THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 533/2019

In the matter between:

CONTANGO TRADING SA	**FIRST APPELLANT**
NATIXIS SA	**SECOND APPELLANT**
GLENCORE ENERGY UK LIMITED	**THIRD APPELLANT**

and

CENTRAL ENERGY FUND SOC LIMITED	**FIRST RESPONDENT**
STRATEGIC FUEL FUND ASSOCIATION NPC	**SECOND RESPONDENT**
VENUS RAYS TRADE (PTY) LTD	**THIRD RESPONDENT**
TALEVERAS PETROLEUM TRADING DMCC	**FOURTH RESPONDENT**
VESQUIN TRADING (PTY) LTD	**FIFTH RESPONDENT**
VITOL ENERGY (SA) (PTY) LTD	**SIXTH RESPONDENT**
VITOL SA	**SEVENTH RESPONDENT**
MINISTER OF ENERGY	**EIGHTH RESPONDENT**
MINISTER OF FINANCE	**NINTH RESPONDENT**

Neutral citation: *Contango Trading SA v Central Energy Fund SOC Ltd* (533/2019) [2019] ZASCA 191 (13 December 2019)

Coram: Cachalia, Wallis, Zondi, Van der Merwe and Mokgohloa JJA
Heard: 26 November 2019
Delivered: 13 December 2019

Summary: Discovery – Rule 35(12) of the Uniform Rules of Court – requirements – disclosure – whether legal advice privilege over counsels' opinions waived – litigation privilege – whether requirements met.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Saldanha J sitting as court of first instance):

1 The appeal by Contango Trading SA and Natixis SA against the dismissal of their applications for disclosure of the legal review is dismissed;

2 The appeals by Contango Trading SA, Natixis SA and Glencore Energy UK Ltd, against the dismissal of their applications for disclosure of the opinions of counsel are dismissed;

3 The appeals by Contango Trading SA, Natixis SA and Glencore Energy UK Ltd, against the dismissal of their applications for disclosure of the KPMG report are upheld and the respondents are ordered to disclose that report within 10 days of the date of this order;

4 The appeal by Glencore Energy Limited against the dismissal of their application for disclosure of the PwC report is upheld and the respondents are ordered to disclose that report within 10 days of the date of this order;

5 Each party is ordered to pay its own costs of this appeal;

6 The order of the court a quo is set aside only to the extent of its dismissal of the applications for disclosure of the documents mentioned in paras 3 and 4 above.

7 The costs order in the court a quo is set aside and the following order is substituted in its place:

‘The respondents are ordered to pay the costs of the applications by Contango Trading SA, Natixis SA and Glencore Energy UK Limited, such costs to include those consequent upon the employment of two counsel.’

JUDGMENT

Cachalia JA (Wallis, Zondi, Van der Merwe and Mokgohloa JJA concurring)

[1] This appeal is against a decision of the Western Cape High Court[1] dismissing two interlocutory applications in terms of Rule 30A of the Uniform Rules of Court seeking to compel two state entities to discover documents following their refusal, when requested to do so in terms of Rule 35(12).

[2] Those entities are the Central Energy Fund SOC Limited (CEF) and its parent body, the Strategic Fuel Fund Association NPC (SFF). They are the applicants in a review application (the main review) in which they seek to set aside several of their own decisions, as well as certain agreements concluded pursuant thereto, concerning the SFF's disposal of some 10 million barrels of this country's crude oil reserves. Eight of the ten respondents in the review application are oil companies, cited because of their interest in the impugned decisions. Three of these companies, Contango Trading SA, Natixis SA and Glencore Energy UK Limited, are the appellants in the present appeal. It is convenient to refer to them by their prefix names. The same legal team represents Contango and Natixis. Glencore has its own attorneys. Where appropriate I shall refer to them collectively as 'the appellants', and to the CEF and the SFF jointly as 'the respondents'.

[3] After receiving the main review, the appellants issued notices in terms of Rule 35(12) requesting the respondents to produce and make available certain documents allegedly 'referred' to in their papers. Contango's and Natixis's request was aimed at securing the production of three categories of documents mentioned in the respondents' founding affidavit. Glencore's notice contained a more extensive list comprising thirty documents. This included documents referred to in the founding affidavit, as well as those mentioned in its annexures and in a record produced by the respondents.

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[1] Saldanha J sitting as the court of first instance.

[4] The respondents refused to disclose the requested material referred to in the founding affidavit and annexures. The appellants then brought 'compelling' applications in terms of Rule 30A in the high court to obtain the documents. Glencore's notice, however, was aimed not only at securing the documents requested in terms of Rule 35(12), but also documents that were said to have been mentioned in, but omitted from the record. Its Rule 30A notice aimed to secure those documents as well.

[5] The court a quo dismissed both applications in a single judgment. Contango and Natixis were not able to secure the production of any documents. Their appeal is against the entire order of the high court. Glencore achieved some success: the court a quo ordered the production of some documents, but refused others. On the morning of the hearing of the appeal, counsel for Glencore informed us that it would no longer persist in its demand for the documents mentioned in the record, but persisted in its claims for production of documents referred to in the founding affidavit.

[6] Glencore also abandoned its appeal in respect of its demand for a 'legal report' during the hearing. The report was mentioned in a minute of a meeting of the SFF held on 5 February 2016, which was annexed to the founding affidavit but not mentioned in the body of the affidavit. The high court refused to grant an order to produce the legal report on the ground that it was legally privileged. But, as the report was requested under Rule 35(12), which requires a reference to a document in 'pleadings or affidavits' – not in its annexures – before its discovery is sought, the request fell outside the scope of the rule and was properly abandoned.

[7] Three categories of documents were sought in this appeal, namely a 'legal review', two legal opinions, and two reports by auditing companies KPMG and PwC. This judgment deals with the 'legal review' and the reports by KPMG and PWC, while that of my brother Wallis JA, which I have read and agree with, deals with the two legal opinions. Glencore did not seek production of the 'legal review' and Contango and Natixis no longer wanted the PwC report, despite having requested it originally. The respondents referred to all these materials in their founding affidavit in the main review to explain, and to seek condonation for, their delay of two years in instituting these proceedings.

