



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

Case no: 2025 – 13373

In the matter between:

**DEPARTMENT OF MINERAL
RESOURCES & ENERGY**

First Applicant

MINE HEALTH AND SAFETY INSPECTORATE

Second Applicant

THABO SIKWANE NO

Third Applicant

AFIKA NDLOVU NO

Fourth Applicant

VUSI MTHETHWA NO

Fifth Applicant

and

IMPALA PLATINUM MINES LTD

First Respondent

**ASSOCIATION OF MINEWORKERS
AND CONSTRUCTION UNION**

Second Respondent

NATIONAL UNION OF MINEWORKERS

Third Respondent

UNITED ASSOCIATION OF SOUTH AFRICA

Fourth Respondent

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA

Fifth Respondent

SOLIDARITY

Sixth Respondent

Heard: 17 October 2025

Delivered: 20 November 2025

Summary: *Application to compel disclosure of report – whether protected by legal privilege – whether privilege constituting sufficient cause under section 71(5) of the MHSA.*

JUDGMENT

DANIELS J

Introduction

[1] The applicant is the Department of Mineral Resources and Energy, also known as the Department of Mineral and Petroleum Resources (hereafter the “Department” or “DMPR”). The Department brings this application to compel disclosure of a report issued by the DRA South Africa Projects (hereafter “the DRA”) to the legal representatives of the first respondent, in the context of a mine inquiry conducted in terms of section 65 of the Mine Health and Safety Act No. 29 of 1996 as amended (hereafter “MHSA”).¹ The first respondent was instructed to disclose the DRA report,² but it contends that the report is subject to legal privilege, and therefore immune from disclosure.

Urgency

[2] It is clear³ a party seeking urgent relief must sufficiently, and in detail, set out the circumstances which render the matter urgent, and the reasons why it is

¹ Section 82 of the MHSA states that the Labour Court has jurisdiction in respect of any dispute about the interpretation and application of any provision of the MHSA, except where the MHSA itself provides otherwise.

² Section 90(b) of the MHSA states that any person who, without sufficient cause, fails to comply with an instruction in terms of section 70(c)(i) is guilty of an offence. The applicant did not inform the court why it decided not to assert its right to lay criminal charges against the first respondent.

³ *Jiba v Minister: Department of Justice and Constitutional Development and Other* (2010) 31 ILJ 112 (LC) at para 18; *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6; *Dynamic Sisters Trading (Pty) Limited and Another v Nedbank Limited* (081473/2023) [2023] ZAGPPHC 709 (21 August 2023) at para 18; *Public Servants Association of SA and Another v Minister of Home Affairs and Others* [2016] ZALCJHB 439 at paras 12 to 18; *Moyane v Ramaphosa and Others* [2019] 1 All SA 718 (GP) at para 33

said that substantial redress cannot be obtained at a hearing in due course. The degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency, and the applicant is not entitled to rely on urgency that is self-created when seeking deviation from the Rules. A further essential requirement is that an applicant seeking urgent relief must approach the court with the necessary haste, or as soon as the cause of discontentment arises.⁴ The court must also consider the interests of the respondent party, and any prejudice that it may suffer should urgency be accepted.

- [3] This dispute concerns the disclosure of a document, sought during a mine inquiry. The inquiry concerns an incident, on 27 November 2023, which led to the deaths of sixteen mineworkers and serious injuries to others. This was, of course, nothing short of catastrophic for the deceased mineworkers, the injured mineworkers, as well as their families.
- [4] The mine inquiry commenced on 9 December 2024 and was adjourned to July 2025. When the hearing resumed, Mr Pieter Rossouw, an employee of the first respondent (hereafter “Impala”) testified. He testified that: *“There was an official investigation done by a third party after the accident. That was DRA and Wessel Cronje and Winder Controls assisted me during that investigation. That was the one that was done officially.”* This was the first time that the applicant became aware of the DRA report. The presiding officer instructed Impala to disclose the report. Ultimately, Impala refused to do so on the basis that the report was privileged. The inquiry adjourned pending the resolution of the disclosure dispute. Impala launched an application shortly thereafter, and the Department brought a counter application to compel disclosure of the report. This judgment relates only to the counter application only.

⁴ *Association of Mineworkers & Construction Union & others v Northam Platinum Ltd & another* (2016) 37 ILJ 2840 (LC) at para 26

- [5] The dispute is of fundamental importance and cannot be determined in the ordinary course. The parties agree that the dispute must be resolved expeditiously. Having considered all the relevant principles, I accept that the application may be heard as one of urgency.

