



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: 2025-076403

In the matter between:

KAREEBERG LOCAL MUNICIPALITY

First Applicant

KAREEBERG MUNICIPAL MANAGER, MANUEL N.F. N.O

Second Applicant

and

SOLIDARITY OBO BRITTNELL, R

Respondent

In re:

SOLIDARITY OBO BRITTNELL, R

Applicant

and

KAREEBERG LOCAL MUNICIPALITY

First Respondent

KAREEBERG MUNICIPAL MANAGER, MANUEL N.F. N.O

Second Respondent

Heard: 24 July 2025

Delivered: 29 August 2025

Striking out application – legal advice privilege – legal opinions and deliberations thereon privileged not waived when inadvertently disclosed – impugned passages struck out with consequential relief

JUDGMENT – APPLICATION TO STRIKE OUT

HARVEY AJ

Introduction

[1] This application concerns whether Solidarity may rely on legal opinions discussed in a closed municipal council meeting and later disclosed to it, which the Municipality says occurred in error. The Municipality asserts legal advice privilege and seeks a striking-out order and related relief.

[2] The application arises in the context of urgent review proceedings launched by Solidarity, on behalf of its member Mr Brittnell, to challenge the decision of the Kareeberg Local Municipal Council taken on 5 February 2025 not to appoint Mr Brittnell as Senior Manager: Infrastructure and Community Services, and instead to re-advertise the post.

[3] In those proceedings the Municipality and its municipal manager are the respondents. They now appear as the applicants in this interlocutory matter. They seek orders:

- 3.1 striking out specified passages of Solidarity's supplementary affidavit said to disclose privileged legal opinions and deliberations – these being paragraphs 2.8, 2.8.1, 2.8.2, 2.8.3, 2.9 and the phrase '*not rationally connected to the legal opinions provided*' in paragraph 3.1;
- 3.2 postponing the urgent review hearing pending:
 - 3.2.1 a decision on the striking-out application;

3.2.2 removal of the transcript of the 15 April 2025 closed council meeting and the supplementary affidavit from the electronic court file; and

3.2.3 the uploading of a redacted supplementary affidavit in accordance with the striking-out order;

3.3 permitting them to file their answering affidavit in the review within 15 days of Solidarity's compliance with 3.2 above;

3.4 prohibiting Solidarity from disclosing the contents of the legal opinions and the council's deliberations in respect thereof relating to the recruitment and selection process for the post of Senior Manager: Infrastructure and Community Services;

3.5 that a judge other than the one deciding the interlocutory application should determine the review application;

3.6 that the conduct of Solidarity's legal representatives be referred to the Legal Practice Council and the Office of the Legal Service Ombud; and

3.7 that Solidarity's legal representative pay the costs of the interlocutory application *de bonis propriis* on the attorney client scale including the costs of 2 counsel - alternatively, that Solidarity pay the applicant's costs, on the same basis.

Background facts

[4] On 5 February 2025 the Kareeberg Local Municipal Council (the council) resolved not to appoint Mr Brittnell to the post of Senior Manager: Infrastructure and Community Services and to re-advertise the position.

[5] On 24 February 2025 Mr Brittnell's attorneys, Joubert Galpin Searle, addressed a demand to the municipal manager. They recorded that their client had been informed that his application was unsuccessful and that the post would be re-advertised. They demanded that he be appointed by 3 March 2025, failing which urgent proceedings would be instituted, including a review of the council's decision, an interdict, and a claim for punitive costs.

[6] Following that demand the Municipality obtained legal opinions, which were considered and deliberated upon at a closed council meeting on 15 April 2025. That meeting again resolved not to appoint Mr Brittnell, and to re-advertise the position.

[7] On 27 May 2025 Solidarity, acting on behalf of Mr Brittnell, launched the present urgent review proceedings seeking to set aside the council's 15 April 2025 decision to readvertise the position as well as an order compelling the Municipality to appoint Mr Brittnell to the post.