[8] Mr Luvo Lincoln Makasi, the chairperson of the CEF Board, deposed to the founding affidavit in the main review on behalf of the respondents. The manner in which he dealt with the documents in question was decisive of the issues in this appeal. It is thus necessary to repeat the relevant parts of the affidavit in full. It reads as follows:

'**Enquires into the reviewability of the sale of the Oil Reserves**

319 Following the engagement between the Minister of Finance and the Minister of Energy in June 2016, Minister Joemat-Pettersson directed the CEF to conduct a legal review of all the contracts entered into by SFF, dating back to 2014, which specifically related to any sale of the Oil Reserves or storage agreements.

320 Initially, the CEF's efforts to implement the Minister's instruction relating to the legal review of SFF's contracts were met with resistance and an unfortunate lack of organisation on the part of its subsidiary.

[320.1] First, SFF had no proper contract management system in place, thereby making the process to source contracts challenging.

[320.2] Second, SFF failed to respond to the CEF's requests timeously, and required repeated requests for documentation before the SFF staff obliged. In fact, contracts were only obtained once the then acting CEO of SFF, Mr Godfrey Moagi, intervened and instructed the staff to comply with the CEF's requests.

321 The legal review directed by CEF was completed on 20 December 2016 when the Minister, the CEF Board and the SFF Board were provided with feedback. In essence, the outcome of that process revealed that:

321.1 The sale of the Oil Reserves did not comply with the conditions that Minister Joemat-Pettersson set out in the Second Directive as no "*detailed due diligence*" had been undertaken, the "*integrity of our Strategic Stock levels*" were not sufficiently secured given that SFF would have to purchase oil at prevailing market rates in the event of an emergency or catastrophe and because the sales took place before a trading division was formally established.

321.2 There were indications that the sale of the Oil Reserves did not comply with provisions of the Companies Act and the PFMA, and, on this basis, the disposals were liable to be set aside in judicial review proceedings.

322 Given these concerns relating to the legality of the sale of the Oil Reserves, the CEF considered it prudent to engage senior advocates to consider the outcomes of the legal review and, in the event of their agreement, provide legal advice on the way forward. The first senior counsel provided his opinion on 10 February 2017 and the second senior counsel provided his opinion on 27 July 2017.

323 The reason for seeking a second opinion from senior counsel concerned the financial analysis the CEF received from KPMG. *This financial analysis was sought for purposes of gaining a comprehensive understanding of the financial consequences for the CEF, SFF, and by implication, the fiscus*, given the unlawful nature of the sale of the Oil Reserves. (Emphasis added.)

324 KPMG issued its report on 25 July 2017 and the CEF accordingly instructed new senior counsel to consider the outcome of the legal review directed by the CEF in the light of the financial analysis it received from KPMG.

325 Although the advice received from senior counsel is legally privileged and is not, I submit, capable of discovery, given where we are now, suffice it to say that *the senior advocates agreed with the outcomes of the CEF legal review*. (Emphasis added.)

326 However, matters were further delayed following a series of compromising reports that related to allegations published on various media platforms, that one of KPMG's employees had engaged in unethical conduct relating to services the auditing firm provided to a public entity. Subsequently, *the CEF considered it prudent to seek a second financial analysis from PriceWaterhouse Coopers (PwC). PwC's report was provided on 7 November 2017*. (Emphasis added.)

327 Along the trail of these enquiries into the reviewability of the sale of the Oil Reserves, four respective Ministers of Energy presided over the energy sector in the government. This change in guard added a further dimension to the delay in instituting this application as all new Ministers had to be fully apprised of the context and circumstances surrounding the sale of the Oil Reserves, amongst other current programmes underway in the energy sector.'

The duty to provide documents in terms of Rule 35(12)

[9] Under Rule 35(12)[2] any party, who refers to a document in their pleadings or affidavits, must produce it upon receipt of a notice calling upon it to do so unless the document is irrelevant, privileged or cannot be produced. In general any reference to a document – even if not by name – triggers the entitlement to claim its production. A detailed or descriptive reference to the document is not required, but in the absence

[2] '**35 Discovery, Inspection and Production of Documents**
(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.'

of any direct or indirect reference thereto, a document will not have to be produced under this sub-rule merely because its existence may be deduced by inferential reasoning.[3] Reference must have been made to it.

The Legal Review

[10] I begin with the 'legal review'. As emerges from Mr Makasi's founding affidavit, in June 2016 Minister Joemat-Petterson, the then Energy Minister, directed the CEF to conduct a legal review of all the contracts concluded by the SFF over a two-year period. The process was demanding because the SFF had no proper contract management system in place, which made it difficult to source the contracts, and the SFF staff resisted requests for documentation and the contracts. The review was completed on 20 December 2016, when the Minister and both respondents were briefed on its conclusions, described at paras 321.1 and 321.2 of the affidavit. The CEF then engaged senior counsel for legal advice on the 'outcomes of the legal review'.

[11] The respondents resisted production of the legal review on two grounds. First, they said that the review referred to a process and not to a document as envisaged in Rule 35(12); and, secondly, they claimed that the process was in any event privileged.

[12] In their Rule 30A application to compel production of the legal review Contango and Natixis said that it was evident, from the manner in which it was referred to in the respondents' founding papers in the main review, that the legal review was used to brief counsel to advise on the lawfulness of contracts pertaining to the sale of the oil reserves or storage agreements. They therefore submitted that the legal review was a document, which was provided to counsel for this purpose.

[13] In addition, they pointed to the fact that during the period 1 September 2017 to 13 November 2017, media reports indicated that the respondents had commissioned a report from a firm of attorneys, Allen & Overy, to investigate and report on the fuel

[3] See *Penta Communication Services (Pty) Ltd v King* 2007 (3) SA 471 (C) at 476 paras 16 and 17 and *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) at 246I-J, and generally 'Discovery, inspection and production of documents' in Erasmus *Superior Court Practice* 2 ed (RS 6 2018) at D1-478 and the cases cited there.

trading and sale contracts. The outcome of the investigation, which mirrored the conclusions of the legal review referred to in the respondents' founding affidavit, found its way into these media reports. These publications, they say, confirmed that the review was a document.

[14] In their answering papers, deposed to by Mr Lionel Frederick Egypt, the respondents' attorney, on 1 August 2018, the respondents denied that the legal review was a document and asserted that:

'[T]here was no document or series of documents entitled "legal review" – rather the reference is simply shorthand for the process of investigating whether the contracts that were concluded were lawful or unlawful.'

