**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 3509/2014

Before: The Hon. Mr Justice Binns-Ward
Hearing: 11 September 2017
Judgment: 11 October 2017

In the matter between:

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| **ASTRAL OPERATIONS LTD t/a** | |
| **COUNTY FAIR FOODS** | First Applicant |
| **PIONEER FOODS (PTY) LTD t/a** | |
| **TYDSTROOM POULTRY** | Second Applicant |
| **BOTTELFONTEIN ACTION GROUP** | Third Applicant |

and

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| **MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL** | |
| **AFFAIRS AND DEVELOPMENT PLANNING (W. CAPE)** | First Respondent |
| **CITY OF CAPE TOWN** | Second Respondent |

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**JUDGMENT**

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**BINNS-WARD J:**

[1] The Minister for Local Government, Environmental Affairs and Development Planning (Western Cape) has granted the City of Cape Town leave to undertake various activities identified in terms of s 21 of the Environment Conservation Act No. 73 of 1989 for

the purpose of a large refuse deposit at a regional landfill site that the City proposes to operate at Kalbaskraal. The first and second applicants and the members of third applicant conduct farming operations in the vicinity of the proposed facility. They have applied for the judicial review of the Minister's decision. The Minister and the City are the first and second respondents, respectively, in the review application. One of the issues of central significance in the pending review proceedings is whether the impugned decision was made with properly informed regard to the risk of pollution of the underground water resources in the area if the contemplated landfill operation goes ahead. The parties have agreed that the dispute concerning the pertinent facts in this regard will be the subject of oral evidence at the hearing of the review. It is accepted that there are aquifers that underlie the site and that waste deposited at the landfill has the potential to contaminate run-off water and produce leachate that could pollute groundwater in the area. Most of the farmers in the area are reportedly dependent to a greater or lesser extent on groundwater supplies.

[2] The matter for determination at this stage is an application by the applicants in the review to compel compliance with a notice served on the respondents in terms of rule 35(12) of the Uniform Rules for the production of a document described as 'Memo_Parsons_2016'. I shall hereafter refer to the document simply as 'the memorandum'. Its existence came to the attention of the applicants because it was referred to in an attachment to an affidavit made by a geohydrologist, Mr Andrew Johnson, that was filed of record by the respondents in the review proceedings.

[3] The respondents have refused to make the memorandum available. They both assert that it is privileged.[1] It is undisputed that a litigant is entitled to decline to produce a document demanded in terms of rule 35(12) if it is privileged.[2] The applicants contend that any privilege that may have attached has been waived; alternatively, that a waiver of privilege falls to be imputed by virtue of the disclosure that has been made concerning the memorandum in the papers filed of record and in correspondence that the respondents have made available.

[4] In their assertion of privilege the respondents rely on 'legal advice privilege' and/or 'litigation privilege'. These are two manifestations of the category of privilege that is called

[1] The Minister in point of fact did not respond to the rule 35(12) notice, but the state attorney has filed an affidavit in these proceedings in which the Minister's opposition to the application to compel is confirmed, and it is stated that the opposition is founded on the reasons set forth in Attorney Winstanley's opposing affidavit on behalf of the City.

[2] See *Gorfinkel v Gross, Hendler and Frank* 1987 (3) SA 766 (C), [1987] 4 All SA 289, at 774G-I (SALR).

'legal professional privilege'.[3] It has been suggested that the rationale for legal advice privilege is the public policy interest in encouraging and protecting full and frank disclosure by clients to their legal advisors when seeking and getting advice in a legal context and the client's right to confidentiality in that connection, and that the basis for litigation privilege lies in the proper functioning of our adversarial system of litigation.[4] The so-called 'docket privilege' that attached to the contents of the prosecutor's docket, until it was quite recently found by the Constitutional Court to be inconsistent (at least in its 'blanket' form) with an accused person's fair trial rights,[5] was another example of legal professional privilege. Its civil law equivalent that denies a litigant insight into the content of his opponent's legal representative's brief still applies.