[8] When providing the record of the impugned decision, the Municipality first furnished Solidarity with minutes of council meetings from which references to legal opinions, and the deliberations thereon, were redacted. On 20 June 2025 its attorneys explained that delivery of the audio recording of the 15 April 2025 council meeting was delayed because of its size. Pending receipt of the audio recording, Solidarity in a letter dated 24 June 2025 complained that the record provided was redacted and incomplete, in that the legal opinions, as well as the minutes of a 30 March 2025 meeting, were missing. It requested the outstanding documents, unredacted minutes, and the audio recording.

[9] On 26 June 2025 the Municipality's attorneys responded that the legal opinions mentioned in the closed council meeting were privileged, that the Municipality had not waived privilege, and that they had no instructions to provide them. In a further letter of the same date the Municipality's attorneys asserted that the council meeting on 15 April 2025 was a special council meeting which was held 'in-committee' (meaning it was a closed meeting and not open to the public). It repeated that the legal opinions were privileged and that privilege would not be waived, but added that the balance of the in-committee discussion would be made available to Solidarity.

[10] On 27 June 2025 Solidarity confirmed receipt of the audio recording, and informed the Municipality's attorneys that it would be transcribed. At the same time Solidarity maintained that the legal opinions themselves were not privileged: in its

view, they formed part of the record of the decision under review, and an adverse inference should be drawn from the Municipality's refusal to disclose them.

[11] On 30 June 2025 the Municipality's attorneys wrote to Solidarity reiterating that the legal opinions and related deliberations were privileged, and that because they were confidential they were deliberated upon in a closed session. Solidarity replied the same day, confirming that it had now received its transcription of the recording, and indicating that any issues arising would be dealt with in the course of the court proceedings.

[12] On 2 July 2025 the Municipality's attorneys, having received the transcribed audio, wrote to Solidarity noting that the transcripts included references to privileged and confidential information, including the legal opinions. The Municipality requested that this information not be included in the record to be filed in the Labour Court review. It stated that if Solidarity wished to challenge its assertion of privilege, it should do so formally.

[13] On 4 July 2025 Solidarity responded that it would redact the names of bidders, vendors and attorneys (in respect of which the Municipality claimed confidentiality) but maintained that the legal opinions were relevant to the review, that any privilege had in any event now been waived as the unredacted recording had been freely provided to them, and that extracts would be used in its pleadings. Solidarity filed its supplementary affidavit annexing portions of the transcript on 9 July 2025.

[14] The applicants launched the present interlocutory application on 16 July 2025, seeking, among other things, the striking out of the impugned passages, the removal of the transcript, and related relief.¹

¹ As summarised in paragraph [3] above.

Submissions of the parties

The Municipality

[15] The Municipality submits that the legal opinions obtained after Brittnell's attorneys' letter of 24 February 2025, and the council's deliberations on those opinions at its special meeting on 15 April 2025, are protected by legal advice privilege. The opinions were sought in the face of threatened litigation, and the privilege extends not only to the opinions themselves but also to the council's internal discussion of their contents.

[16] The Municipality explains that it had redacted the information protected by legal advice privilege from the minutes, and that it had intended similarly to redact the audio recording of the meeting – however, the full audio recording was provided to Solidarity in error. It states that this did not amount to waiver. It points to the correspondence showing that from as early as 26 June 2025 its attorneys expressly and repeatedly asserted privilege in relation to the opinions and related deliberations, and that they maintained this stance consistently throughout – only to find that Solidarity incorporated the privileged material in papers filed on 9 July 2025. It insists that Solidarity should not be permitted to rely on this material in the review proceedings.

Solidarity

[17] Solidarity disputes that the opinions and deliberations are subject to legal advice privilege. They argue that the opinions were obtained to guide an appointment decision, not for litigation, and that council deliberations about whether to accept or reject legal advice are not communications between attorney and client.

[18] They assert that, even if privilege could apply, it was not asserted until 2 July 2025, by which time the unredacted recording had already been provided and transcribed. They maintain that supplying the unredacted recording without reservation amounted to waiver.