He added:

'The references to legal review in . . . the founding affidavit are made in so far as it is stated that senior counsel was instructed to consider the outcomes of such review . . . . [There is no] suggestion that the legal review was documented in any form. It is therefore perplexing that the respondents insist that the legal review is a document.'

[15] In answer to the allegation that the media reports confirmed the existence of the legal review, Mr Egypt said that the reports referred to an 'investigation' commissioned by the CEF, which reviewed the fuel trading and sale contracts. This, he said, was not a reference to a document.

[16] In their reply, on 1 August 2018, Contango and Natixis said that Mr Egypt had no personal knowledge of the process and that his statements on this score were therefore inadmissible. His evidence was not credible either, they added, for two reasons. First, they said, the evidence from the newspaper articles referred to earlier suggested that a document was indeed produced and referred specifically to a report as the Allan & Overy report; and secondly, that it was inherently implausible that an extensive review was undertaken of the contracts entered into over a two-year period, which culminated in feedback to the meeting on 20 December 2016 – at which conclusions were drawn and on which counsel was thereafter briefed for advice – all without any documentation being produced. Glencore lodged its Rule 30A application the following day, on 2 August 2018. In summary it repeated the substance of Contango's and Natixis's assertions.

[17] In response to Glencore's application, Mr Egypt again deposed to the answering affidavit on behalf of the respondents on 7 September 2018. He repeated what he had said in response to Contango's and Natixis's Rule 30A application, which was that the legal review was simply a 'shorthand for the process' of investigating the lawfulness of the contracts. He then added the following explanation, which muddied the waters:

'To the extent that the legal review process could be interpreted to refer to any written communications, documentations, notes or memoranda that may have been produced during the process of the legal review for instance with internal and external legal advisors, these are confidential communications made for providing legal advice to the [respondents].'

[18] This passage suggests that documents were indeed produced during the review, but that they were privileged. It is apparent from Glencore's reply, on 28 September 2018, that they understood the respondents' position now to be that 'to the extent' that the documents existed – implicitly accepting that they did – they were privileged. But Glencore insisted that they were liable to be produced because the respondents had 'plainly waived such privilege'.

[19] Despite what appeared to have been at least an implicit acceptance by the respondents that some form of documentation existed, the respondents produced a 'confirmatory affidavit' in the Rule 30A application deposed to by Mr Abdul Farhad Haffejee, the Acting Legal Head of the CEF and the Company Secretary of the respondents, on 31 October 2018. This was necessitated by the appellants having disputed that Mr Egypt had personal knowledge of the legal review. Mr Haffejee 'confirmed' that he had personal knowledge of the review, and, he continued, for 'the avoidance of doubt . . . the references to the legal review in the applicant's founding affidavit and elsewhere in these proceedings, are references to the legal review process rather than to a document'.

[20] The high court considered Mr Haffejee's affidavit to be dispositive of the dispute, and found that the legal review was not a document that had to be produced under Rule 35(12). As I have mentioned Contango and Natixis persisted with the demand for its production. Glencore no longer did.

[21] The respondents had various – apparently inconsistent – responses to the appellants' request for the legal review. Their affidavits suggested that despite the fact the legal review was conducted over several months; that media reports had referred to its outcomes including a report by Allan & Overy; that its conclusions were presented to a meeting on 20 December 2016, and that counsel was briefed for legal advice regarding its outcome, all without any documentation. This stance was later contradicted by implying that if documents were generated during the process these were legally privileged. More ridiculously, they claimed legal privilege for the entire process.

[22] It would not have been difficult for the respondents, in opposing the production of the legal review, simply to make clear that during the course of the review of contracts concluded over a period of two years, a large number of documents were generated. These would presumably have included email communications, letters, memoranda, legal reports, minutes of meetings and advice to and from internal and external legal advisors. They could have explained that some of these communications might well be privileged while others were not, but added that no such documents were referred to directly in the founding affidavit in the review application, and accordingly, to the extent that they existed, they fell outside the purview of the sub-rule. That might well have been the end of the dispute concerning discovery of the legal review. Instead their contradictory and obtuse responses to the demand to produce the review served to obfuscate rather than clarify. This was not the conduct of organs of state who had a duty of candour when compiling their affidavits, and is to be deprecated.

[23] Despite this failure on their part, however, the respondents' basic contention that there was no reference to a specific document in the respondents' affidavit was correct. The affidavit did no more than refer to the legal review, which as the respondents said was a process by which a legal investigation into the contracts concluded by the SFF over two years regarding the sale of oil reserves or storage agreements was conducted. No doubt a large number of documents of various description would have been generated during this process. But Contango and Natixis, now expect the court to find, by a process of inferential reasoning, that the legal review

referred to a specific document. In argument they suggested that this was the Allan & Overy report. But this was impermissible, as I have pointed out earlier.

[24] In his oral submissions counsel for Contango and Natixis sought to make the case that there was indeed such a reference to a document because, so he submitted, para 321.1 of the founding affidavit quoted specifically from it by referring to the absence of a 'detailed due diligence' and the fact that the 'integrity of the Strategic Stock levels' had not been sufficiently secured.

[25] In response to this submission counsel for the respondents produced, without objection, the letter from which these references were taken. The letter dated 8 October 2015 was signed by the Minister and addressed to the Acting Chief Executive Officer of the SFF. It dealt with a request by the SFF for an earlier ministerial directive to be withdrawn and for a new directive to be issued. It granted the request subject to several conditions. One of these was for a 'detailed due diligence' to be undertaken and the other was that the 'integrity of our Strategic Stock Levels' be secured, as quoted in this paragraph. It is therefore beyond dispute that para 321.1 did refer to a document – the ministerial letter – but not to the legal review.

[26] There are more fundamental and practical difficulties with the demand for the production of the legal review. I accept, as I have said earlier, that documentation was generated during the review. But an order for discovery of the legal review, which is the order Contango and Natixis seek, would have to include, to use the respondents' description of the material generated during the process: 'written communications, documentation, notes or memoranda that may have been produced during the process of the legal review . . . and include for instance "confidential communications with internal and external legal advisors".'