Material facts

- [6] Below, I set out the facts relevant to this application.

- 6.1 On 27 November 2023, a fatal incident occurred at Shaft 11 of Impala Platinum Mines, situated in Rustenburg. The incident, seemingly due to a fault of the Man Winder system,⁵ resulted in the immediate deaths of ten mineworkers and injuries to seventy-six others. Subsequently, a further six mineworkers succumbed to their injuries.
- 6.2 Impala states that, as early as 27 November 2023, it was aware that there was contemplated litigation in the form of a mine inquiry and a possible prosecution, or civil proceedings, thereafter. The mine inquiry may result in Impala being sanctioned or being recommended for prosecution.
- 6.3 On 28 November 2023, Impala contacted ENS Attorneys to advise it on the inquiry, its rights and duties, and its potential defences. ENS advised Impala that it required expert analysis before it could render advice.
- 6.4 Mr Jacobus, of ENS, contacted Wenhold Safety Investigations and Consultancy (hereafter “WSI”) on 1 December 2023, the DRA on 6 December 2023, and CM Consulting Services (hereafter “CMCS”) on 7

⁵ It is not the function of this court to determine the cause of the incident, and no such determination is made. This comment is made only to provide context.

December 2023. The DRA was instructed to commence their work from 13 December.⁶

- 6.5 Mr Pieter Colyn, an executive of ENS, states that the limited function of the DRA was to prepare an expert report for ENS so that it could advise Impala about the impending litigation. This is confirmed by Mr Lukas Van Rooyen (“Van Rooyen”) of the DRA.
- 6.6 On 13 December 2023, following an inspection of Shaft 11, together with representatives of Impala, DMPR inspectors (the third and fourth applicants) issued instructions to Impala to conduct a full investigation, in terms of section 11(5) of the MHSA, into the cause of the accident. The Principal Inspector directed that the section 11(5) investigation be led by “independent experts specializing on winders”. Later that same day, Van Rooyen, of the DRA, attended at Winder House. There he engaged with persons present to understand the operations of the winder. Van Rooyen explains that no findings or conclusions had been made by the DRA at that stage, because they had only just become involved.
- 6.7 The investigation began on 3 January 2024, at the Lapa at 11 Shaft, and thereafter meetings were held at the boardroom, located at 11C Shaft. The investigation was led by Mr Coenraad Mynhardt (“Mynhardt”) of CMCS and Mr Stefan Wenhold (“Wenhold”) of WSI. Mynhardt was the lead technical investigator while Wenhold was the lead independent investigator. The DRA and its personnel were not present at any of these meetings. This is confirmed by Van Rooyen of the DRA.
- 6.8 On 12 January 2024, as part of the investigation, Mynhardt interviewed Mr Wessel Cronje (“Cronje”) of Winder Controls. The interview occurred in the presence of Mr Rossouw.

⁶ Although the mandate of the DRA was only finalized on 19 December 2023.

- 6.9 The first respondent alleges, which is confirmed under oath by Mynhardt and Cronje, that no joint investigation was conducted by the investigators and Winder Controls. Furthermore, the first respondent states, no confidential information was imparted to Cronje by Mynhardt.
- 6.10 On 19 January 2024, Impala provided the inspectors with the investigation report, that had been compiled by CMCS and WSI.
- 6.11 On 13 February 2024, CMCS provided a further report to Impala's attorneys, ENS Attorneys. Although Impala stated that this report was privileged, but it later waived privilege and disclosed the report.
- 6.12 On 23 February 2024, DRA provided its report to ENS. Impala maintains that this report is privileged and need not be disclosed.
- 6.13 And on 4 March 2024, WSI provided its report to ENS. Although Impala alleged that this report was privileged, it later disclosed the report.
- 6.14 As previously mentioned, the mine inquiry commenced on 9 December 2024, when it was adjourned to July 2025.
- 6.15 When the mine inquiry convened on 24 July 2025, Mr Rossouw testified as follows: *"There was an official investigation done by a third party after the accident. That was DRA and Wessel Cronje and Winder Controls assisted me during that investigation. That was the one that was done officially."* The presiding officer requested Impala to disclose the report. ENS advised that it would take instructions from Impala.

6.16 When the inquiry reconvened on 5 August 2025, ENS raised legal privilege on behalf of Impala and refused to disclose the DRA report. The presiding officer again requested disclosure of the report.

6.17 On 6 August 2025, on behalf of Impala, ENS made written submissions indicating that the DRA report was privileged and need not be disclosed.