[5] The relevant law is judge-made and, as might be expected in the circumstances, it has developed and changed over time. At the heart of it is the premium attached as matter of public policy to the protection of confidentiality as between attorney and client and as an incidence of the adversarial system of litigation. The tension between the public interest in full disclosure as an aid to the vindication of truth in litigation on the one hand and the considerations informing the existence of legal professional privilege on the other is widely acknowledged in the pertinent jurisprudence, but it has been generally accepted for a variety of reasons that the latter should prevail.[6] The right to assert privilege is not absolute, however. Depending on the facts of a particular case, it may be outweighed by countervailing considerations.[7] Once the confidentiality of the information has been breached, the basis for claiming privilege in it is destroyed. The right to assert legal professional privilege in appropriate circumstances is recognised as a substantive right, not just a rule of evidence with procedural effect.

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[3] *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538, at para 20.

[4] See, for example, the discussion in DT Zeffert and AP Paizes, *The South African Law of Evidence* 2nd ed at p.625ff.

[5] *Shabalala and Others v Attorney-General of the Transvaal and Another* [1995] ZACC 12; 1995 (12) BCLR 1593; 1996 (1) SA 725.

[6] The judgments given by each of the seven justices in the High Court of Australia decision in *Baker v Campbell* [1983] HCA 39, (1983) 153 CLR 52, (1983) 49 ALR 385 afford an informative collection of discussions on the tension and the reasons for resolving it in favour of upholding the privilege. See also *R v Steyn* 1954 (1) SA 324 (A), at 334E-335C.

[7] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1; 2008 (12) BCLR 1197, at para. 185.

[6] Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given.[8] It is not restricted in its ambit to advice on matters of law; it also extends to *'advice as to what should prudently and sensibly be done in the relevant legal context', including advice as to how a client's position or case should best be presented*'.[9]

[7] Litigation privilege protects communications between a litigant or his legal advisor and third parties, if such communications are made for the purpose of pending or contemplated litigation. The privilege belongs to the litigant, not the legal advisor or third party, and may be waived only by the litigant.[10] It has been held that 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.[11] It applies typically to witness statements prepared at a litigant's instance for this purpose, and also to other information 'forming part of the brief', that is documents that have come into existence for the purpose of advising the client in regard to the litigation.[12] (In *R v Steyn* 1954 (1) SA 324 (A), at 334B-E, it was held that having regard to the rationale for the privilege it would be grossly inequitable to distinguish the position of a self-actor litigant from that of a legally represented one in respect of privilege in witness statements.)

[8] The first of the two aforementioned requirements for litigation privilege has been broadly construed with reference to the policy rationale for the privilege. Thus communications between a litigant's legal representative and a potential witness in pending

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[8] *Three Rivers District Council & Ors v. Bank of England* (No. 6) [2004] UKHL 48, [2004] 3 WLR 1274, [2005] 1 AC 610, at para 10 (per Lord Scott of Foscote); also reported in the All England Reports as *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2005] 4 All ER 948 (HL).

[9] As I had occasion to note in *A Company and Others v Commissioner for the South African Revenue Services* [2014] ZAWCHC 33; 2014 (4) SA 549 (WCC) at para. 25, after rehearsing the salient aspects of the leading English Court of Appeal judgment in *Balabel and another v Air India* [1988] 2 All ER 246 (CA), [1988] Ch 317, '*It appears to be accepted that the judgment of the Court of Appeal in Balabel correctly expresses the scope of legal advice privilege in English law. The House of Lords decision in Three Rivers District Council (No.6)* [see note 8 above], *confirmed that the concept of what falls within the expression 'legal advice' for the purposes of legal advice privilege goes not only to advice on the law, but also, as pointed out by Taylor LJ in Balabel, 'advice as to what should prudently and sensibly be done in the relevant legal context', including advice as to how a client's position or case should best be presented*'. (Footnote omitted.)

[10] *Arcerlormittal*, note 3 supra, at para. 20 (per Cachalia JA).

[11] Ibid, at para. 21.

[12] *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others* 1979 (1) SA 637 (C), [1979] 3 All SA 505, at 648 (SALR).

proceedings are subject to litigation privilege, provided, of course, they bear on the litigation. The judgment of this court in *S v Nieuwoudt* (2) 1985 (4) SA 507(C) serves to illustrate the point. In *Nieuwoudt (2),* Friedman J referred with approval to the following statement concerning litigation privilege in Joubert et al (eds.) *The Law of South Africa* (1st ed.) vol. 9, s.v. '*Evidence*' at para. 485:

> Information as to the manner in which the statement was taken, that is to say, the questions that had been asked and what had been said to the witness, is also protected. The privilege is not confined only to the final statement, but includes everything called into existence for incorporation in the communication in its completed form.