[27] However, for a request to fall within the ambit of the sub-rule there must be a reference to a specific document, not to a general category of documents, which is in effect what Contango's and Natixis's request for discovery of the legal review is. An order of that kind would perforce include within its scope irrelevant documents and confidential communications that the respondents are properly entitled to withhold. In other words it would have to include every bit of paper generated during the process.

That is not what the sub-rule envisages. It would amount to early discovery and Rule 35(12) is not directed at that purpose. So, despite my reservations about the manner in which the respondents dealt with the demand for the production of the legal review, I conclude that the reference to the legal review in the affidavit was not a reference to a document as contemplated in Rule 35(12). The court a quo therefore correctly refused to order its production.

The KPMG and PwC reports

[28] The circumstances and, more importantly, the purpose for which these reports were obtained appeared from the passages in Mr Makasi's affidavit. The court a quo upheld the respondents' claim that the reports were protected from disclosure by litigation privilege. The appellants appeal this finding.

[29] In *Arcelormittal*[4] we explained that litigation privilege has two 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*. (Emphasis added.) As I shall demonstrate below the respondents have not brought themselves within these strictures. I begin by referring to what Mr Makasi himself said was the purpose for obtaining these reports.

[30] For ease of reference I repeat the relevant passages from his affidavit here:

'323 The reason for seeking a second opinion from senior counsel concerned the financial analysis the CEF received from KPMG. *This financial analysis was sought for purposes of gaining a comprehensive understanding of the financial consequences for the CEF, SFF, and by implication, the fiscus*, given the unlawful nature of the sale of the Oil Reserves. (Emphasis added.)

324 KPMG issued its report on 25 July 2017 and the CEF accordingly instructed new senior counsel to consider the outcome of the legal review directed by the CEF in the light of the financial analysis it received from KPMG.

. . . .

[4] *Competition Commission v Arcerlormittal SA Ltd & others* [2013] ZASCA 84; 2013 (5) SA 538 (SCA) para 21.

326 However, matters were further delayed following a series of compromising reports that related to allegations published on various media platforms, that one of KPMG's employees had engaged in unethical conduct relating to services the auditing firm provided to a public entity. Subsequently, *the CEF considered it prudent to seek a second financial analysis from PriceWaterhouse Coopers (PwC). PWC's report was provided on 7 November 2017*.' (Emphasis added.)

[31] It is evident from these passages that the KPMG report was obtained after the first opinion from Counsel was obtained, and it was procured explicitly for the purpose of gaining a comprehensive understanding of the financial consequences for the CEF, SFF, and by implication, the fiscus, of the unlawful contracts. In other words it was not obtained for the purpose of obtaining legal advice. The PwC report was obtained for the very same purpose long after the second legal opinion was given. There was therefore simply no suggestion, much less a clear assertion, that either report was obtained for the purpose of legal advice or for any anticipated litigation.

[32] It gets worse. The respondents' answers to requests for the production of the documents were as obtuse, inconsistent and contradictory as their responses to demands for the production of the legal review. Thus, in response to Contango's and Natixis's Rule 35(12) notice, Mr Egypt denied that KPMG's financial analysis was a reference to a document, when it patently was, and then claimed that the report was 'legally privileged', without explaining why an auditor's financial analysis would attract such privilege. The PwC report, he asserted, was 'legally privileged' and prepared in 'contemplation of litigation' even though the two reports were prepared for precisely the same reason. Two things were apparent from this response. First, that no litigation privilege was claimed over the KPMG report and, secondly, that no factual basis for the assertion of litigation privilege was disclosed. In response to Glencore's Rule 35(12) notice, on the other hand, 'legal privilege' – not litigation privilege – was claimed over both reports.

[33] Thereafter, in response to Contango's and Natixis's Rule 30A application, pointing out that the report was obviously a document because it was a 'report', the respondents said, for the first time, that the report was 'conducted' (obviously meaning 'obtained') in anticipation of litigation and was therefore privileged. Glencore's

Rule 30A application was met with a similarly obtuse answer. Mr Egypt said that the 'documents' were protected from disclosure as they were 'legally privileged on the basis of *inter alia* litigation privilege'. Once again, there was no factual basis disclosed in support of this assertion.

[34] The respondents and their attorneys seemed to assume that the mere assertion of litigation privilege was, without more, sufficient to withhold disclosure of a document. But that was not correct. The purpose for which the document was prepared lay at the heart of this analysis. In *Arcerlormittal*[5] it was pointed out that, in our law, the position following *A Sweiden and King*[6] is that it suffices if a definite purpose is shown, whereas in some Commonwealth jurisdictions the dominant purpose test is adopted. In this case, it is apparent from the founding affidavit in the main review that the documents were obtained for an entirely different purpose – to assess the financial implications of the possible termination of the unlawful contracts. There was simply no connection in the affidavits between the anticipated litigation, on the one hand, and the asserted litigation privilege on the other.[7] Both documents must therefore be disclosed.

[35] To conclude, I thus hold that the reference to the 'legal review' in Mr Makasi's affidavit was not a reference to a 'document' as contemplated in Rule 35(12) and was accordingly not liable to be disclosed. For the reasons given by Wallis JA privilege was not waived in respect of either legal opinions and they too are not liable to be disclosed. In respect of the KPMG and PwC reports, I hold that the purpose for which the reports were obtained was unrelated to the belated claim of litigation privilege. Accordingly, the KPMG report and the PwC report must be disclosed.

[36] What remains is costs. Contango and Natixis have enjoyed limited success in relation to the KPMG report, but have been unsuccessful in relation to the 'legal review' and the two opinions, which took up the bulk of the argument. Glencore sought a large number of documents in the high court and was unsuccessful in obtaining disclosure

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[5] *Competition Commission v Arcerlormittal SA Ltd & others* [2013] ZASCA 84; 2013 (5) SA 538 (SCA) para 21.
[6] *A Sweidan and King (Pty) Ltd & others v Zim Israel Navigation Co Ltd* 1986 (1) SA 515 (D) at 519A.
[7] *Sweidan and King (Pty) Ltd & others v Zim Israel Navigation Co Ltd* 1986 (1) SA 515 (D) at 516C-G has a useful example of the facts that must be set out to support a claim for litigation privilege.

of many of them. On appeal it abandoned its attempts to obtain the remainder of them on the day of the hearing. It was unsuccessful in relation to the two opinions, but succeeded in obtaining an order for disclosure of the KPMG and PwC reports. It is difficult to resist the inference that it had embarked on a fishing expedition to obtain those documents. On balance, and bearing in mind that the relevance of the documents of which copies have been obtained is not yet apparent, I think the fairest order is that all parties should bear their own costs in this court, but the appellants are entitled to their costs in the high court. The costs of two counsel will be allowed.