[19] Solidarity also emphasises that this is a review against the state as employer, where the Court must be placed in possession of a full record of the decision under review. To exclude the transcript would, in their submission, impair the Court's ability to perform its supervisory role and would not serve the interests of justice.

Issues for determination

[20] The issues arising for determination in these interlocutory proceedings are:

20.1 whether the legal opinions obtained by the Municipality, and the council's discussions of those opinions, are protected by legal advice privilege;

20.2 if so, whether legal advice privilege was waived by the Municipality when it - allegedly inadvertently - sent Solidarity the unredacted audio recording of the 15 April council meeting; and

20.3 if privilege applies and was not waived, whether Solidarity may rely on the impugned passages in its supplementary affidavit, and the full transcript included in the filed record, or whether these should be struck out (with or without consequential relief).

Legal principles

Striking out

[21] The Rules of the Labour Court are silent on striking out, and this Court applies Uniform Rule 6(15) which permits matter to be struck out if it is *scandalous, vexatious or irrelevant* and if its inclusion causes prejudice. The enquiry is therefore two-stage: first, whether the impugned passages fall within one of those categories, and second, whether the party applying for relief will be prejudiced if they remain.² The power is discretionary and is exercised sparingly, since ordinarily irrelevant or inadmissible matter can simply be ignored.

[22] Although privileged material is often factually relevant, it is legally inadmissible and cannot properly be placed before the Court. For purposes of Rule 6(15) such

² See for example *Burquip International (Pty) Ltd v Geral & another* (2023) 44 ILJ 776 (LC) at 10-13.

matter is treated as *irrelevant* and, on the second leg, its disclosure will always be inherently prejudicial to the party entitled to claim privilege. Courts have therefore ordered that privileged matter be struck out.³

Legal Advice Privilege

[23] Legal advice privilege protects confidential communications between a client and a legal adviser for the purpose of obtaining or giving legal advice, including where the advice is sought in relation to threatened or contemplated litigation:⁴ the information sought to be protected is privileged if it is (1) legal advice (2) given by a legal advisor (3) in confidence to a client and (4) the privilege is claimed.⁵ The right to legal advice privilege is a common law rule, the purpose of which is '*to facilitate the proper functioning of an adversarial system of justice by encouraging full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation.*'⁶

Waiver

[24] Waiver is first and foremost a matter of intention: the starting point is to ascertain the will of the party said to have waived the right in question (in this case, legal advice privilege).⁷ Where waiver is not express, it may be tacit. Tacit waiver is not lightly inferred – it must be shown that the holder of the right to legal advice privilege, acting in full knowledge of his rights, conducted himself in a manner that, judged objectively, is consistent with abandoning the right to assert the privilege.⁸

³ See *South African Airways SOC v BDFM Publishers (Pty) Ltd and others* 2016 (2) SA 579 at 40-41; *Contango Trading and others v Central Energy Fund SOC Ltd and others* 2020 (3) SA 58 (SCA) at 29.

⁴ *Competition Commission v ArcelorMittal SA Ltd and others* 2013 (5) SA 538 (SCA) at 21.

⁵ *South African Airways SOC v BDFM Publishers (Pty) Ltd and others* 2016 (2) SA 579 at 46.3.

⁶ *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at 184.

⁷ *Road Accident Fund v Mothupi* [2000] 3 All SA 181 (A) at 15-16 (cited also in *Contango Trading and others v Central Energy Fund SOC Ltd and others* 2020 (3) SA 58 (SCA) at 43).

⁸ *Contango Trading and others v Central Energy Fund SOC Ltd and others* 2020 (3) SA 58 (SCA) at 44, citing *Harksen v Attorney-General, Cape and others* 1999 (1) SA 718 (C) at 60-62.

