THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 10332/2014

PETER JACOBUS VILJOEN DU TOIT **FIRST APPLICANT**

MEDIA 24 LTD **SECOND APPLICANT**

And

STELLENBOSCH UNIVERSITY **RESPONDENT**

JURIE ROUX **INTERVENING PARTY**

Coram: ROGERS J

Heard: **31 AUGUST 2015**

Delivered: **8 SEPTEMBER 2015**

JUDGMENT

ROGERS J:

Introduction

[1] This is an application in terms of the Promotion of Access to Information Act 2 of 2000 to compel the respondent ('the University') to give the applicants access to a forensic report by KPMG allegedly considered at a meeting of the University's Audit & Risk Committee ('the Committee') on 7 November 2013. The report deals with financial irregularities involving, among others, the intervening party ('Roux'). Roux was employed by the University in a financial position until 2010. He is currently the Chief Executive Officer of the South African Rugby Union ('SARU'). The alleged financial irregularities concern rugby expenditure.

[2] The University refused access, relying on s 40 of the Act. That section provides that the information officer of a public body (it is common cause that the University is such) must refuse access if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived it. In August 2013 KPMG gave an oral report to the Committee regarding the financial irregularities in question. The University engaged Werksmans as its attorneys and requested KPMG to furnish its written report, when ready, directly to Werksmans, with a view to the latter providing advice and recommendations in regard to civil claims, criminal prosecution and employment law issues. KPMG delivered its draft report to Werksmans on 30 August 2013. Werksmans thereafter furnished legal advice and engaged senior counsel for an opinion.

[3] The reports considered at the Committee's meeting of 7 November 2013 were, according to the University, Werksmans' advice and counsel's opinion, not the draft KPMG report (as the applicants had inferred). Nothing turns on this, though, because it is common cause that the University is in possession of the draft KPMG report and understood the applicants' request to relate to that document.

[4] KPMG delivered its final report to Werksmans on 12 December 2013. In January 2014 the University gave a copy thereof (excluding annexures) to SARU on

terms of confidentiality. The latter in turn confidentially gave a copy to Roux (the University claims that SARU breached the terms of confidentiality by doing so).

[5] The applicants' request in terms of s 18 is dated 22 November 2013. It was framed in such a way as to refer, in effect, to the draft KPMG report. Indeed, the final KPMG report was not in existence as at 22 November 2013. The University refused access in a letter dated 20 December 2013.

[6] The present application was issued in June 2014. The notice of motion sought to compel the University to provide the applicants with the record requested in their request of 22 November 2013. (The applicants did not know at that stage that the requested record was a draft report which had been superseded by a final report.) The University continued to oppose production of the report, relying on s 40. In reply the applicants alleged that, if the report were found to be privileged, the University should nevertheless be ordered to produce it in terms of s 46 because the report's disclosure would reveal evidence of a substantial contravention of, or failure to comply with, the law and the public interest in disclosure clearly outweighed the harm contemplated in s 40.

[7] In August 2014 Roux delivered an application for leave to intervene, which intervention was granted without opposition on 16 September 2014. Roux alleged that the KPMG report was indeed legally privileged in the University's hands. He also alleged that both SARU and he had sought copies of the report with a view to obtaining legal advice.

[8] The pleadings closed in October 2014. On 8 April 2015 the matter was set down for 4 June 2015. On 21 May 2015 the University delivered a notice withdrawing its opposition, abiding the court's decision and tendering the applicants' costs to date. The matter was removed from the roll and re-enrolled for 31 August 2015.

[9] On 22 July 2015 the applicants' attorneys wrote as follows to the University's attorneys regarding their notice of 21 May 2015:

'Our understanding of the notice is that your client has withdrawn its objection to producing the report, and that if it had not been for the fact that the application is still opposed by Mr Roux, your client would have tendered delivery of the report. If your client has not withdrawn its objection, our client will have to address this in the court, which would of course have cost implications.

We shall be grateful if you would kindly confirm that our understanding of your client's position is correct.'

[10] The reply from the University's attorneys, dated 24 July 2015, was that the applicants' understanding of the University's position was correct.

[11] On 28 July 2015 the applicants delivered an interlocutory application, to be made at the commencement of the hearing on 31 August 2015, for an order receiving further evidence. This further evidence concerned the University's recent issue of summons against Roux, a copy of which was attached to the supplementary affidavit. On 18 August 2015 Roux filed an affidavit opposing the interlocutory application. After filing a replying affidavit the applicants on 26 August 2015 withdrew the interlocutory application and tendered the wasted costs, apparently with a view to avoiding a postponement.