[37] The following order is made:

1 The appeal by Contango Trading SA and Natixis SA against the dismissal of their applications for disclosure of the legal review is dismissed;

2 The appeals by Contango Trading SA, Natixis SA and Glencore Energy UK Ltd, against the dismissal of their applications for disclosure of the opinions of counsel are dismissed;

3 The appeals by Contango Trading SA, Natixis SA and Glencore Energy UK Ltd, against the dismissal of their applications for disclosure of the KPMG report are upheld and the respondents are ordered to disclose that report within 10 days of the date of this order;

4 The appeal by Glencore Energy Limited against the dismissal of their application for disclosure of the PwC report is upheld and the respondents are ordered to disclose that report within 10 days of the date of this order;

5 Each party is ordered to pay its own costs of this appeal;

6 The order of the court a quo is set aside only to the extent of its dismissal of the applications for disclosure of the documents mentioned in paras 3 and 4 above.

7 The costs order in the court a quo is set aside and the following order is substituted in its place:

‘The respondents are ordered to pay the costs of the applications by Contango Trading SA, Natixis SA and Glencore Energy UK Limited, such costs to include those consequent upon the employment of two counsel.’

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A Cachalia

Judge of Appeal

Wallis JA (Cachalia, Zondi, Van der Merwe and Mokgohloa JJA concurring)

[38] I have read and agree with the judgment of my brother Cachalia JA dealing with the claim for production of the 'legal review' and the KPMG and PwC reports. This judgment is concerned with the claim for production of two opinions furnished to the respondents by senior counsel. They were referred to in the founding affidavits but the respondents claim privilege as the ground for resisting their production. The appellants accept that they were privileged, but contend that the privilege was waived by the manner in which the founding affidavit made reference to them.

[39] In a lengthy founding affidavit setting out the factual and legal basis for this review, and when explaining the delay in commencing review proceedings, the deponent, Mr Makasi, explained that the respondents had sought and obtained two opinions from senior counsel. The opinions were not attached and Mr Makasi's only comment concerning them was in the following paragraph:

'Although the advice received from senior counsel is legally privileged and is not, I submit, capable of discovery, given where we are now, suffice it to say that the senior advocates agreed with the outcome of the CEF legal review.'

[40] On the basis of that throwaway remark the appellants contended that there was a waiver of privilege and that the opinions had to be produced in accordance with the provisions of rule 35(12). They argued that the outcome of the legal review was set out broadly in the affidavit and had been summarised a few paragraphs earlier. Its conclusion was that the disposals of the oil reserves did not comply with the conditions imposed in a Ministerial directive relating to such disposals, and that there were indications that they did not comply with provisions of the Companies Act and the Public Finance Management Act. On those grounds the affidavit concluded that the disposals were liable on review to be set aside. Furthermore Mr Makasi said, at the outset of his affidavit,[8] that insofar as he made legal submissions these were made on the advice of the respondents' legal representatives. It followed, so the argument ran, that there had been a disclosure of the contents of the two opinions amounting to a waiver of the privilege that would otherwise attach to them.

[8] Vol 1, p 13, para 9.

[41] It is trite that advocates' opinions attract legal advice privilege. That privilege may be waived. In *RAF v Mothupi* Nienaber JA explained the basis for considering any waiver of a right in the following terms:[9]

'Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it. …

The test to determine intention to waive has been said to be objective …. That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations … ; secondly, that mental reservations, not communicated, are of no legal consequence … ; and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional *alter ego*, the reasonable person standing in his shoes.'(Citations omitted)

This statement of the basis for finding waiver is equally applicable to the waiver of legal advice privilege.

[42] Arguments over the waiver of legal advice privilege do not commonly arise when there has been an express waiver of the privilege by, for example, providing a copy of a privileged document to the other side. Difficulties arise, as in this case, when it is suggested that a party by their actions has waived the privilege. Customarily this was described as an implied waiver, but in *Peacock v SA Eagle Insurance*[10] it was suggested that it was preferable to refer to an imputed waiver, because a waiver might arise in such a situation notwithstanding that there might have been no subjective intention to waive the privilege. Farlam AJ said the following:

'Although most of the authorities to which I have referred have used the expression "implied waiver" in this context, I have difficulty in seeing how one can speak of privilege being lost by an implied waiver where the party losing the privilege has not intended to waive it in respect of the part of the statement which he has not disclosed. In *Attorney General for the Northern Territory v Maurice* (1987) 61 ALJR 92 (High Court of Australia) Deane J said (at 98B - C, column 2):

"Plainly enough, there was no actual waiver of the right to assert legal professional privilege in relation to such materials as a matter of subjective intent (see *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326). If the right to assert the privilege has been waived, it must be *by imputation of law* in the circumstances of the case."

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[9] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) paras 15-17.
[10] *Peacock v SA Eagle Insurance Co Ltd* 1991 (1) SA 589 (C) at 591C-F.

It would seem preferable, therefore, to speak rather of imputed waiver, where, as here, an actual intention to waive cannot be inferred on the facts.'

[43] The necessity for a semantic change from implied waiver to imputed waiver is unclear. Tacit terms in a contract are based upon the implication to the parties of an intention, irrespective of their subjective intention. The interpretation of contracts is objective and evidence of the parties' intentions or understanding of a contract's meaning is inadmissible in the absence of a claim for rectification. Similarly, the enquiry into implied waiver, as explained in *RAF v Mothupi*, is an objective one based on the outward manifestations of the person's conduct, irrespective of any mental reservations. In all these cases the law imputes conduct to a person irrespective of their subjective intention.