The learned judge held that privilege attached to a letter addressed by the prosecution to a state witness concerning evidence to be given by the witness in a trial that was already underway. He found that the position fell in every respect within the concept of litigation privilege. It seems to me that a memorandum from counsel to their instructing attorney concerning the nature of enquiries to be made to potential witnesses, which would fall into category of legal advice privilege, could potentially also fall into the ambit of information protectable by litigation privilege. If such a memorandum were used by the attorney to convey instructions to an expert witness who is expected to produce a report, the position would be closely analogous to that of the prosecution's letter to the state witness in *Nieuwoudt* (2).

[9] In *S v Safatsa and Others* 1988 (1) SA 868 (A), [1988] 4 All SA 239 at 885-6 (SALR), the late Appellate Division (per Botha JA) endorsed the following description of legal professional privilege by the High Court of Australia in *Baker v Campbell* [1983] HCA 39, (1983) 153 CLR 52, (1983) 49 ALR 385: '[legal professional] *privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation....*'.[13] In the same passage the court in *Safatsa* also referred with approval to the observation by Friedman J in *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others* 1979 (1) SA 637 (C), [1979] 3 All SA 505, at 643H - 644B (SALR) concerning the importance, as a matter of public policy, '*that inroads should not be made into the*

[13] At para 24 of the judgment of Dawson J.

[fundamental] *right of a client to consult freely with his legal adviser, without fear that his confidential communications to the latter will not be kept secret*'. The same policy considerations would apply to the protection of the confidentiality of communications between counsel and instructing attorney in respect of the preparation or conduct of a case or the furnishing of opinions.

[10] Before turning to treat of the questions whether the memorandum was privileged, and if so, whether the privilege was waived, it is appropriate first to describe the factual context.

[11] The respondents are opposing the review application on identical grounds, advanced in jointly prepared opposing papers. They have engaged the same senior counsel to represent them in the case. Senior counsel for the respondents in the matter is instructed by the state attorney on behalf of the Minister and by Ms Winstanley of attorneys Cliffe Dekker Hofmeyr on behalf of the City. He is briefed with two juniors, one instructed by the state attorney and the other instructed by Ms Winstanley. On the face of it the composition of the respondents' legal team in the review proceedings suggests that it must have been agreed between them that they had an identity of interest in opposing the application.[14] It is difficult to conceive how the same senior counsel otherwise could have been instructed to act for both parties, or how he could have felt able to accept briefs to act on behalf of both of them. Indeed, Ms Winstanley explained the position in her affidavit (at para. 9) as follows:

> In this regard, as the applicants know, the City and the Minister, both of whom oppose the granting of the review relief sought by the applicants for the same reasons, are represented in these proceedings by the same senior counsel, namely Adv Breitenbach SC; Adv Du Toit is briefed as his junior by the State Attorney (i.e. for the Minister); and Adv Michelle O'Sullivan is briefed as his junior by me (i.e. for the City). Moreover, as the applicants also know, because of the volume of the papers and the number of issues raised in the main application, the respondents' legal representatives decided that it would facilitate this Honourable Court's understanding of the facts and of their defence if a main answering affidavit by the Minister was prepared, supported by confirmatory affidavits and by affidavits dealing with self-contained issues. This modus operandi has been followed by the respondents ever since their main answering papers were delivered in April 2015, including when, following the postponement of the hearing of the review application on 22 November 2016, described below, the respondents delivered supplementary answering papers in May and June 2017.

Ms Winstanley explained (at para. 34.2 of her affidavit) that the arrangement allowed 'the respondents to share the costs of senior counsel and so conserve scarce public funds'. (Both

[14] I have not been required to read the very voluminous papers in the review application, but the insight into the review that I have been given suggests that an alleged material mistake of fact by the decision-maker is a major issue in the case.

of respondents are organs of state and their legal costs will consequently be funded out of the public purse, albeit presumably charged separately to their respective budgets.)

[12] The applicants did not take issue in reply with the factual allegations made in para. 9 of Ms Winstanley's affidavit. However, at the hearing the applicants' counsel argued that, objectively considered, the disclosure of the memorandum prepared by the *Minister's* junior counsel to the *City's* attorney constituted a waiver of confidentiality that destroyed the right of either of the respondents to assert privilege in the document. I shall give consideration to that argument presently.