6.18 On 7 August 2025, the presiding officer rejected the submissions from Impala and issued a written instruction that the report must be disclosed.

Legal principles and analysis

[7] As previously mentioned, the applicant seeks an order compelling Impala to disclose the DRA report, which Impala alleges is confidential. The parties did not address the power of the court to make such an order. I assume, without deciding, that this court has the power to do so.

Relevant provisions of the MHSA

[8] The following provisions of the MHSA are pertinent:

8.1 Section 70(c) states that the person presiding at an inquiry may instruct any person: (i) to produce any book, plan, record or other document or item necessary for the purposes of the inquiry; or (ii) to perform any other act in relation to *this Act* necessary for the purpose of the inquiry.

8.2 Section 71(2) states: "*The law regarding a witness's privilege in a court of law applies equally to any person being questioned at an inquiry*".

8.3 Section 71(5) states: “A person instructed in terms of section 70(c) must comply with that instruction unless the person has sufficient cause for not doing so”. (own emphasis)

[9] Impala argues that the presiding officer cannot issue an instruction in terms of section 70(c) absent a court order. In my view, this interpretation is not sustainable. Legislation must be understood in a manner consistent with the interpretative triad of language, purpose and context. The interpretation proposed by the Impala would lead to absurd results, which could never have been intended. It would deny the presiding officer the power to effectively manage the inquiry and produce a result without undue delay. This could never have been the purpose. That interpretation is also inconsistent with the context. Section 71(5) of the MHSA states that a person instructed in terms of section 70(c) must comply, unless they have sufficient cause not to do so. No court order is first required.

[10] Section 71(2) and 71(5) of the MHSA must be read together. The conclusion that legal privilege constitutes sufficient cause to refuse compliance with an instruction to produce a document at an inquiry is inescapable.

Legal professional privilege

[11] Legal professional privilege is of vital importance to our legal system. It preserves the lawyer and client relationship, ensuring that clients can freely disclose information, seek advice and representation. Legal professional privilege is of two types. It covers communications made for the purpose of seeking legal advice, legal advice privilege, and communications made in the context of or in contemplation of litigation, litigation privilege. In this matter, Impala asserts that the report from the DRA is covered by litigation privilege.

- [12] As the Supreme Court of Appeal in *Competition Commission v ArcelorMittal South Africa Ltd and others*⁷ (“*ArcelorMittal*”) held:

“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.”

(own emphasis)

- [13] The applicant only takes issue with the first requirement outlined in *ArcelorMittal*. It contends that the DRA report was brought into existence for the purpose of the section 11(5) investigation, not for the purpose of legal advice in the face of impending litigation. This allegation is denied by Impala, its attorneys, and the DRA itself. Importantly, the timeline discredits the applicant's allegation. The DRA report was finalised after the section 11(5) investigation report was finalised and delivered to the inspectors. Furthermore, the investigation was led by CMCS and WSI, who also deny that the DRA was involved with the investigation at any level. If the DRA report was brought into existence for the purpose of the section 11(5) investigation, the DRA would have actively engaged in the investigation and the parties involved in the investigation. The mandate of the DRA would have terminated when the investigation was complete. Finally, the DRA and the CMCS are competitors. It is unlikely that the DRA would have willingly agreed to participate in an investigation led by the CMCS.

- [14] In any event, I am bound by the *Plascon Evans*⁸ rule which holds that where applicants seek final relief on application they must, in the event of conflicting versions, accept the version put up by their opponents unless those allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable

⁷ 2013 (5) SA 538 (SCA) at para 21

⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C

that the court is justified in rejecting them merely on the papers. Given what is set out above, the dispute raised by the first respondent is genuine and bona fide. I therefore accept that the DRA report was produced for the purpose of contemplated litigation, and not for the investigation. Following a disaster of such magnitude, there can be no question that litigation was contemplated.

