IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. 20428/2014

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes.
(3)	REVISED.

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DATE SIGNATURE

In the matter between:

PAUL GARDNER ALLEN First Plaintiff
VULCAN INCORPORATED Second Plaintiff

and

MICHAEL KIRKINIS Defendant

Case Summary: **Interlocutory application: (a) Discovery, inspection and production of documents – to compel production of documents requested under rule 35(3) of the Uniform Rules of Court - a probability has not been shown to exist that defendant is either mistaken or false in his assertion of irrelevance or in his assertion that certain documents no longer in his possession and their whereabouts unknown to him. (b) Further particulars - to compel the furnishing of adequate further particulars requested under rule 21 - particulars requested not strictly necessary to prepare for trial. Application dismissed.**
Interlocutory counter-application: Discovery, inspection and production of documents – to compel production of documents requested under rule 35(3) of the Uniform Rules of Court - a probability has not been shown to exist that plaintiffs either mistaken or false in their assertion of irrelevance. Evidence – Privilege – Legal professional privilege – Rule that document once privileged always privileged part of our law – Privilege extends to consultation notes by plaintiffs' attorneys made during consultation with witness in preparation for hearing of unrelated legal proceedings - consultation notes remain subject to privilege and plaintiffs not obliged to disclose them. Counter-application dismissed.

JUDGMENT

MEYER, J

[1] These motion proceedings are interlocutory to a pending action between the first plaintiff, Mr Paul Gardner Allen, the second plaintiff, Vulcan Incorporated (a company incorporated in the United States of America), and the defendant, Mr Michael Kirkinis (the action). In this application the plaintiffs seek an order to compel the defendant to deliver documents sought under two notices in terms of rule 35(3) of the Uniform Rules of Court, dated 13 May 2016 and 22 June 2016 respectively, as well as an order to compel the furnishing of certain further particulars that were requested under rule 21. The defendant, by way of counter-application, seeks an order to compel the plaintiffs to deliver certain documents which the defendant sought in terms of a rule 35(3) notice, dated 12 July 2016.

[2] The plaintiffs' case in the action is that they used the defendant for a period of about four years to arrange expeditions for them in Southern Africa. The expeditions included luxury game viewing safaris in a number of countries in Southern Africa, *inter alia* Botswana and Tanzania. The plaintiffs expended tens of millions of dollars on the expeditions over a number of years. In earlier years (2006 to 2010), the expeditions were arranged and facilitated by two safari entities: Royal African Safaris, a partnership, and Passage to Africa, initially a partnership and later registered and incorporated as a company. (These entities, including another partnership, Lebombo Safaris, of which the defendant was a partner also, are referred to by the parties as 'the PTA entities' and I adhere to their nomenclature.)

[3] In 2010, so allege the plaintiffs, they had a fall-out with the PTA entities. By then the second plaintiff and his sister (who frequently travelled together) had formed a close personal relationship with the defendant, who had been a guide on a number of the safaris. They had discussions with him and he agreed with them that Passage to Africa (in which he was a partner and later a shareholder) had let them down unacceptably, both in the organisation of the expeditions and in another area which

is not presently relevant. The defendant, according to the plaintiffs, agreed to extricate himself from his relationship with the PTA entities and to be personally responsible for organising and facilitating the expeditions for them in the future. In return, he would receive a commission, which was to be recovered from the third-party suppliers that ultimately provided the services on the expeditions. This agreement, allege the plaintiffs, was concluded in November 2010.

[4] Pursuant to the conclusion of the agreement, the defendant, according to the plaintiffs, arranged a number of expeditions to Southern Africa for them and various guests and members of their party. (Those expeditions are referred to in the papers as 'the relevant trips'.) Prior to any payments by the plaintiffs, so it is averred in their declaration, the defendant emailed them a final itinerary/breakdown of costs, which reflected the costs of the relevant trip. Once an itinerary had been accepted by the plaintiffs and the defendant had put the necessary arrangements into place, he requested, where necessary, an up-front payment from the plaintiffs, either as a payment in full or a deposit. After the relevant trip had been completed, where the expenses incurred exceeded those paid for by the plaintiffs, the defendant forwarded a list of expenses actually incurred, requesting payment of the outstanding balance. The amounts requested, so aver the plaintiffs, were deposited into a bank account nominated by the defendant. It is undisputed that the plaintiffs only ever made payments for their African expeditions and safaris into a Guernsey bank account, before late 2010 and thereafter.

[5] In early 2014, the second plaintiff became concerned about the level of the expenditure – he could not reconcile the costs with what was going on the ground, and there were various features of the expeditions that caused him concern. He, therefore, asked the defendant to account to them for the use and application of the funds which had been paid to him. This did not happen and litigation ensued.

