



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 5458/2021

In the matter between

CARLOS ALBERTO DA SILVA

APPLICANT

and

INTELIGRO (PTY) LTD

(Registration Number: 1998/004580/07)

RESPONDENT

In Re

INTELIGRO (PTY) LTD

(Registration Number: 1998/004580/07)

PLAINTIFF

and

CARLOS ALBERTO DA SILVA

DEFENDANT

Neutral citation: *Da Silva v Inteligro (Pty) Ltd* (5458/2021) [2026] ZAFSHC 381 (3 August 2026)

Coram: STEYN AJ

Heard: 23 July 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand-down is deemed to be 3 August 2026.

Summary: Application to compel – authority of deponent – litigation privilege –

elements and requirements restated.

ORDER

- 1 The late filing of the applicant's replying affidavit is condoned.
 - 2 The application to compel discovery is dismissed.
 - 3 The applicant is to pay the costs of this application on Scale B, such costs to include the costs occasioned by the postponement on 18 June 2026.
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JUDGMENT

Steyn AJ

Introduction

[1] This is an opposed application by the applicant to compel the respondent to make available for inspection a preliminary report compiled by Mr. Brian Kerrin, an expert agricultural loss adjuster, following his inspection of the applicant's farming premises on 1 December 2022. The applicant seeks this relief pursuant to a notice in terms of Uniform Rule 35(3) delivered to the respondent on 12 June 2025, to which the respondent responded on 8 September 2025, claiming that the report was privileged from disclosure as it was 'prepared in contemplation of litigation'. The applicant thereafter launched this application to compel on 22 May 2026.

[2] The respondent delivered its answering affidavit on 17 June 2026, deposed to by Mr. Wayne Donald Forrester, an attorney practicing as such at Savage Jooste & Adams Inc, acting on behalf of the respondent's insurer, Lombard Insurance Company Limited. The applicant delivered its replying affidavit on 9 July 2026, approximately five court days out of time, and now seeks condonation for the late delivery thereof.

Issues for determination

- [3] The following issues fall for determination:
- (a) Whether the applicant should be granted condonation for the late filing of his replying affidavit;
 - (b) Whether Mr. Forrester has the requisite *locus standi* to oppose the application on behalf of the respondent;

- (c) Whether the report by Mr. Kerrin is protected from disclosure by litigation privilege; and
- (d) Whether the report by Mr. Kerrin, being an interim expert report, is protected from disclosure under the applicable rules of court.

Application for Condonation

[4] The explanation proffered for the late delivery of the applicant's replying affidavit is that his attorney of record and counsel departed from Bloemfontein on 19 June 2026 for the recess period commencing on 22 June 2026 and were out of office until 1 July 2026. Upon their return, they immediately attended to the preparation of the replying affidavit.

[5] Although I find this explanation to be wholly inadequate and indicative of a lack of proper case management and a disregard for procedural timelines, I am of the view that it remains in the interests of justice, and encompasses little prejudice to the respondent, to grant condonation for the late filing of the replying affidavit. Condonation is accordingly granted.

***Locus standi* of Mr. Forrester**

[6] The applicant contends that Mr. Forrester, as the attorney for the respondent's insurer, lacks the requisite *locus standi* to oppose the application because the insurer is not a party to the proceedings and its interest has not been pleaded. It is trite that, for a party to have the necessary legal standing (*locus standi*), he or she must have a direct and substantial interest in the subject matter of the judgment sought. Mr. Forrester has not replaced the respondent but merely deposed to the affidavit in opposition of this application. The inquiry into his *locus standi* is therefore irrelevant.

[7] The applicant argued that Mr. Forrester lacked the necessary authority to oppose the current application. In *Ganes and Another v Telecom Namibia Ltd*¹ the court gave a complete answer to the issue of authority and held:

'(I)t is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which

¹ *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

must be authorised.'

