

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 2353/2016

Date Heard: 11 November 2021

Date Delivered: 23 November 2021

In the matter between:

GRAHAM ANDREW MASON

Applicant/Defendant

and

PATRICIA BRIDGET MASON NO

(in her capacity as duly appointed executor

of the Estate of Ashley Robin Mason)

Respondent/Plaintiff

JUDGMENT

EKSTEEN J:

[1] This is an application to compel the production, in terms of Rule 35(7)¹ of the rules of court (the rules), of documents, in respect of which the respondent claimed privilege.

The documents, in issue are relevant to a pending action between the parties.

¹ Rule 35(7) provides: "If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence."

[2] The applicant, Mr Graham Andrew Mason, is the defendant in the pending action. The respondent is the duly appointed executrix of the estate of the late Ashley Robin Mason (the deceased). During his lifetime the deceased and the applicant had been the sole members of a close corporation, L Mason Electrical CC. After the deceased passed away, a dispute arose between the parties which led to the issue of summons in the pending action on 14 July 2016. The applicant resisted the claim and filed a counter-claim. The issues in the pending action are not material for purposes of the present application. Suffice it to record that it involved, amongst others, questions relating to the valuation of their respective members interest in the close corporation.

[3] In February 2019 the respondent's attorney of record engaged PricewaterhouseCoopers Advisory Services (Pty) Ltd (PWC) to provide professional opinions and advices in respect of the pending litigation so as to enable him to advise the respondent and to conduct the litigation. Correspondence passed between them and eventually a report, authored by one Bruce Killerby, an employee of PWC, was prepared. The respondent gave notice in terms of Rule 36(9) of the rules of her intention to call Mr Killerby to testify as an expert at the trial. A copy of his final report was duly filed as required by Rule 36(9)(b).

[4] After the close of pleadings the respondent had made discovery in terms of the provisions of Rule 35(2). However, the applicant's attorney, on 15 March 2021, delivered

a notice in terms of notice 35(3)², in which he called for the discovery of further documents which he contended were relevant to the litigation. The desired documents were:

- '1. A copy of the engagement letter by the Plaintiff's Attorney to PriceWaterhouseCoopers Advisory Services (Pty) Limited dated the 28th of February 2019;
2. The extension of service letter by the Plaintiff's Attorneys to PriceWaterhouseCoopers Advisory Services (Pty) Limited dated the 30th of July 2020;
3. Inasmuch as the Report of PriceWaterhouseCoopers Advisory Services (Pty) Limited (Mr Bruce Killerby) is entitled "The Final Report", the Defendant requests copies of any interim or draft reports received by the Plaintiff's Attorneys from PriceWaterhouseCoopers prior to the 30th of July 2020;
4. A copy of the letter of instruction by the Plaintiff's Attorneys to PriceWaterhouseCoopers Advisory Services (Pty) Limited and copies of all correspondence between the Plaintiff's Attorneys and PriceWaterhouseCoopers Advisory Services (Pty) Limited relative to the aforesaid Report.'

[5] The respondent objected to the disclosure of these documents as she claimed privilege in respect thereof. She provided a brief affidavit in which she contended:

² Rule 35(3) provides: "If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known."

“The documents sought by the Respondent in terms of his Notice in terms of Rule 35(3) delivered on 15 March 2021 are legally privileged and the Plaintiff is not obliged to provide copies thereof to the Respondent.

The documents pertain to information provided to and received from the Plaintiff’s advisors in the course of and in support of the current litigation proceedings between the parties.”

[6] The present application to compel the production of the documents followed. In opposing the application the respondent elaborated as follows on the privilege which she claimed:

“All the documents referred to by the Defendant in his Rule 35 notice are privileged because those documents came into existence with the sole purpose of the existing litigation between the Plaintiff and the Defendant. They were all prepared for the purposes of being able to fully advise the Plaintiff and thereby to enable her to conduct the litigation against the Defendant on a sound and sensible basis.”

