



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)**

Case No: 69/25

In the matter between

J[...] C[...] A[...] K[...]

APPLICANT

AND

H[...] M[...] K[...]

RESPONDENT

Heard on: 05 MARCH 2026

Delivered on: 19 MAY 2026

JUDGMENT

THULARE J

ORDER

- (a) The application to strike out passages in the founding and replying affidavits is granted with costs, including costs of counsel on scale C.
- (b) The application is dismissed with costs, including costs of counsel on scale C.

[1] Growing intolerable incompatibility and death are causing the dissolution of nucleus families and the creation of blended families. This matter arises out of the politics of a blended family after the death of one of the spouses. At the heart of these politics is greed, abusive behaviour, obsession with control and a lack of empathy for others. The respondent, HM, was married to JC's father, JM. JC is the applicant. JM passed away on 31 March 2024. JC had a sibling, J[...]. HM had a daughter, T[...]. For purposes of this judgment, I will only refer to those members of the blended family relevant for purposes of this judgment. Wilma, T[...]'s mother-in-law, was a broker who advised and handled HM's life insurance policies. JC applied for an order to direct HM to pay an amount of R251 600-00 plus interest and costs. JC alleges it was a loan. HM opposed the application, disputing that it was a loan. HM's case is that there are major disputes of facts and that on that ground alone the application should be dismissed. There are also two interlocutory applications. The first is unopposed and from JC for condonation for the late delivery of the replying affidavit. The second is opposed and from HM for the striking out of certain portions of the founding and replying affidavits.

[2] The condonation was granted. The papers demonstrate that HM and JC rarely spoke, and after the death of JM, were not on speaking terms. JM lived with HM at HM's property throughout their marriage until his death. When JM's health deteriorated, JC approached J[...] and requested him to facilitate a discussion around JM's care. At the time, HM ran a business which required her leave home early and return late. Petrus, an employee, attended to JM. The

dispute is about the full terms of what was agreed at that meeting of 28 March 2022, which was attended by HM, T[...], JC and J[...], amongst others. As a result of the discussions at the meeting, three things happened. The first, HM ceased to work full time and cared for JM. Second, JC paid the outstanding amount then owing on HMs mortgage bonds, which was R251 600-00. Thirdly, JC would be the beneficiary of a life insurance policy, whose premiums HM would continue to pay. The issue is whether that was a loan and if so, its terms and conditions, including any terms and conditions to the payment of the premiums.

Application to strike out passages in the founding and replying affidavits.

[3] As an annexure to the founding affidavit, JC attached a settlement proposal which HM had written to him. In that attachment HM confirmed that JC paid the amount to have the bonds cancelled over the property; that she refuses to pay the increased amount of the policy and proposed to pay a portion of the instalments that she had been paying in respect of the policy. JC did not accept the settlement proposal. Furthermore, JC attached communication between J[...] and HM and presented it as communication between JC and J[...]. In respect of the settlement proposal, JC's answer was that HM did not raise this in her answering affidavit and did not reserve her right to do so, as such she had waived her right to object, and in respect of the J[...] communication, his answer was that HM was aware that he was the one communicating with her through J[...]s device as he had blocked her from his own device.

[4] In respect of the replying affidavits, HM objected to the paragraphs containing arguments, new matters and inadmissible evidence. JC denied their

characterisation by HM and argued that they constituted a response to the allegations advanced by HM in the answering affidavit. JC also argued that HM did not disclose what or how prejudice was purportedly occasioned by what was contained in the paragraphs that HM complained of.

[5] JC attempted to use HM proposals as evidence of an admission of liability after the negotiations failed. It is precisely the mischief that privilege obtains on negotiations and settlement proposals. In *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* (1135/2016) [2017] ZASCA 98; [2017] 3 All SA 739 (SCA); 2017 (6) SA 55 (SCA) (6 July 2017) at para 19 and 20 it was said that:

[19] The policy, as I indicated earlier, is to promote the settlement of disputes without resort to litigation, and was discussed at length by Trollip JA in *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A). Referring (at 674A-B) to a statement made by Lord Mansfield in the 19th century that ‘it must be permitted to men to “buy their peace” without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether any thing or what is due’, Trollip JA said that the origin and the rationale for the without prejudice rule was public policy.

[20] ...Trollip JA, finding that the letters had been written without prejudice, said (at 677B-D):

‘[S]uch correspondence, once respondent objected to its being adduced in evidence, was wholly inadmissible. The rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses (nowadays, very high), delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in the ensuing litigation.’