[8] It was held in *PM v MM and Another*² that a deponent to an affidavit is a witness who states, under oath, facts within their personal knowledge. A deponent to an affidavit swears or affirms to the truthfulness of such facts and is no different from a person who testifies orally and needs no authorisation to do so. Mr. Forrester deposes to facts within his personal knowledge as the attorney handling the counterclaim on behalf of the insurer and in consultation with the respondent's attorneys. He is the person most intimately acquainted with the facts concerning the commissioning of the report of Mr. Kerrin.

[9] Furthermore, the involvement of the insurer is a collateral fact, as was confirmed in *Smith v Banjo*.³ The insurer's right to control the litigation is a matter *res inter alios acta* and does not require pleading. The court held:

'The involvement of the insurer in a lawsuit is irrelevant and therefore it is not necessary to plead such involvement. It has already been established that in subrogation claims the insurer takes the place of the insured. The historical practice in our courts is to allow the insurer to institute action in the name of the insured Logically, the parties to a suit have the same rights and duties as they would have had, had the matter not been a subrogated claim. I agree with the plaintiff's submission that from a practical perspective the insurer's involvement in the suit is irrelevant. For this reason, it is clearly not necessary for the plaintiff to plead the insurer's involvement in the suit.'⁴

[10] The respondent referred the counterclaim to its insurer, who formally instructed Savage Jooste & Adams Inc, to assist with the defence. This is a matter of internal arrangement between the insured and the insurer and does not affect the procedural posture of the case before this Court.

[11] The applicant's reliance on *Rellams (Pty) Ltd v James Brown & Hamer Ltd*⁵ is misplaced. That case stands for the proposition that discovery affidavits should generally be made by the parties themselves. However, this is not a discovery affidavit in the strict sense, it is an answering affidavit in an application to compel, where the deponent is

² *PM v MM and Another* [2021] ZASCA 168; 2022 (3) SA 403 (SCA).

³ *Smith v Banjo* [2010] ZAKZPHC 73; 2011 (2) SA 518 (KZP).

⁴ *Ibid* para 12.

⁵ *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

explaining the basis for a claim of privilege. In any event, Mr. Forrester is in a position to depose to the facts from his own knowledge, as he was directly involved in the instructions to Mr. Kerrin. I, accordingly, find this argument without merit.

Litigation privilege over the report of Mr. Kerrin

[12] The requirements for litigation privilege are two-fold as was held in *Competition Commission v ArcelorMittal Sa Ltd and Others*.⁶ Firstly, the document must have been obtained with the dominant purpose of submitting it to a legal advisor for legal advice, and secondly, that litigation was pending or contemplated as likely at the time.

[13] The Supreme Court of Appeal in *Ibex RSA Holdco Ltd v Tiso Blackstar Group (Pty) Ltd*⁷ definitively adopted the 'dominant purpose' test. The respondent's evidence is that the report was commissioned for the dominant purpose of being submitted to the respondent's legal advisors to assess the merits of the applicant's counterclaim, advise on whether it should be defended, and provide tactical advice on the conduct of the litigation. This is corroborated by the letter of instruction dated 21 September 2022, which expressly states that Mr. Kerrin was to 'investigate the nature of the advice given and whether there is any merit in the counterclaim' in order for the insurer to be advised accordingly.

[14] The factual findings in the report were gathered, selected and expressed for the dominant purpose of enabling the legal advisors to assess the merits of the counterclaim. They are accordingly embedded in, and inseparable from, the privileged forensic exercise for which the report was commissioned.

[15] It is common cause that the counterclaim was launched on 13 February 2022 and that the report was commissioned on 21 September 2022. Litigation was therefore very much 'pending' when the report was brought into existence.

[16] Litigation privilege is not confined to communications between a litigant and their attorney. It extends equally to communications between a litigant's legal advisor and any third party, including expert witnesses, loss adjusters and investigators, provided that

⁶ *Competition Commission v ArcelorMittal Sa Ltd and Others* [2013] ZASCA 84; 2013 (5) SA 538 (SCA).

⁷ *Ibex RSA Holdco Ltd v Tiso Blackstar Group (Pty) Ltd* [2024] ZASCA 166; 2025 (2) SA 408 (SCA).

those communications were made for the dominant purpose of pending or contemplated litigation. The privilege belongs to the litigant, not the expert.

