[17] The affidavit of Minister of Intelligence clearly sets out evidence which demonstrates that the disclosure of the unedited Bryntirion Report will compromise the security of the business of the state including international relations.

I cannot find any justifiable reason for not upholding the state privilege claimed by the respondent. In my view, the objection to disclose the unedited Bryntirion Report is well founded.

[18] In the heads of argument, the applicant's counsel further submitted that the applicant relies on sections 32 and 33 of the Constitution to obtain the documents it requires, namely legal opinions and the unedited Bryntirion Report.

In order to give effect to the abovementioned rights, Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and the Promotion of Access to Information Act 2 of 2000 were promulgated.

In *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) at 420A-C (para [52]) O'REGAN, J said the following:

"Accordingly a litigant who seeks to assert his or her right to engage in collective bargaining under s 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on s 23(5)."

See also *MEC for Education, KZN v Pillay* 2008 1 SA 474 (CC) p488H-489B (para [40]).

The reliance by the applicant on sections 32 and 33 is incorrect.

During oral argument, the applicant's counsel conceded that the applicant cannot rely on sections 32 and 33 of the Constitution.

[19] The applicant was correct not to rely on the provisions of Promotion of Access to Information Act *supra* as section 33 of the said Act read with sections 38, 40 and 41 thereof authorises the information officer of a public body to refuse to disclose some of the documents the applicant is seeking disclosure thereof.

[20] My view is that the applicant has failed to make out a case for an order in terms of its application in terms of Rule 30A.

The following order is made:

- (a) The application is dismissed.
- (b) The applicant is to pay costs of this application which costs will include costs consequent upon the employment of two counsel.


W L SERITI

JUDGE OF THE NORTH-GAUTENG HIGH COURT

HEARD ON: 15 NOVEMBER 2008
FOR THE APPLICANT: N G D MARITZ SC
INSTRUCTED BY: STEGMANN'S INCORPORATED, PTA
FOR THE RESPONDENT: G J MARCUS SC AND M SHIKHAKHANE
INSTRUCTED BY: EDWARD NATHAN SONNENBERGS, JHB