[6] In *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013

(5) SA 538 (SCA); [2013] 1 CPLR 1 (SCA) (31 May 2013) at para 33 and 34 it was said that:

[33] 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 judged by its outward manifestations; in other words from the perspective of how a reasonable person would view it.²⁵ It follows that privilege may be lost, as the English courts have held, even if the disclosure was inadvertent or made in error. Imputed waiver occurs when fairness requires the court to conclude that privilege was abandoned. The respondents contend that in this case the loss of privilege is implied or to be imputed to the Commission. The Commission submits that the bare references to the leniency application in the referral affidavit did not amount to a waiver of privilege.

[34] I appreciate that a bare reference to a document in a pleading, without more, may be insufficient to constitute a waiver, whereas the disclosure of its full contents may constitute a waiver. Where the line is drawn between these extremes is a question of degree, which calls for a value judgment by the court. When that line is crossed the privilege attached to the whole document, and not just the part of the document that was referred to, is waived. The reason is that courts are loath to order disclosure of only part of a document because its meaning may be distorted. But it must also be so that it does not inevitably follow that because part of document is disclosed, privilege is lost in respect of the whole document. This would be so where a document consists of severable parts and is capable of severance.

[7] JC does not allege that HM also relied on a full recital of the contents of the privileged communication or that she used the facts therein to support her defence or in any way acted in a manner inconsistent with maintaining confidentiality of the communication. I am persuaded that the communication engaged for purposes of settlement should be struck out. The arguments, new matters and inadmissible evidence also are struck out. Just as an example, JC cannot plead direct communication with HM in his founding affidavit, and only

when HM said but it was J[...] that I was speaking to, for JC to only then say I was speaking through J[...], which he did not disclose in his founding affidavit and moreover, where J[...] did not file a statement to conform such agency in the founding affidavit. JC kept the context of a referenced document and its circumstances secret. This would fetter HMs ability to respond, and JC cannot be heard to say, when the context is disclosed, I have to respond thereto, by introducing new evidence. I am also not persuaded that there was a waiver of the privilege as alleged by JC.

[8] The terms of the oral agreement alleged by JC are in dispute. This JC knew, when he decided to approach the court on motion. JC should have reasonably foreseen that a serious, unresolvable dispute of fact would develop before initiating the motion proceedings. JC knew that he disputed that HM not continuing to work after the meeting where the disputed agreement was struck, was related to his settlement of HMs mortgage bonds underpinned by the daily full care for his father by HM. HM was not happy with the increase paid on the policy premium applicable to their agreement and held the view that it was not in terms of their agreement. This JC knew. JC also knew that the question as to when the loan was to be repaid according to him, was in dispute. HM said the policy was ceded and JC made beneficiary as the intention was that only at her death, and not earlier, would JC only get R251 600-00 without any interest. On the papers, these disputes cannot be resolved.

[9] In *Dipela v Fischer and Another* [2023] ZAGPPHC 768; 20360/21 (6 February 2023) at para 24 and 25 it was said that:

[24] In dealing with disputes of fact in motion proceedings, Conradie J in *Cullen v Haupt* said:

"I have consulted some of the better known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard, of course, Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3)SA I 155([) at 1162, where Murray A.JP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or ii may be dismissed with costs, "particularly when the applicant should have realised when launching his application a serious dispute of fact was bound to develop" .

The next of better known cases on this topic is that of Conradie v Kleingeld 1950 (2) SA 594 (0) at 597, where Howirtz J said that a petition may be refused where the applicant at the commencement of the application should have realised that a serious dispute of fact would develop".

[25] In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26, the test laid down in *Plascon Evans* was restated, Harm DP observed that motion proceedings were really designed for the resolution of legal disputes based on common cause facts. In most applications, however, disputes of facts, whether minor or more substantial, arise. As a result, rules have been developed to determine the facts upon which matters must be decided where disputes of fact have arisen and the parties do not want a referral to oral evidence or trial. The Supreme of Court of Appeal also emphasised that motion proceedings cannot be used to resolve factual issues because they are not designed to determine the probabilities, unless the circumstances are special.

[10] There are no special circumstances in this matter. A court may dismiss an application where material dispute of facts were known to the applicant, and the applicant nevertheless approached the court on motion proceedings, well aware that motion proceedings are not designed to determine factual disputes [Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162; *CULLEN v HAUPT* 1988 (4) SA 39 (C) at p 40F-H] For these reasons I make the order.

DM THULARE

JUDGE OF THE HIGH COURT