[7] The privilege contended for has become known as “litigation privilege”.³ It serves to protect from disclosure communications between a client or their legal advisor on the one hand, and third parties, on the other. Privilege may be claimed in respect of such communications provided that: (i) it was made for the purpose of being submitted to a legal advisor; and (ii) the communication was made after litigation was contemplated.⁴

³ It is sometimes regarded as a component of legal professional privilege. (eg: *Competition Commission of South Africa v Arcelormittal South Africa Limited and Others* 2013 (5) SA 538 (SCA); and *Schwikkard and Van der Merwe: Principles of Evidence* (3rd ed) at 149, however, it may be preferable to recognise it as a form of privilege separate and distinct from legal professional privilege (*Zeffert and Paizes: The South African Law of Evidence* (2nd ed) at p. 668)

⁴ *General Accident, Fire and Life Assurance Corporation v Goldberg* 1912 TPD; *Potter v South British Insurance Co. Ltd* 1963 (3) SA 5 (W), *Bagwandeem v City of Pietermaritzburg* 1977 (3) SA 727 (N); *Tshikomba v Mutual and Federal*

Litigation privilege applies typically to witness statements, however, the privilege attaching to such statements is a manifestation of a much wider privilege that entitles a litigant to refuse to disclose any communication that forms part of his or her litigation brief if it was brought into existence for the purpose of litigation.⁵

[8] Ms *Bands*, who appeared on behalf of the applicant recognised these general principles and acknowledged that the communications which had been sought fall within this category of documents and meet the requirements for privilege. However, the thrust of the applicant's case for production of the documents as formulated in the founding affidavit was:

“As is apparent from the defendant's notice in terms of Rule 35(3) the documents requested relate to the appointment of the expert appointed by the plaintiff.

It is pivotal in cases where experts are employed to assess and challenge the accuracy of the factual basis which constitutes the foundation of any particular witnesses' opinion.”

[9] In developing this argument Ms *Bands* sought to distinguish between factual evidence and expert evidence and relied on “*The Law of Evidence in South Africa: Basic Principles*”⁶ which explains:

“In an accusatorial–adversarial legal system, a party is not entitled to prior knowledge of the oral evidence that will be adduced by their opponent. However, the contrary is

Insurance Co Ltd 1995 (2) SA 124 (T); and *Arcelormittal* para [21]. See also *The South African Law of Evidence p. 668 and Principles of Evidence* p. 149.

⁵ *The South African Law of Evidence* p. 673

⁶ *Bellengère and Others* at para 60.3.1

true when it comes to expert evidence because it is necessary for a party's legal representative to acquaint him – or herself with the opinion of an expert to prepare for trial.”

[10] This principle too, is not contentious. The rules⁷ have for many years required of any party who intends to call a witness to give evidence as a expert to give notice not only of the identity of the expert but also of the opinions which they would express and the reasons on which they are founded. The purpose of the rule is to give an opposing party such information about his evidence as to remove the element of surprise from the trial. Compliance with the rule may enable experts to exchange views before giving evidence and thus to reach agreement on at least some of the issues, thereby saving costs and time at the trial.⁸ The rule, however, makes inroads on the general principles relating to privilege and it places a litigating party at a disadvantage of having to intimate in advance what their expert is going to say. For these reasons it must be strictly construed.⁹ In this case it has been complied with and the report of Mr Killerby has been provided.

[11] What the applicant sought in his Rule 35(3) notice was to make far greater inroads on the principles of privilege than Rule 36(9) ever envisaged. There can be no justification for the extension of the rule to provide for the discovery of communications between the

⁷ Rule 36(9)

⁸ The recent amendment to the provisions of the rule require the filing of the summary of the witnesses' evidence shortly after the close of pleading. The obvious purpose of the rule as amended, is to encourage the early settlement of issues and, if possible, the trial, in order to curtail costs of litigation.

⁹ *Boland Construction Co (Pty) Ltd v Lewin* 1977 (2) SA 506 (C) at 508H; and *Doyle v SentraBoer (Co-operative) Limited* 1993 (3) SA 176 (SE) at 180G-J.

respondent's legal advisor and Mr Killerby, the instructions given to Mr Killerby or the interim reports compiled in the course of the formulation of his opinion.

[12] In the result, the application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant/Defendant: Adv I Bands instructed by Friedman Scheckter,
Gqeberha

For Respondent/Plaintiff: Adv B Boswell instructed by Rushmere Noach Inc,
Gqeberha