[6] The plaintiffs initially instituted motion proceedings against the defendant in June 2014 based on the alleged oral agreement to obtain a statement and debatement of account. However, because a number of material disputes of fact had arisen on the papers, the matter was by agreement referred to trial in December 2015. The plaintiffs seek the following order in their declaration in the action:

‘1. Declaring that a relationship of agency subsisted between the plaintiffs and the defendant, from November 2010, which included the terms set out [in paragraph 6.3 of the declaration]; *alternatively* declaring that a relationship which included a duty to account subsisted between the plaintiffs and the defendant, from November 2010.

2. That the defendant deliver to the plaintiffs a full and proper statement of account for the use and application of any funds paid by the plaintiffs in relation to or in connection with the relevant trips, within 14 days of this Order, which account is duly supported by all relevant vouchers (including, without limitation, all relevant documents, agreements, receipts, statements, entries in books of account and correspondence) in respect of the relevant trips (as defined in the plaintiff’s declaration), and for the use of any of the funds paid by the plaintiffs in relation to or in connection with the relevant trips, for the period 2011 to 2014.

3. Ordering that, after rendering the account in prayer 2, the defendant shall . . . debate the aforesaid account; and . . . disgorge and pay to the plaintiffs, such amounts, if any, as may be due to them upon such debatement.’

[7] There are a number of factual disputes between the parties, but for present purposes, they can be fairly simply stated. The plaintiffs aver, essentially, that they concluded an agreement with the defendant personally. That agreement, according to them, was one of agency, or one of a similar nature that incorporated various fiduciary duties, including the duty to render an account. The defendant denies that the plaintiffs concluded any agreement with him personally. The trips, according to him, were arranged by the plaintiffs through Passage to Africa (Pty) Ltd, represented by him, until May 2013, and thereafter by Lebombo Safaris, also represented by him. The defendant avers that he only ever acted in a representative capacity on behalf of the PTA entities, and did not owe the plaintiffs a duty to account. The expeditions, so alleges the defendant, were purchased by the plaintiffs from the PTA entities at a globular price, and the plaintiffs, therefore, have no right to any insight into the underlying costs.

[8] In explanation of his defence the defendant states that no agreements were concluded between himself and any service providers; all agreements were concluded between the PTA entities and the service providers; all negotiations with service providers were conducted by the PTA entities; all bookings with service providers were made by the PTA entities; service providers issued their invoices to the PTA entities; payments for services rendered were made by the PTA entities to

the relevant service providers; and the plaintiffs made payments in respect of their expeditions to the PTA entities.

[9] The central issues raised on the pleadings, therefore, are whether any oral agreement was concluded between the plaintiffs and the defendant in terms of which the defendant agreed to act as the plaintiffs' agent or in a similar capacity in organising the plaintiffs' expeditions or trips, and what the terms of the oral agreement were, if it had indeed been concluded.

[10] Questions that require investigation with reference to the facts, according to the plaintiffs, include: the capacity in which the defendant related with the plaintiffs and with the various service providers; the capacity in which the defendant paid the service providers and in which he received payment of fees or commissions or a salary; how he accounted for and described his earnings to the tax authorities; what revenues he received, from whom, and in what capacity; how the underlying costs were passed on to the plaintiffs; and the relationship between what was paid to the various service providers and what was charged to the plaintiffs. The plaintiffs contend that the answers to these issues, and others like them, will be the best evidence of the true nature of the relationship between the defendant and the plaintiffs. The acid test, argue the plaintiffs, of the contradictory versions of the parties is how they treated that relationship at the time, and the best evidence of that, they contend, lies in the contemporaneous documentation. The plaintiffs argue that from such material can be determined how the relationship between them and the defendant manifested itself in the actual dealings between the defendant and those third parties that supplied services to the plaintiffs.

[11] Rule 35(3) provides that-

'[i]f any party believes that there are, in addition to documents … disclosed as aforesaid, other documents … *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 him to make the same available for inspection …or to state on oath … that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.'

(Emphasis added.)

[12] The documents sought to be produced in terms of the plaintiffs' first notice in terms of rule 35(3), are:

(a) all correspondence between the defendant or any of his agents or employees and the service providers who provided services for the trips: e.g. accommodation; helicopters; aeroplanes; and the like (item 4);

(b) all invoices, receipts, quotations or other financial documentation provided by the service providers in relation to the relevant trips (item 5);

(c) all agreements or memoranda of understanding between the defendant or the entities which he allegedly represented and the service providers (item 6);

(d) all invoices, receipts, underlying documentation, working papers, quotes, statements, entries in books of account, agreements, correspondence and other documentation relating in any way, to the relevant trips (item 7);