[44] Be that as it may, it is clear that the change espoused in that case was terminological, not substantive. That was confirmed by the judgment in *Harksen v Attorney-General*,[11] where this was discussed:

'The requirements for an implied waiver of legal professional privilege are, firstly, that the privilege holder must have full knowledge of his rights and, secondly, that he must have so conducted himself that, objectively speaking, it can be inferred that he intended to abandon those rights. (See, for example, *Laws v Rutherfurd* 1924 AD 261 at 263; *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) at 704F--H.)

There is also authority to the effect that legal professional privilege may be *imputedly* waived where the privilege-holder so conducts himself that, whatever his subjective intention might be, the inference must *in fairness* be drawn that he no longer relies on his privilege. (See, for example, *Attorney General, Northern Territory v Maurice and Others* (1986) 161 CLR 475 (HCA) at 481 ((1987) 61 ALJR 92); *Goldberg and Another v Ng* [1996] 185 CLR 83 (HCA); *Peacock v SA Eagle Insurance Co Ltd* … 591--2.)

Wigmore *On Evidence* 3rd ed vol 8 in the oft-quoted passage in para 2327 does not appear to draw a distinction between an *implied* waiver and an *imputed* waiver. Having posed the question: "What constitutes a *waiver by implication*?" the author supplies the following answer: "Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, ie not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is

[11] *Harksen v Attorney-General, Cape and Others* 1999 (1) SA 718 (C) paras 60-62.

always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final." What *Wigmore* terms "waiver by *implication*" is in effect "waiver by *imputation*" as described in the *Goldberg, Maurice* and *Peacock* cases *supra*.'[12]

[45] That the terms waiver by imputation and waiver by implication are synonymous appears from *Mann v Carnell*,[13] the leading authority on this topic in the former expression's country of origin. The relevant passage in the joint judgment of Gleeson CJ, Gaudron, Gummow and Callinan JJ reads as follows:

'Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. *When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege.* Thus, in *Benecke v National Australia Bank*, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.'(My emphasis)

[46] The High Court of Australia has since reaffirmed that approach in *Osland*.[14] The applicant had been convicted of the murder of her husband and, after exhausting her appeals, petitioned the governor of the state of Victoria to grant her a pardon. When the attorney-general announced that her petition had been denied, he issued a press release stating that he had appointed a panel of three senior counsel[15] to consider the

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[12] In *South African Airways v BDFM Publishers (Pty) Ltd and others* 2016 (2) SA 561 (GJ) para 55, fn 18, it was said that the two expressions are equivalent.
[13] *Mann v Carnell* [1999] HCA 66; 201 CLR 1; 168 ALR 86 para 29.
[14] *Osland v Secretary to the Department of Justice* [2008] HCA 37 para 45.
[15] One of whom subsequently became a Justice of the High Court and has recently retired.

petition and had received a joint memorandum of advice from them recommending the denial of the petition on all grounds. Ms Osland sought disclosure of this memorandum of advice, claiming that privilege had been waived. The court unanimously rejected her claim saying that the memorandum was referred to for the purpose of making it clear to the public that independent advice had been sought and followed. In regard to the applicable legal principles the majority (Gleeson CJ, Gummow, Heydon and Kiefel JJ) said:

'Waiver of the kind presently in question is sometimes described as implied waiver, and sometimes as waiver "imputed by operation of law". It reflects a judgment that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances.'

[47] Lastly, while considering Antipodean authority, the Federal Court of Australia dealt with the question of when fairness, in the sense used in these judgments, requires disclosure, in *Telstra v BT*[16] and *Adelaide Steamship.*[17] In *Telstra*, after analysing a number of judgments where the privilege was held to have been waived, the majority formulated the test for unfairness leading to disclosure as being whether the litigant had raised 'as an element in the cause of action relied upon, an issue incapable of resolution without reference to the material.' In *Adelaide Steamship* the court said:

'In other words the cases are ones in which, in the substantive proceedings brought, the privilege holder has put in issue the very advice received. We observe in passing that it is questionable whether advice can properly said to be in issue in a proceeding merely because it may be relevant to an issue in it … save, perhaps, where the proceeding is between client and legal adviser and the advice is relevant to the adviser's defence of that proceeding.'

[48] Drawing the threads of both local and foreign authorities together four things emerge that must be considered cumulatively. The first is that there is no difference between implied waiver and a waiver imputed by law. They are different expressions referring to the same thing. The second is that such a waiver may be inferred from the

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[16] *Telstra Corp Ltd & Another v BT Australasia Pty Ltd & Another* [1998] FCA 901.
[17] *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360 at 372A-B. Approved in *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAPC 86; (2006) ALR 304 para 53.

objective conduct of the party claiming the privilege in disclosing part of the content or the gist of the material. The third is whether the disclosure impacts upon the fairness of the legal process and whether the issues between the parties can be fairly determined without reference to the material. Finally, the fourth is that there is no general over-arching principle that privilege can be overridden on grounds of fairness alone. The rule is 'once privileged, always privileged' and it is a fundamental condition on which the administration of justice rests. Only waiver can disturb it.[18]

[49] I have dealt with this in some detail because there may otherwise be some misunderstanding of the legal position and a tendency to regard an implied and an imputed waiver as embodying different legal doctrines, the latter being founded solely on considerations of fairness. That possibility arises from the summary of the legal position in the judgment in *S v Tandwa and Others*.[19] That was an appeal against conviction on the grounds that the first appellant's fair trial rights had been infringed by incompetent legal representation at his trial. His complaint was that he had been wrongly and incompetently advised not to give evidence in his defence. In response to these allegations the State delivered an affidavit by his erstwhile advocate detailing the legal advice given to him. Counsel on his behalf accepted that this affidavit was admissible in assessing his claims, so,[20] so that there was no issue before the court in that regard. Obviously, once the appellant put the quality of the legal advice in issue, he waived the privilege attaching to that advice.[21]

[50] The summary of the law in that case was therefore not strictly necessary for the decision and the judgment contains none of the careful consideration of the authorities that would be required if the intention was to strike out in a new direction. The relevant passage reads as follows:

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[18] *R v Derby Magistrates' Court, ex parte B and Another* [1995] 4 All ER 526 at 537-541, in the speech of Lord Taylor of Gosforth LCJ, the House of Lords held that a claim of legal privilege is not subject to any balancing of interests between the claimant and the party seeking disclosure. If the document is privileged that is conclusive on the issue of disclosure. General considerations of fairness do not enter the picture. See also *Three Rivers Disrict Council and Others v Governor and Company of the Bank of England* [2004] UKHL 48; [2005] 4 All ER 948 (HL) para 25.