- [15] While it is clear the document must have been obtained or brought into existence for the purpose of providing advice in the context of litigation, there is some uncertainty as to whether such purpose must be its sole or dominant purpose. In *Ibex RSA Holdco Ltd and another v Tiso Blackstar Group (Pty) Ltd and others*⁹ the Supreme Court of Appeal favoured the dominant purpose test. It is clear from the facts of this matter that the dominant purpose of the DRA report was to enable Impala's lawyers to advise it on impending litigation.
- [16] In *South African Airways SOC v BDFM Publishers (Pty) Ltd and others*¹⁰ Sutherland J (as he then was) held that the guarantee of confidentiality over communications between clients and their legal advisor is an indispensable attribute of the right to counsel and the adversarial litigation system. Litigation privilege too is contextualized within the adversarial system. In *Chief Inspector of Mines v Assmang (Pty) Ltd*¹¹ Cripps JA stated: "*In the MHSA the inquiry contemplated in section 65 is distinguished from an investigation in terms of that Act. It may be combined with an investigation, since an investigation may be converted into an inquiry ... and it may even be held after an investigation has been completed It is an extensive formal process that, significantly, does not rely on the element of surprise for its effectiveness.*" In this matter, the applicant does not contend that the inquiry is an inquisitorial process.

⁹ 2025 (2) SA 408 (SCA) at para 71

¹⁰ 2016 (2) SA 561 (GJ) at para 47

¹¹ (JA 42/19) [2020] ZALAC 57; (2021) 42 ILJ 753 (LAC) (12 November 2020) at para 29

Waiver of privilege

[17] As explained in *ArcelorMittal*:

“Waiver may be express, implied or imputed. It is implied if the person who claims the privilege discloses the contents of a document, relies upon it in its pleadings or during court proceedings. It would be implied too if only a part of the document is disclosed or relied upon. For a waiver to be implied the test is objective, meaning that it must be judged by its outward manifestations, in other words from the perspective of how a reasonable person would view it. It follows that privilege may be lost, as the English courts have held, even if the disclosures were inadvertent or made in error.”

[18] It is trite that the party alleging waiver bears the onus of proof of establishing its requirements.¹²

[19] The only evidence the applicant has adduced in support of its claim that privilege was waived are extracts from a transcript of Mr Rossouw’s testimony, in which he suggested that DRA conducted its investigation openly and with other experts. However, notably, Mr Rossouw did not confirm that he was directly, or personally, involved with the DRA report. His evidence on the issue is therefore hearsay. In any event, the DRA and the two other implicated experts, confirmed on oath that this was not so.

[20] Waive is not easily established. There are no, alternatively insufficient, manifestations which show, objectively, that Impala waived privilege. The applicant has not, in my view, proved that Impala waived the privilege which attaches to the DRA report.

¹² *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another* 2009 (4) SA 529 (CC) para 81

Public interest override

- [21] The applicant contends that fairness and the public interest, in having the truth revealed as to the cause of the incident, outweighs the first respondent's right to invoke legal professional privilege. Having considered the authorities, it is apparent that legal professional privilege is considered so fundamental that it is absolute, unless waived. Indeed, legal privilege is more than a mere rule of evidence and is a substantive rule of law.
- [22] Of course, from time to time, legislation limits the right to invoke privilege, such as in the case of information sought through the Promotion of Access to Information Act No. 2 of 2000 ("PAIA").¹³ However, in the MHSA, there is no provision which limits the right to invoke legal privilege, whether on the basis of fairness or the public interest.
- [23] In *Contango Trading SA and others v Central Energy Fund SOC Ltd and others*¹⁴ Wallis JA stated: "*there is no general overarching principle that privilege can be overridden on grounds of fairness alone*". Accordingly, absent legislation, there is no basis to override privilege based on the public interest or fairness.

Factual material in a privileged document

- [24] The applicant submits that the *factual material* in the DRA's report is not privileged. No authority was provided for the submission. I do not accept the submission. It must also be noted that expert reports are covered by privilege, when the usual requirements are met.¹⁵

¹³ See section 70 of PAIA

¹⁴ 2020 (3) SA 58 (SCA) at para 48

¹⁵ *MEC for Health, NW Province v Dumisani, MR obo BM; In Re. Dumisani, MR obo BM v MEC for Health, NW Province* (319/2016) [2019] ZANWHC 28 (31 May 2019) at paras 12 to 14

Costs

[25] Both parties sought costs against the other, but neither pursued the issue with intensity. There is an ongoing relationship between the parties, albeit not an employment relationship. The inquiry is ongoing, and these proceedings may be frustrated by costs orders. In addition, the issues were complex and novel. In the circumstances, no cost order is warranted.

Conclusion

[26] For the reasons set out above, the DRA report is subject to litigation privilege and need not be disclosed. The applicant has not shown that the first respondent waived the privilege. In the circumstances, the applicant failed to make out a case for the relief it seeks. The application falls to be dismissed. There is no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant

Adv G Hulley SC

Adv N Ali

For the First Respondent

Adv A Myburgh SC

Adv J Davis