[13] The memorandum was composed by junior counsel for the Minister in the review application. It was drafted at the instance of the senior counsel who acted for both the respondents in the case. The exercise was undertaken because certain allegations had been made in the applicants' replying papers in the review concerning the geological and hydrological conditions at the proposed landfill site that had not been foreshadowed in the founding papers. (The hearing of the review application, which had been set down to take place in November 2016, was subsequently postponed to permit the respondents to deal with the new matter.)

[14] The applicants' replying papers had been delivered during August 2016. The memorandum was made available by counsel to the state attorney and the City's attorney. It was sent as an attachment to an email dated 2 September 2016 addressed by counsel to both attorneys. Having regard to the manner in which the respondents were conducting the litigation that was hardly surprising. In the given circumstances senior counsel's reasons for instructing the junior briefed for the Minister to prepare the memorandum would have been indistinguishable from those relevant to his conduct of the case for the City.

[15] In argument the applicants' counsel questioned the appropriateness of the respondents being represented by a legal team composed in the manner I have described. It was suggested that it was inappropriate having regard to the respondents' respective roles as decision-seeker and decision-maker in respect of the administrative action that is subject of the review. In my judgment the wisdom or propriety of the respondents' decision to co-operate in the manner described above - about which it is for present purposes not necessary to express any view - has no bearing on whether the memorandum is privileged. The respondents' conduct of the case shows clearly that as a matter of fact they have what in essence is a single legal team; or as their senior counsel Mr *Breitenbach* put it 'a composite

team'. This has been illustrated on the papers by the despatch of the memorandum by the counsel formally briefed only for the Minister not only to her instructing attorney, but simultaneously also to the City's attorney. And also by the fact that the memorandum was produced by junior counsel at the instance of the lead counsel acting for both of the respondents. The email correspondence between Ms Winstanley and the applicants' attorneys concerning the respondents' assertion of privilege in the memorandum was also copied by both sides to Ms Chetty of the state attorney's office. All the objectively identifiable indications bear out the explanation given by Ms Winstanley in the passage from her affidavit that I quoted earlier.

[16] The respondents have explained their assertion of privilege by broadly describing the content of the memorandum.[15] They averred (in para. 11 of the opposing affidavit by Ms Winstanley) that it contains -

1. an analysis and contextualisation of certain of the allegations concerning the geology and geohydrology of the Kalbaskraal site and its surrounds made in the further supplementary replying affidavit of the applicants' Mr Visser, dated 12 August 2016, and in the affidavits accompanying Mr Visser's affidavit, especially the affidavit by a certain Dr Gresse, dated 26 April 2016;

2. advice concerning, amongst other things, the implications of those allegations, if correct, for the siting of the City's proposed new regional landfill site and for the applicants' review of the Minister's decision, as well as the sufficiency or otherwise of the evidence about the matters raised by those allegations in the respondents' answering papers as they then stood;

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[15] Cf. *A Company and Others v Commissioner for the South African Revenue Services* supra, at para. 39, where, with reference to *In re Grand Jury Witness (Salas and Waxman)* [1982] USCA9 2216; 695 F. 2d 359, 361-62 (9th Cir. 1982), in which the US Court of Appeal (9th Circuit) noted that blanket assertions of privilege (that is without the provision of an explanation of how the information concerned fits within the privilege) are 'extremely disfavored', this court held that '[a] *party that asserts legal professional privilege should generally be able to provide a rational justification for its claim without needing to disclose the content or substance of the matter in respect of which the privilege is claimed*'. It was pointed out that the provision of a general description of the content was desirable in order to equip a court to determine, when the question is in dispute, whether privilege was justifiably asserted in respect of a document without the judge having to confidentially examine its contents. Leaving aside the arguably contentious implications of the use in the provincial division judgments of the term 'onus', this approach seems to me, with respect, essentially consistent with that adopted in *Gorfinkel v Gross, Hendler and Frank* supra, loc.cit., *Unilever plc and Another v Polagric* [1997] ZAWCHC 2, 2001 (2) SA 329 (C), at 337-338, and *Centre for Child Law v The Governing Body of Hoerskool Fochville* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA), 2016 (2) SA 121, at para. 18. Cf. also *Thint v NDPP* supra, at para. 215.