(e) all documents recording, referring to and/or explaining any credits, rebates, discounts, compensation, deposits, commissions or other benefits or fees, refunds and/or cancellations (as well as any policies in respect of credits, rebates, discounts, compensation, deposits, commissions or other benefits or fees, refunds and/or cancellations) which related to, were applied or were applicable in respect of one or more of the relevant trips (item 8);

(f) bank statements reflecting all transactions on account 707440 of EFG Private Bank Ltd, Leconfield House, Curzon Street, London or St Peter Port, Guernsey, Channel Islands, United Kingdom (the bank account) in relation to the relevant trips and the outflow of funds previously paid into the bank account by the plaintiffs in relation to the relevant trips (item 9);

(g) all invoices received from Phil Mathews for the period 2010 to 2014 in relation to the relevant trips (item 10);

(h) all correspondence with suppliers and service providers for the period 2010 to April 2014, where the defendant negotiated to have the suppliers and service providers affording the plaintiffs credit for future expeditions should the plaintiffs cancel service requests already paid for on a current or planned expedition (item 11);

(i) all correspondence between the defendant or any of his agents or employees and any 'operators', as referred to in the defendant's email dated 4 March 2014 and annexed to the founding affidavit marked PA59 (item 12);

(j) all emails ‘on record’ where the defendant requested any party to ‘channel all travel requests associated with Paul or Jody’s travel through [the defendant]’, as appears from annexure PA63 to the founding affidavit (item 13); and

(k) all non-disclosure agreements referred to in annexure MK13 to the answering affidavit (item 17).

[13] The documents sought to be produced in terms of the plaintiffs’ second notice in terms of r 35(3), are:

(a) all documentation, including the documentation made available by or on behalf of the defendant to the South African Revenue Service or any other revenue service in a country other than South Africa (revenue authorities) for the period 2009 to 2014 demonstrating or evidencing proof of the defendant’s income, the source or sources of his income and the expenditure incurred by him (item 2);

(b) any documents evidencing, setting forth and/or supporting the defendant’s income, the source or sources of his income and the expenditure incurred by him in the calculation of his income tax or VAT for the 2009-2014 tax years (item 3);

(c) any documents showing how the income derived directly or indirectly by the defendant from the relevant trips was declared by the defendant to the revenue authorities and how that income was treated in the defendant’s financial records (item 4);

(d) any income tax and VAT returns and documentation use to calculate the amounts set out in the returns of the entities which the defendant allegedly represented (item 5); and

(e) the IRP 5 forms, IT 3(a) forms, IT 14 forms and supporting schedules, income tax reconciliation computations and schedules, directors’ remuneration schedules and trial balances, EMP 201 monthly employer declarations, EMP 501 employer reconciliation declarations and any spreadsheet or calculation which show how any of the relevant entities’ payroll company determined the amount of PAYE to be deducted per month for the period 2009 to 2014, be they in draft or final form, relating to the defendant and/or any of the entities which the defendant allegedly represented (item 6).

[14] The defendant objects to the disclosure of the documents on four grounds: First, he contends that the plaintiffs' application is an abuse of process because the plaintiffs seek to pre-empt the outcome of the action. The defendant's argument is that the documents sought in discovery are at the heart of the accounting, and the plaintiffs should therefore not be entitled sight of the documents unless and until the court has determined the main issue in the trial, namely whether the plaintiffs are entitled to an accounting. This objection is raised to the discovery of the documents referred to in items 4, 5, 6, 7, 8, 9, 10, 11, 12 of the plaintiffs' first notice in terms of rule 35(3). Second, the defendant contends that the documents sought are privileged in the hands of the PTA entities which the defendant alleges he represented and/or are confidential, and on that basis are protected from disclosure. This objection is raised to the discovery of the documents referred to in item 6 of the plaintiffs' first notice in terms of r 35(3). Third, the defendant contends that the documents sought are irrelevant in that they either do not support the plaintiffs' claim or undermine the defendant's defence. The contention is that the documents will merely advance the defendant's own case, and therefore are not discoverable. This objection is raised to the discovery of the documents referred to in items 4, 5, 6, 7, 8, 9, 10, 11, 12 and 17 of the plaintiffs' first notice in terms of rule 35(3) and to the discovery of the documents referred to in items 2, 3, 5 and 6 of the plaintiffs' second notice in terms of rule 35(3). Fourth, the defendant objects to the discovery of certain of the requested documents on the basis that they do not exist or are not in his possession and their whereabouts are unknown to him. This objection is raised to the discovery of the documents referred to in items 13 and 17 of the plaintiffs' first notice in terms of rule 35(3) and to the discovery of the documents referred to in items 2, 3, 4, 5 and 6 of the plaintiffs' second notice in terms of rule 35(3).