[25] Where information protected by legal advice privilege has already been disclosed, what is the effect thereof on the right to claim privilege? In *South African Airways SOC Ltd v BDFM Publishers (Pty) Ltd*⁹ (SAA) certain legal opinions had been leaked to the media, and SAA had not immediately asserted its right to privilege. The Court held that confidentiality had already been shattered, and it set aside an interdict preventing publication. It reasoned that legal advice privilege is a negative right: it entitles the holder to resist disclosure, but does not create a positive right to suppress or reclaim information once it has entered the public domain.¹⁰ It is for the privilege-holder to take steps to protect confidentiality; if privileged material is allowed to circulate publicly, the law may not restore secrecy after the fact.

[26] But in *All G2 G Ltd v Janse van Rensburg and others*¹¹ the Court granted a striking-out application in respect of emails containing legal advice which had been unlawfully intercepted and attached to court papers. The Court distinguished the facts from those in SAA because the information was not in the public domain (having been circulated only to the parties involved in the litigation) and privilege was immediately asserted.¹²

Record in review proceedings

[27] In review proceedings the decision-maker must produce the record of the decision under attack. The purpose is to place before the Court all the material that was before the decision-maker, so that the Court can perform its supervisory function. The review record includes the deliberations of the decision-makers, which ‘*may well provide evidence of reviewable irregularities in the process, such as bias, ulterior purpose, bad faith, the consideration of irrelevant factors, a failure to consider*

⁹ Note 5 above.

¹⁰ Ibid at 53-54.

¹¹ *All G2 G Ltd v Janse van Rensburg*¹¹ 2021 JDR 1443 (GJ).

¹² Ibid at 35. The Municipality in its heads of argument also relies on *Avontuur & Associates v Chief Magistrate Oudtshoorn* 2013 (1) SACR 615 (WCC), telling this Court that it is authority for the proposition that ‘inadvertent disclosure does not by itself result in waiver of privilege’. However, reliance on this judgment appears to be misplaced and counsel is cautioned to check references properly and in person.

*relevant factors, and the like ... Deliberations are the most immediate and accurate record of the process leading up to the decision.*¹³

[28] Rule 37(2)(b) read with 37(7) of the Labour Court Rules requires the respondent in a review to dispatch the 'complete' record of the proceedings sought to be reviewed. The record must include all documents and evidence relevant to the decision.

[29] However, the duty to disclose the complete record does not override legal advice privilege: the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*¹⁴ acknowledged that documents subject to legal advice privilege are exempt from inclusion in a review record.¹⁵ Analysis

Legal advice privilege

[30] The starting point is whether the legal opinions and the council's deliberations about them are indeed protected by legal advice privilege. The opinions were obtained following a threat of urgent litigation by Mr Brittnell's attorneys. They were prepared by the Municipality's legal advisers for the purpose of giving legal advice in relation to or in anticipation of that threatened litigation. They fall squarely within the established scope of legal advice privilege.

[31] The discussions in the closed council meeting of 15 April 2025 are similarly privileged to the extent that they reveal or summarise the content of the opinions. Privilege extends not only to the legal advice itself but also to communications or deliberations that would disclose its substance. The Municipality is entitled to assert that privilege.

Waiver

¹³ *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 23.

¹⁴ Note 13 above.

¹⁵ *Ibid* (note 13 above) at 30.

[32] The next question is whether privilege was waived when the audio recording of the 15 April 2025 meeting was provided to Solidarity. The evidence shows that the Municipality's attorneys expressly asserted privilege in correspondence of 26 June 2025, upon becoming aware (after receipt of the transcript) that the audio recording provided to Solidarity had not been appropriately redacted. The Municipality's legal representatives repeated this stance in correspondence on 30 June 2025 and 2 July 2025, as the correspondence attached to the affidavits demonstrates.

[33] Waiver turns on intention, assessed objectively. The Municipality had already redacted the minutes to remove references to the legal opinions, and Solidarity had objected to that redaction. That conduct made the Municipality's position plain: it regarded the legal opinions and deliberations as privileged and it intended to assert its right to such privilege. Against that background, the subsequent delivery of the unredacted audio recording can only reasonably be explained as inadvertent. The Municipality described it as such, and that explanation is consistent with its prior and subsequent conduct. There is nothing to suggest an intention to abandon privilege.