[19] *S v Tandwa and Others* [2007] ZASCA 34; 2008 (1) SACR 613 (SCA) para 19.

[20] *S v Tandwa* para 20.

[21] *Benecke v National Australia Bank* (1993) 35 NSWLR 110 at 111-2 dealt with precisely this point. It was quoted with approval in the passage from *Mann v Carnell* cited in para 45 of this judgment.

'… the admissibility of his advocate's affidavit depends on whether he waived his right to legal professional privilege. In *Peacock v SA Eagle Insurance Co Ltd* and *Harksen v Attorney-General, Cape, and Others*, the courts drew a distinction between implied and imputed waiver of legal professional privilege. Implied waiver occurs (by analogy with contract law principles) when the holder of the privilege with full knowledge of it so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where – regardless of the holder's intention – fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment.'

[51] With respect, neither *Peacock v SA Eagle*, nor *Harksen*, drew a distinction between implied and imputed waiver, much less on the basis set out in this passage. Both judgments regarded implied and imputed waiver as synonymous. So did the Australian judgments that first referred to 'imputed waiver'. Implied waiver has never been concerned with whether an inference of intentional waiver can be drawn from a person's objective conduct. If as a matter of fact such an inference can be drawn the case is one of actual waiver. Implied waiver, as all the cases on the subject show, arises where the conduct of the person concerned is objectively inconsistent with the intention to maintain confidentiality and, if permitted, will unfairly fetter the opponent's ability to respond to the case or defence advanced in reliance on the privileged material. It arises notwithstanding any express reservation of the right to invoke privilege. That was the basis upon which this court held that privilege had been waived in *Arcelormittal.*[22]

[52] The facts in *Arcelormittal* are instructive. The Competition Commission had received information and documents from Scaw concerning alleged prohibited practices in the steel industry. Scaw made a formal leniency application in terms of the Commission's corporate leniency policy. The Commission then conducted its own investigation into pricing in the steel industry and referred a complaint of alleged prohibited practices to the Competition Tribunal for adjudication. In its referral affidavit the Commission said that Scaw had confirmed in its application for leniency 'that there had been a long-standing culture of co-operation among the steel mills regarding

[22] *Competition Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) para 37. Accordingly, the dictum in para 33, based on *S v Tandwa*, that 'Imputed waiver occurs when fairness requires a court to conclude that privilege was abandoned' takes the matter no further.

prices to be charged and discounts to be offered'. In addition there had been arrangements for market division. It referred to its own investigation and concluded that it was 'as a result of information contained in the Scaw application' as well as its own investigation that it had made the referral.

[53] Against that background some of the parties against whom the complaint had been made asked for production of the Scaw leniency application. This court pointed out that reference to the information obtained from Scaw was unnecessary, as a referral could have been made simply on the basis of a 'concise statement of the grounds of the complaint and the material facts or point of law relied on'. By including it the Commission made it part of its cause of action to which the other parties to the referral would have to respond. Without production they could not do so. In the result this court held that there had been an implied waiver of the privilege that would otherwise have attached to the leniency application.

[54] The facts in this case are entirely different. The opinions were referred to solely in the context of explaining the delay. Privilege was clearly asserted. The deponent then added the rather cryptic statement 'given where we are now, suffice it to say' that the advocates agreed with the outcome of the legal review. No reliance was placed on the content of the opinions in support of the case that had been set out in some detail in the first three hundred odd paragraphs of the founding affidavit. The prefatory words 'given where we are now' referred to the fact that the respondents' case had already been set out fully in the preceding portion of the affidavit. 'Suffice it to say' conveyed that nothing of substance needed to be said about the opinions and the advice received. Nothing of substance was then said, beyond an indication that counsel agreed that the disposal agreements fell to be reviewed and set aside.

[55] Implied waiver is always a factual enquiry and that renders reference to ostensibly similar factual situations potentially misleading. However, there is a passage in the judgment in *Avontuur*[23] that may be thought to support disclosure in the present case. Based on Australian authority, it reads:

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[23] *Avontuur & Associates Inc and Another v Chief Magistrate, Oudtshoorn: Magistrates' Court and Others* [2012] ZAWCHC 94; 2013 (1) SA 615 (WCC) para 43.

'Disclosure of the substance of the advice will occur if the ultimate conclusion, without the supporting reasoning process, or if a summary of the advice is revealed, especially if that is done for forensic or commercial purposes (eg to emphasise the strength and substance of the case to be made) …'

[56] I need make only two comments about this proposition. First, several of the Australian cases relied on pre-dated the decisions in *Mann v Carnell* and *Osland* and were inconsistent with them. Second, it propounded as a legal principle what is at most in certain cases a finding to be made on the facts. That is illustrated by reference to a case relied on in *Avontuur* and one on substantially similar facts that arrived at an opposite conclusion.

[57] *Avontuur* relied for the proposition in question on the judgment in *Switchcorp*,[24] which involved a stock exchange announcement[25] in regard to pending litigation against the company. The announcement saying that:

'The Board's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiffs' claim will not succeed.'

The judge held that this disclosure was inconsistent with maintaining confidentiality and that the unfairness in not disclosing it lay in that inconsistency. With respect that blurred the question whether there was inconsistency and whether it occasioned or would occasion unfairness in the process of litigation. In my view the decision is inconsistent with the leading Australian cases. It would have been irresponsible for the Board to launch a vigorous defence of the claim without seeking legal advice and it was appropriate (and possibly obligatory) for it to inform shareholders and investors of that fact.

[58] What illustrates the danger of treating decisions on facts as laying down legal principles emerges when one discovers that *Switchcorp* is incompatible with the decision in *GMCG*, [26] also by a single judge but in a different state. There the waiver was said to arise from a note in the company's accounts under the heading 'Contingent liability'. The note said that the company was engaged in litigation over certain

[24] *Switchcorp Pty Ltd v Multimedia Ltd* [2005] VSC 425.
[25] Equivalent to a SENS notice on the Johannesburg Stock Exchange.
[26] *GMCG, LLC v Agenix Ltd* [2007] QSC 309.

consulting fees and ‘has received legal advice that it has no liability whatsoever’. Having reviewed the leading authorities already mentioned, the court held that the disclosure was made to explain why there was no provision for the claim in the accounts. The disclosure was restricted to this purpose and nothing more. The contention that the reference to legal advice constituted a waiver of privilege was rejected.