[17] The authorities are clear on this point. In *Tshikomba v Mutual & Federal Insurance Co Ltd*,⁸ the court held that where an insurer commissions an independent assessor's report for the purpose of defending an anticipated claim, the report is privileged. In *Potter v South British Insurance Co Ltd and Another*⁹, the court held that:

'In the preparation for litigation it is sometimes necessary for the litigant to prepare documents, either by himself or by his agents, for submission to his lawyers, and there is an extension of the scope of the privilege to cover such documents, with safeguards to ensure that the documents covered should fall within the protection of the privilege. Where the communications pass not between the party and his lawyers but between the party and a non-professional agent or third party they are not privileged unless made (1) for the purpose of litigation existing or contemplated

...'¹⁰

Interim expert reports and Rule 36(9)

[18] Rule 36(9) requires a party intending to call an expert witness to deliver a notice setting out the substance of that expert's opinion and the reasons for it. The respondent has not delivered any such notice and has confirmed it does not intend to call Mr. Kerrin as an expert witness at trial. The obligation to disclose an expert report under rule 36(9) is accordingly not triggered.

[19] Moreover, as held in *Mason v Mason NO*,¹¹ there can be no justification for the obligation(s) under rule 36(9) to be extended to provide for the discovery of communications between the respondent's legal advisor and Mr. Kerrin, the instructions given to Mr. Kerrin or the interim reports compiled in the course of the formulation of his opinion. The cover page of the report is expressly marked as 'PRELIMINARY REPORT PREPARED IN CONTEMPLATION OF LITIGATION PRIVILEGED DOCUMENT - CONFIDENTIAL'. Its interim nature alone renders it protected from disclosure.

Relevance

⁸ *Tshikomba v Mutual & Federal Insurance Co Ltd* 1996 (3) SA 936 (A).

⁹ *Potter v South British Insurance Co Ltd and Another* 1963 (3) SA 5 (W).

¹⁰ *Ibid* at 7.

¹¹ *Mason v Mason NO* Unreported, ECD, Port Elizabeth, Case No. 1830/2013.

[20] The test for relevance in discovery is a wide one. As stated in *Swissborough Diamond Mines v Government of the RSA*,¹² a document must be discovered if it may, directly or indirectly, enable the party seeking discovery to advance its own case or damage the case of its adversary.

[21] The applicant has failed to provide an explanation as to why it requires the report. It has not stated that the report is required to advance its own case, to undermine the respondent's case, or to lead to a train of inquiry that may produce either of those consequences. I accordingly find that the requirement of relevance has not been established.

[22] For the reasons discussed above, I am satisfied that the report of Mr. Kerrin is protected from disclosure by litigation privilege. It is an interim expert report, the respondent has not indicated any intention to call Mr. Kerrin as an expert witness and the applicant has failed to establish its relevance.

Costs

[23] The respondent seeks an order for costs against the applicant on the attorney and client scale, alleging that the applicant has caused the respondent unnecessary expense in having to oppose an application devoid of merit. An order for punitive costs, however, is a sharp sword that courts reserve only for the most egregious conduct.

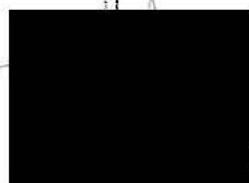
[24] The application, while ultimately unsuccessful, was based on a bona fide interpretation of the parties' obligations. There is no evidence before me that the application was brought recklessly, vexatiously or with the intent to harass the respondent. I therefore find that costs must be awarded on the party-and-party scale.

[25] Accordingly, the following order is made:

- 1 The late filing of the applicant's replying affidavit is condoned.
- 2 The application to compel discovery is dismissed.

¹² *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T).

3 The applicant is to pay the costs of this application on Scale B, such costs to include the costs occasioned by the postponement on 18 June 2026.



L STEYN
ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicant:

Instructed by:

J Donnelly-Bornman

Donnelly-Bornman Law Inc

Bloemfontein.

For the respondent:

Instructed by:

WJ Groenewald

Gerrit Coetzee Attorneys

c/o Horn & Van Rensburg Attorneys

Bloemfontein.