[12] In the meanwhile, on 5 August 2015, the applicants gave notice in terms of rule 28(1) of their intention to seek an amendment of their notice of motion so as to include production of the final KPMG report. This had been foreshadowed in their replying affidavit of 3 September 2014. Roux delivered a notice of objection. At the start of the hearing Mr G Budlender SC, who appeared for the applicants, abandoned the amendment, again apparently with a view to avoiding a postponement. Argument then proceeded as to whether the applicants were entitled to production of the draft KPMG report. Mr Kuschke SC leading Ms van Huyssteen appeared for Roux.

Draft KPMG report privileged?

[13] The argument focused on whether Roux could assert privilege, having regard to the University's withdrawal of its opposition and its attorneys' letter of 24 July

2015. However it is convenient first to consider whether the draft KPMG report was, subject to subsequent events, privileged. This was not a question fully addressed in argument.

[14] The form of privilege with which we are concerned is not legal professional privilege relating to communications made for purposes of obtaining legal advice but the distinct form of privilege now recognised as so-called litigation privilege (see *Competition Commission v ArcelorMittal South Africa Ltd & Others* 2013 (5) SA 538 (SCA) paras 20-22; Hoffmann & Paizes *The South African Law of Evidence* 2nd Ed 678-682). In general, litigation privilege entitles a person to refuse to disclose documents, including communications from agents and third parties, brought into existence at a time when litigation is pending or contemplated as likely and for submission to the person's lawyer for purposes of obtaining the latter's advice in respect of the pending or contemplated litigation.

[15] Mr Budlender submitted, with reference to pp 679-680 of Hoffmann & Paizes op cit and the discussion there of *United Tobacco Companies (South Africa) Ltd v International Tobacco Co (SA) Ltd* 1953 (1) SA 66 (T), that the scope of litigation privilege in regard to communications by agents was not altogether settled. It was held by a full bench in *United Tobacco* that 'a communication between a principal and his agent in the matter of the agency giving information of the facts and circumstances of the very transaction which is subject matter of the litigation' is not privileged (at 70E-F per Clayden J). The court said that this 'subsidiary rule' was 'really but an illustration of cases where the document is regarded as not made for the purpose of being laid before legal advisers'. This decision is criticised by Hoffmann & Paizes, inter alia on the basis that its English foundations have in that country been called into question.

[16] However, even if the 'subsidiary rule' articulated in *United Tobacco* were correct, it does not find application here. What seems to have been contemplated as falling under the 'subsidiary rule' are cases where an employee or agent, engaged to assist his employer or principal in the conduct of some business, reports to his employer or principal regarding what he has done in the transaction of the business (see the passages from *Anderson v Bank of British Columbia* (1878) 2 Ch D 644

cited by Clayden J in *United Tobacco* at 68H-69B). Such a report, so the court held, is not privileged simply because litigation was contemplated, even though the employer or principal had in mind to submit the report of his employee or agent to a lawyer in respect of contemplated litigation.

[17] This 'subsidiary rule' cannot apply to an agent engaged specifically to undertake investigation and report to his principal on the subject matter of contemplated litigation and in circumstances where the principal intends to submit the report to his lawyer for legal advice in relation to the contemplated litigation. This was recognised by a subsequent ruling made by Clayden J as the trial judge in the same litigation. I refer to *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd* 1953 (4) SA 251 (W). There a private detective, Mr Plumley, had been engaged by the plaintiff, in advance of litigation, to investigate and report on matters relevant to anticipated litigation. Mr Plumley in the course of his investigations received reports from his own employees and from third persons. It was taken for granted on both sides that Mr Plumley's report to the plaintiff was privileged. Clayden J held that what Mr Plumley's employees and third persons had told him was likewise privileged.

[18] In the present case KPMG was specifically tasked to investigate and report to the University on matters which were anticipated to give rise to litigation and for purposes of the submission of such report to the University's lawyers for legal advice in relation to such litigation. The draft report was thus legally privileged.

[19] I am not concerned in these proceedings with any privilege which SARU or Roux may have in regard to the copy of the final report in their possession. The applicants seek production from the University. Mr Kuschke conceded that the only relevant question is the University's privilege.

Has the privilege been waived?

[20] Certain grounds on which a public body may refuse access to a record exist for the protection of third parties (eg, ss 34, 36, 37 and 38). The public body cannot unilaterally waive such grounds of refusal. One can understand in such cases that

the third party might wish to intervene to fortify the public body's grounds of opposition or to advance grounds of opposition where the public body fails to defend court action.

[21] Section 40, and s 67, which is its counterpart in relation to private bodies, stand on a different footing. Legal professional privilege and litigation privilege exist for the sole benefit of the litigant. It can always be waived (*ArcelorMittal* supra paras 32-33). It is thus not surprising that ss 40 and 67 permit the holder of the privilege to waive it, in which case the record must be produced. Here the recipient of the request for access and the holder of the privilege are one and the same person, namely the University. The same principle would, however, have applied if the request for access had been directed not to the University but, for example, to its attorneys. In terms of s 67 the attorneys would have been bound to refuse access unless the holder of the privilege, namely the University, waived it.