[59] It follows that the general proposition in *Avontuur* cannot be supported. Each case must be decided on its own facts and there is no presumption that the disclosure of the gist of legal advice will inevitably amount to conduct incompatible with asserting privilege in relation to the advice itself.

[60] The respondents referred to the opinions in setting out the timeline of the steps taken by them in investigating the disposals. They did not incorporate the contents of the opinions into their case in a way that compelled the appellants to provide a response to those contents without having had sight of them. All the legal points calling for answers were fully set out in the earlier part of the founding affidavit.

[61] The opinions were referred to expressly in the founding affidavit and that brought rule 35(12) into play and justified the request to produce the opinions. The response was to claim privilege. That was a complete answer unless privilege had been waived. It was for the appellants to establish waiver. It is therefore appropriate to look at the reasons advanced by Contango and Natixis on the one hand, and Glencore on the other, for seeking production of the opinions.

[62] Mr Strachan, who deposed to the founding affidavit on behalf of Contango and Natixis, said that the respondents had disclosed the content of the opinions by saying that counsel agreed with the outcome of the legal review. He then advanced two propositions. The first was that privilege is lost once the contents of the document have been disclosed. Secondly he said that fairness dictated that the opinions should be disclosed. He did not amplify on the considerations of fairness on which he relied. In reply he said that the respondents tried to throw the weight of two counsel’s opinions behind their contentions. Quite rightly the response was that the views of counsel were

irrelevant and inadmissible. Courts are only concerned with counsel's submissions, not their opinions.

[63] Both propositions advanced by Mr Strachan were inconsistent with the law as summarised in para 48 of this judgment. Questions of the waiver of privilege are far more nuanced than that. The nature, extent and purpose of the disclosure is fundamental. Considerations of fairness come into play when the disclosure introduces into the claim or defence contentions that can only be responded to if there is full disclosure is where. There is no automatic waiver as a result of a partial disclosure, as the facts in both *Peacock v SA Eagle* and *Harksen* demonstrate. Nor is fairness an independent ground for holding that there has been a waiver of privilege.

[64] The deponent on behalf of Glencore to the founding affidavit, Ms Smit, said that the contents of the opinions were relevant to the question whether the respondents acted with due expedience after receiving the advice and also to the relief to be granted. I am unable to agree with either proposition. There is no suggestion that the advice sought from and given by counsel related to the timing of legal proceedings or how expeditiously they should be instituted. It was simply said that the advocates agreed with the view of the legal review that the disposal contracts were liable to be reviewed and set aside. So far as delay was concerned the opinions were relevant to the time taken from December 2016, when the outcome of the legal review was provided to the boards of the respondents and March 2018 when the review was launched. It explained that two months were taken to obtain the first opinion; that there was then a period of five months taken to obtain the KPMG report; and, thereafter, a further period of two days to obtain the second opinion. That was disclosed and the appellants did not need the opinions in order to deal with it. The suggestion that the opinions may have dealt with the degree of expedition with which proceedings should have been brought was pure speculation. The proposition in reply that the respondents relied on the conclusions in the opinions to justify delay is not borne out by the founding affidavit in the review.

[65] I am also unable to appreciate on what basis the opinions could bear upon the just and equitable relief to be granted to the respondents if the review succeeded. That outcome would merely establish that the views of counsel were legally correct. It is a

mystery to me how that could influence or affect the just and equitable remedy the court might in due course award. As with any such case the court would hear submissions from the parties and craft an appropriate order. If, as was foreshadowed, the question of remedy was to be held over until the merits had been decided it is conceivable that the court might require further information to be placed before it or to have a separate hearing on remedy.[27] The opinions of counsel would not affect any decision in that regard.

[66] I accept that the statement that counsel were of the opinion that the outcome of the legal review was correct, constituted a partial and limited disclosure of the conclusion reached in the opinions. In some small measure it may also have conveyed the gist of those opinions, insofar as the basis for the conclusions of the legal review had been set out earlier in the founding affidavit. To that extent there was conduct on the part of the respondents that could objectively speaking be viewed as inconsistent with preserving in full the confidentiality of the opinions. However, that conduct must be seen in the light of the fact that in the very same paragraph a claim that the opinions were privileged was asserted.

[67] In the face of that assertion, and applying the approach set out in *RAF v Mothupi*, there can be no question of the respondents relying on some undisclosed mental reservation in regard to their right to claim privilege. They asserted it directly and the perception of a reasonable person in the shoes of the appellants would have been that they claimed privilege in respect of the opinions. I accept that the mere assertion of privilege will not in all cases preclude a finding that privilege has been waived. The extent of disclosure may be so great; the incorporation of the substance of the document in the claim or defence so apparent; the necessity in all fairness for there to be disclosure if the other party is not to be prejudiced in its conduct of the defence so clamant; that it overrides the expression of a subjective intention not to waive the privilege. But that is not this case. The content of the opinions was not made an issue in the proceedings and there was no need for the appellants to respond to them. The relevance of their contents to the litigation was not apparent. Finally, the

[27] As was done in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC).

appellants did not attempt to show, as opposed to assert without explanatory detail, why it would be unfair for them to proceed with their opposition to the review without having seen the full opinions. For those reasons I conclude that the legal advice privilege attaching to them was not waived and the appellants were not entitled to an order for their production.

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M J D Wallis
Judge of Appeal

Appearances

For the First and Second Appellants:	A Bham SC (with him M Mbikiwa)(Heads of argument prepared by G Marcus SC, with him K Hofmeyr and M Mbikwa)
Instructed by:	Norton Rose Fulbright South Africa Inc, Sandton Webbers, Bloemfontein
For the Third Appellant:	A M Smalberger SC (with him F Ismail)
Instructed by:	Werksmans Attorneys, Cape Town Webbers, Bloemfontein
For the First and Second Respondents:	T Motau SC (with him R Tshetlo, S Scott and U Gcilishe)
Instructed by:	Cliffe Dekker Hofmeyr Inc, Cape Town Phatshoane Henney Attorneys, Bloemfontein