3. a series of enquiries concerning those allegations and issues that counsel asked be directed to the groundwater specialist engaged by the City, Dr Parsons; and

4. a recommendation that Parsons be commissioned to do a further study to investigate the correctness of an allegation by Gresse that a geological map of the Kalbaskraal area that he had prepared for the Council of Geoscience, and upon which Parsons had relied in his evidence in the respondents' answering papers, had been erroneous in a material respect.

Issue has not been taken with that description, and I have not been asked by the applicants to examine the document by taking a so-called 'judicial peek' at its contents. The applicants have merely alleged that '*any memorandum with the contents described in paragraphs 11.1 and 11.3 to 11.4 would not be privileged*'.[16] The distinction that the applicants have sought to make between para. 11.2 and the others parts of para. 11 of Ms Winstanley's affidavit is contrived. It seems clear that all of the content of the memorandum, as it has been described by the City's attorney, is integral to a single topic, namely counsel's advice in respect of the further conduct of the respondents' case arising out of the implications of the evidence that emerged in the applicants' replying papers.

[17] The City's attorney used the memorandum for the purpose of instructing three groundwater experts (i.e. Parsons, the aforementioned Andrew Johnson and one Irene Lea) to prepare reports on matters that had arisen to be dealt with by the respondents as a result of the new matter in the applicants' replying affidavits. The memorandum was provided to the experts on a confidential basis for use only in connection with their respective briefs. The reports were to be prepared by the experts for consideration by the respondents' legal representatives in the review proceedings and the responsible functionaries in the offices of the Minister and the City.

[18] Reports prepared by the three groundwater experts were in due course included in the further set of papers that the respondents were given leave to deliver in the review application. Johnson made two affidavits in the fourth set of papers. Attached to his first affidavit, dated 23 May 2017, were a copy of a so-called desktop study document that he had prepared for Ms Winstanley, dated 22 September 2016, and a draft (dated February 2016) of a report entitled '*City of Cape Town Kalbaskraal Landfill Site: Specialist Review of*

[16] The contents described in the four subparagraphs of paragraph 11 of Ms Winstanley's affidavit correspond in substance with those set forth above in the four numbered items in this paragraph.

*Hydrogeological Reports Parsons and Associates, SRK Consulting and iLEA*' that he had submitted to Ms Winstanley in final form on about 18 May 2017. The 'specialist review' was a review by Johnson of separate reports that had been produced by Parsons (of Parsons and Associates) and by Mr Rosewarne and Ms Imrie of SRK who had been engaged by the applicants. As explained in Johnson's second affidavit made on 24 June 2017, the aforementioned attachments had been annexed to his first affidavit by mistake. He had, he said, actually intended to attach a report prepared by him for Ms Winstanley, dated 7 April 2017, entitled '*City of Cape Town Proposed Kalbaskraal SWS: Peer Review of SRK Numerical Model and Report*' and not the desktop study; and the final version, rather than the draft of the abovementioned 'specialist review'.

[19] The applicants came to know about the memorandum because it was referred to in the desktop study document. It was evident from the content of the desktop study document that Johnson had produced it on the instruction of Ms Winstanley in connection with the pending review proceedings. Indeed, Johnson referred to the proceedings by case number in the introduction and recorded that '[o]ne of the issues raised by the applicants revolves around the groundwater study undertaken at the Kalbaskraal site'. He proceeded to describe his instructions (or 'terms of reference', as he put it) as follows:

> The terms of reference as detailed in Ms Winstanley's correspondence … states
>
> - *Whether we have enough information to determine whether the Colenso Fault goes beneath the Site or whether more fieldwork needs to be done;*
> - *If we have enough information, which expert is correct; and*
> - *If we don't have enough information, what field and other work (such as the interrogation of SRK's modelling) needs to be done to obtain enough information to answer these questions.*
> - *"It is probable that the area coincides with the proposed location of the landfill is underlain by parts of the fault zone of the Colenso Fault in this area. It is also possible that fault line A [referred to in the memo sent to previously] extends along the strike south-eastward and below the surface of the proposed location of the landfill."*

The desktop study document then listed the information that had been supplied to Johnson. This consisted of a list of documents, one of which was the memorandum. It was referred to simply as 'Memo_Parsons_2016'. The desktop study document did not identify the contents of the memorandum.