[34] I therefore accept the Municipality's explanation that the disclosure was inadvertent, and I am satisfied that its conduct throughout was directed at maintaining confidentiality. The prompt reaffirmation of privilege following discovery of the disclosure was consistent with its stance from the outset. On an objective assessment, legal advice privilege was not waived. This conclusion is distinguishable from the position in SAA, where the privileged material had already entered the public domain – here the disclosure was limited to the trade union party to the litigation, and was promptly corrected (even before the transcript was provided to the Court).

Irrelevance and prejudice

[35] Having found that the material is privileged and that privilege was not waived, the question is whether it should be struck out. Uniform Rule 6(15) permits matter to be struck out if it is scandalous, vexatious or irrelevant, and if prejudice would result if it remained.

[36] Material protected by legal advice privilege is legally inadmissible, even if factually relevant, and is, for purposes of the rule, treated as irrelevant because it cannot properly be placed before the Court. The prejudice in allowing it to remain is inherent: legal advice privilege is a substantive right that would be irreparably compromised by disclosure. To allow such material to remain in the affidavits and the record would destroy the Municipality's right to confidential legal advice. It must therefore be struck out.

Conclusion and Relief

[37] The legal opinions and the council's deliberations upon them are subject to legal advice privilege. Privilege was not waived when the audio recording was provided to Solidarity. Their disclosure is legally irrelevant and inherently prejudicial. Although Solidarity invokes the principle that the Court must have a full record in review proceedings, that principle does not override legal advice privilege, as confirmed by the Constitutional Court.¹⁶ The privileged material must therefore be struck out, and the striking-out order, together with such consequential relief as is necessary to give effect to it, will be granted.

[38] I have also considered the further relief sought. It is appropriate to direct that the supplementary affidavit be replaced by a redacted version, and that any audio transcript sought to be filed as part of the review record be redacted to exclude the privileged content. Solidarity will be prohibited from publishing or otherwise disclosing the privileged material. Given that the matter was brought on an urgent basis, the Municipality will be afforded 5 court days (not 15) after receipt of the redacted affidavit to deliver its answering affidavit.

[39] The remaining relief is not warranted. The review will in any event be heard by a different judge. There is no basis for referral of Solidarity's representative to a regulatory body: she is a union official who acted on a genuine though mistaken belief that privilege did not attach, and the issue has now been resolved by the

¹⁶ Discussed at para [29] above.

Court. Nor is a punitive costs order justified. The application raised a genuine dispute of law in the context of review proceedings between a trade union and an organ of state. In these circumstances, each party should bear its own costs.

[40] In the result, the following order is made:

Order

1. The following passages in Solidarity's supplementary affidavit filed on 9 July 2025 are struck out:
 - a. paragraphs 2.8, 2.8.1, 2.8.2, 2.8.3, and 2.9; and
 - b. the phrase "*not rationally connected to the legal opinions provided*" in paragraph 3.1.
2. Solidarity is directed, within 5 court days of this order, to remove the supplementary affidavit and annexures from the electronic court file and replace it with a version that excludes the struck-out material.
3. Any transcript of the closed council meeting of 15 April 2025 sought to be filed as part of the review record must be redacted so as to remove references to the legal opinions obtained by the Municipality in relation to the appointment of the Senior Manager: Infrastructure and Community Services, and deliberations of the council insofar as they disclose the contents of those legal opinions.
4. The Municipality must deliver any answering affidavit no later than 5 court days after the redacted supplementary affidavit is filed.
5. Within 5 court days of receiving the answering affidavit, Solidarity:
 - a. may deliver a replying affidavit; and
 - b. must arrange a hearing date with the Registrar.
6. Solidarity is prohibited from publishing or otherwise disclosing the contents of the legal opinions, and the council's deliberations in respect thereof, relating to the recruitment and selection process for the post of Senior Manager: Infrastructure and Community Services.
7. There is no order as to costs.

SJ Harvey

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Vassen, with him Mr Baloyi – instructed by Baloyi
Katlego Attorneys

For the Respondent: Ms K van Wyk, Union Official, Solidarity