[22] In the context of ss 40 and 67 I see little scope for legitimate intervention by a third party (except, of course, where the third party is the holder of the privilege and the request has been directed to the latter's attorney or agent). In the present case, the privilege exists solely for the benefit of the University. The fact that disclosure of the report might damage Roux's reputation has no bearing on s 40. Indeed, Mr Kuschke acknowledged that if the University had indeed waived privilege Roux could not prevent production of the report. He has not raised any independent ground of refusal recognised by the Act

[23] In terms of the Act, the burden of proving a ground for refusing access rested on the University. If the University had declined to oppose the application and assert privilege, I cannot see on what basis Roux could legitimately have intervened to assert the University's privilege. The position is now the same as if the University had never opposed the application, because it has withdrawn its opposition.

[24] It is true that the University, in withdrawing its opposition, added that it would abide the court's decision. However, and bearing in mind that the onus rested on the University and that it was the only person with an interest in asserting the privilege, the withdrawal of its opposition could not have meant anything other than that it no

longer asserted the privilege. The University was not merely saying that it would no longer participate in the proceedings. That would not have been a true withdrawal of opposition, because the applicants would then still have had to incur the costs of appearing and persuading the court that the report was not privileged. This would have meant that the University remained liable for costs, whereas in its notice of withdrawal it tendered costs only to the date of the notice.

[25] In my view, the only reason that the University added, in its notice, that it abided the court's decision was because Roux as an intervening party still opposed the application. However, the University's abiding the court's decision could not confer on Roux a legal interest in the privilege which he did not otherwise have.

[26] Any doubt as to the University's intention is put to rest by its letter of 24 July 2015. Mr Kuschke submitted that the letter could not be regarded as a waiver by the University of its privilege. He suggested that the University might have adopted the attitude it did because it thought the applicants might succeed on their alternative argument that access should, in terms of s 46, be ordered in the public interest despite the existence of privilege. He complained that the University had not stated under oath that it had waived its privilege.

[27] In my view, the University's motive for withdrawing its objection to the production of the report is irrelevant. What is important is that the University does not object to the production of the report. Insofar as may be relevant, one can safely infer that it has reached this conclusion inter alia after taking legal advice. The only reason that the report has not yet been handed over is that Roux claims a right to assert that the University is not obliged to hand over the report. I do not think he has any such right. Put differently, I am quite satisfied that the University has waived any privilege that may have existed in the draft report. It has hitherto refrained from actually giving the report to the applicants out of respect for the judicial process between the applicants and Roux. This display of deference does not give Roux any right which he did not otherwise have.

[28] The complaint that the University has not filed an affidavit stating that it has waived privilege is without merit. The exchange of correspondence has been placed

before the court by way of an affidavit from the applicants' attorney. Roux did not object to the filing of that affidavit. The waiver is clear from the correspondence viewed in its factual matrix.

Conclusion

[29] For the reasons set out above the application must succeed on the merits. It is unnecessary to consider the applicants' alternative reliance on s 46 (the public interest override).

[30] As to costs, Mr Kuschke submitted that if I was against Roux I should order the parties to bear their own costs, bearing in mind that the University's attitude was only clarified in an exchange of correspondence brought to Roux's attention on 20 August 2014 (this was in the replying affidavit to the interlocutory application which the applicant subsequently withdrew). However, I do not think there can have been any real doubt as to the University's intentions when it withdrew its opposition. Furthermore, Roux did not abandon his opposition upon learning of the exchange of correspondence. And for the reasons I have explained, I consider that his intervention, though not opposed by the University, was misconceived. I thus see no reason why he should not be ordered to pay the costs occasioned by his intervention. The costs caused by the University's initial opposition are covered by its tender in the notice dated 21 May 2015 and I therefore need make no order in respect thereof.

[31] The applicants in accordance with their tender must pay Roux's costs relating to the interlocutory application. The applicants must also pay the costs associated with the withdrawn rule 28(1) notice. Mr Kuschke submitted that any costs in Roux's favour should include the costs of two counsel. In my view, the matter as a whole did not warrant the employment of two counsel, and the same applies to interlocutory matters.

[32] I thus make the following order:

(a) The respondent is ordered, within 14 days of this order, to provide the applicants with copies of all the records requested in the first applicant's request for access to information dated 22 November 2013.

(b) The applicants are to pay the intervening party's costs associated with the interlocutory application dated 24 July 2015 and the rule 28(1) notice dated 5 August 2015.

(c) Save as aforesaid, the intervening party is ordered to pay the applicants' costs occasioned by his intervention, including the costs of the hearing on 31 August 2015.

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ROGERS J

APPEARANCES

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