[20] The desktop study indicated that Johnson's terms of reference had been 'detailed' in correspondence from Ms Winstanley dated 15 and 16 September 2016. Both these letters were made available to the applicants in response to their notice in terms of rule 35(12).

[21] It was apparent from Ms Winstanley's letter of instruction to Johnson, dated 15 September 2016, that the memorandum had been addressed by counsel to both Ms Winstanley and the state attorney. The pertinent part of the letter for current purposes is numbered paragraphs 4 and 5, which followed on the contextual introduction to the pending litigation given in the preceding three paragraphs and the identification of one of the critical issues in it as being '*the geohydrology beneath the Site,* [? in particular] *whether the so-called Colenso Fault extends beneath the Site, and if so, what are the implications of this for the establishment of the Landfill at the Site*'. Paragraphs 4 and 5 proceeded as follows:

> 4 Please would you access the dropbox link to follow. In it you will find a memo addressed to me and Ms Chetty of the State Attorney which sets out the key issues raised by both parties. In addition, there are various technical documents which I hope will be adequate for you to grasp the substance of the contention between the litigants.
>
> 5 Please would you look briefly at these. What we need to know immediately is how long it will take you to determine, with reference to the more detailed questions in the memorandum referred to above:
>
> 5.1 Whether we have enough information to determine whether the Colenso Fault goes beneath the Site or whether more fieldwork needs to be done;
>
> 5.2 If we have enough information, which expert is correct; and
>
> 5.3 If we don't have enough information, what field and other work (such as the interrogation of SRK's modelling) needs to be done to obtain enough information to answer those questions.

[22] In her follow-up letter to Johnson, dated 16 September, Ms Winstanley said in relevant part:

> I confirm that the City would like you please to quote for a desktop study to review the statement made by Dr Gresse that:
>
> > "It is probable that the area that coincides with the proposed location of the landfill is underlain by parts of the fault zone of the Colenso Fault in this area. It is also possible that the fault line A [referred to in the memo sent to you previously] extends along the strike south eastward and below the surface of the proposed location of the landfill."
>
> Please would you prepare this desktop study with reference to the Memorandum and the Documents.

[23] It is admitted that the 'memo' or 'memorandum' referred to in the letters of 15 and 16 September 2016 is the memorandum in issue in this application. In my assessment neither letter discloses the content – as distinct from the nature - of the memorandum.

[24] To treat the City's attorney for practical purposes as not being in the same legal team as the state attorney in the pending review proceedings would, in the factual context described above, be to subordinate the evident substance of the joint relationship between the

respondents and their legal representatives in the conduct of the litigation to the form of the manner in which their legal team has been structured. It would be antithetical to the rationale for the doctrine of legal professional privilege not to recognise in the given circumstances that the respondents' common interest in the confidentiality of the communication between counsel and their attorneys should prevail against the applicants' demand for disclosure. The memorandum is a document that sets out counsel's advice on the developments in the pending review application after receipt by the respondents of the applicants' supplementary replying papers and sets out counsel's recommendations as to how the respondents should deal with the resultant situation. Accepting that its content has been fairly described by Ms Winstanley as related in paragraph [16] above, it is undoubtedly covered by legal professional privilege. In the peculiar circumstances the privilege in the memorandum vested in both of the respondents. It would be lost if either of them abandoned the confidentiality attaching to it. I do not think that it is material for present purposes to decide whether the privilege is properly described as 'litigation privilege' or 'legal advice privilege'. I can readily understand, in the circumstances of its subsequent use by the attorney in instructing the three experts, why Mr *Breitenbach* argued that it qualified under both categories.

[25] The applicants would therefore be entitled to disclosure of the memorandum only if the respondents had expressly or impliedly waived their privilege, or if a waiver of privilege fell to be imputed.

[26] It follows from what I have already found that there is no merit in the applicants' contention that the disclosure by the junior counsel engaged by the Minister's attorney of the memorandum to the City's attorney in the particular circumstances constituted the sort of abandonment of confidentiality that would sustain characterisation as a waiver of privilege. On the basis of the close analogy I identified earlier between the provision of the document to the experts and the prosecution's letter to the state witness in *Nieuwoudt (2),*[17] that conclusion applies equally to the provision of the memorandum by Ms Winstanley to the three experts as part of their instructions.

[27] The applicants contended that the references to the memorandum in Johnson's desktop study and in two letters by Ms Winstanley to Johnson, dated 15 and 16 September 2016, respectively, that were voluntarily disclosed to the applicants gave rise to a waiver of privilege in the memorandum. The correspondence that the respondents have voluntarily

[17] In paragraph [8] above.

disclosed and the desktop study were also amenable to legal professional privilege in my view, but such privilege has obviously been expressly or impliedly waived. The remaining questions for decision are whether fairness requires the memorandum to be disclosed consequent upon the effect of the references to it in the voluntarily disclosed correspondence and the mistakenly disclosed document (an imputed waiver), or whether a waiver should be implied by reason of the extent to which the content of the memorandum has been disclosed or relied upon by the respondents in their papers in the review (an implied waiver).[18]

[28] In my judgment the references to the memorandum in the aforementioned disclosed documents do not reveal the substance or content of the document to an extent even approximating that which might suggest objectively an intention by the respondents to abandon its confidentiality. The mere reference to its existence in the desktop study attached to Johnson's May 2017 affidavit does not amount to a reliance on the memorandum in the review proceedings. No part of the document itself has been disclosed, and the indications as to the general nature of its content described above go not even as far as the respondents were entitled to for the purpose of explaining their right to claim privilege in it.

[29] I also do not consider that considerations of fairness require the disclosure of the memorandum. Johnson's mere reference to it as one of the documents with which he had been briefed does not make it a 'source document' on which he based his opinion, as contended by the applicants' counsel. On the contrary, the general description of the memorandum's content furnished in paragraph 11 of Ms Winstanley's opposing affidavit and rehearsed in paragraph [16] above is incompatible with the characterisation of the document as a 'source document'. It would in any event be a most unusual instance for counsel's memorandum on the implications of evidence already adduced in a case and related advice concerning the further conduct of the matter to have any probative relevance in respect of any issue in the litigation. Indeed, in *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA) ; 2010 (7) BCLR 656; [2010] 3 All SA 304, at para. 2,

[18] In *Arcerlormittal* supra, at para. 33, Cachalia JA gave the following explanation of the concepts of implied and imputer waiver of legal professional privilege: '*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.* [fn. 25. *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 16] *It follows that privilege may be lost, as the English courts have held, even if the disclosure was inadvertent or made in error.* [fn. 26. *Guinness Peat Properties Ltd & others v Fitzroy Robinson Partnership (a firm)* [1987] 2 All ER 716 at 729]. *Imputed waiver occurs when fairness requires the court to conclude that privilege was abandoned* [fn. 27. *S v Tandwa* 2008 (1) SACR 613 (SCA) paras 18-19]'.

Harms DP remarked in the context of a criminal case that '*Litigation privilege is in essence concerned with what is sometimes called work product and consists of documents that are by their very nature irrelevant because they do not comprise evidence or information relevant to the prosecution or defence*'. In this case it is clear from the description of the memorandum's content that the bases for further investigation and expert opinion are those sourced from the applicants' Mr Visser's affidavit, dated 12 August 2016, and the affidavits that accompanied it. As far as may be determined from Ms Winstanley's description, read with the letters of instruction that were disclosed, the memorandum would, for Johnson's purposes, have served as no more than the basis upon which to understand the ambit and litigious context of the expert investigation that he was being requested to independently undertake.

[30] The applicants' suggestion that the memorandum is a 'source document' was the platform for their contention that it would be fair for them to have access to it so as to be able to test the evidence of the respondents' expert witnesses. The memorandum may well include material that might be useful to the applicants in the pending review, but as Lord Simon of Glaisdale observed in *Waugh v. British Railways Board* [1979] 2 All ER 1169 (HL), at 1177, '*The adversary's brief will contain much relevant material; nevertheless, you cannot see it because that would be inconsistent with the adversary forensic process based on legal representation*'.

[31] As it is, nothing in Johnson's desktop study suggests that the content of the memorandum informed the substance, rather than the ambit, of his report. Moreover, no part of the memorandum has been deployed or relied on by the respondents identifiably as part of their case in the review. Indeed, in the light of Johnson's June 2016 affidavit, it is plain that the respondents are not even deploying the desktop study itself in advancement of their defence of the review proceedings; it was included in their papers in error.

[32] For all these reasons the application is dismissed with costs.

**A.G. BINNS-WARD**

**Judge of the High Court**

**Appearances:**

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