[15] The first objection of the defendant is that the discovery of the documents at this stage will pre-empt the relief sought in the action. In his answering affidavit he articulates this defence thus:

'30. Should the plaintiffs fail in proving that an agreement was indeed concluded between them and me and/or that such alleged agreement included a duty for me to account to the plaintiffs, then the plaintiffs will never be entitled to the documents and/or information that are now demanded in this application (and which are sought in the main action).

31. …

32. Because no agreement was ever concluded between the plaintiffs and me, the plaintiffs are not entitled to the relief sought in the main action. Also, until the trial court has determined the dispute between the parties in the main action and found that the plaintiffs are entitled to the relief sought in their declaration, the plaintiffs are not entitled to the relief sought in this interlocutory application.'

[16] The defendant thus contends that the plaintiffs must establish a right to an accounting before they can obtain discovery of the documentation. In this regard the defendant further states as follows:

'Should the applicants fail in proving that an agreement was indeed concluded between them and me/or that such alleged agreement included a duty for me to account to the applicants, then the applicants will never be entitled to the documents and/or information that are now demanded in this application (and which are sought in the main action).

. . .

Also, until the trial court has determined the dispute between the parties in the main action and found that the applicants are entitled to the relief sought in their declaration the applicants are not entitled to the relief sought in this application.'

[17] I must disagree with the defendant's argument that the plaintiffs must establish a right to an accounting before they can obtain discovery of the documentation. If it is found that it is reasonable to suppose that the documents contain information which may be relevant to any matter in question and that they are in the possession of the defendant, then they must, in the absence of a legally valid ground of objection, be discovered. It matters not that certain of the documents which the plaintiffs seek by way of discovery may also ultimately be provided by the defendant as constituting the vouchers that accompany his account to the plaintiffs, should they be successful in their action. Furthermore, the defendant's position is premised on the incorrect understanding that the mere provision of documents constitutes an accounting. As Binns-Ward J said in *Grancy Properties Ltd and Another v Seena Marena Investments (Pty) Ltd and Others* (15757/2007) [2010] ZAWCHC 116 para [32] - [33], citing *Hansa v Dinbro Trust (Pty) Ltd* 1949 (2) SA 513 (T), it was insufficient to provide an account to the effect that-

'[h]ere are my books and here are my vouchers, you are at liberty to go through them and make up an account for yourself'.

[18] The defendant's objection that some of the documents constitute confidential business information of Passage to Africa or Lebombo Safaris, which entities he maintains he represented, or that they are private and confidential to him (such as his private bank statements) must also fail. Confidentiality is no basis to avoid discovery. It is settled that the fact that documents contain information of a confidential nature does not *per se* confer on them any privilege against disclosure (see *Rutland v Engelbrecht* 1956 (2) SA 578 (C) at 579; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260; *S v Naicker and Another* 1965 (2) SA 919 (N); *Crown Cork and Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 (3) SA 1093 (W) at 1099). If a court is minded to do so (although this is not required in the present matter), it may put in place a confidentiality regime for the disclosure of documentation. (See *Crown Cork* (supra) and *Bridon International GmbH v International Trade Administration Commission* 2013 (3) SA 197 (SCA), para [35].)

[19] The defendant's third objection is that the documents sought to be discovered are not relevant. As was said by Van Heerden J in *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 560F-G:

'It is generally speaking, no doubt true that, whilst the Court should not and would not go behind a party's affidavit that the contents of a document are not relevant, such affidavit is nevertheless as far as the Court is concerned not conclusive. After an examination and consideration of the recognised sources as well as the pleadings and the nature of the case the Court may come to the conclusion that the party making discovery in all probability has other relevant and disclosable documents in his possession or power and may order further and better discovery or production in conflict with the claim in the affidavit. *Herbstein and Van Winsen (supra* at 410) and *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) SA 567 (T).'

[20] In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T), at 317E-I, Joffe J said the following:

'It is well established law that Courts are reluctant to go behind a discovery affidavit, which is prima facie taken to be conclusive. In *Marais v Lombard* 1958 (4) SA 224 (E) at 227G it was held that

"when a party making discovery has sworn an affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is either mistaken or false in his assertion".

This approach was held in *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E) at 67C-F to be also applicable when possession, as opposed to the relevance of a document, is in issue. In *Continental Ore v Highveld Steel & Vanadium Ltd* (supra) the following was held at 597E-H:

"It has further been held in a series of cases before the enactment of the present Rules that when a party to an action refuses to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the Court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevancy is incorrect. *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W), per Murray AJP, at 675-7. The affidavit denying relevance is generally taken as conclusive, and the Court will not reject it unless a probability is shown to exist that the deponent is either mistaken or false in his assertion. *Marais v Lombard* 1958 (4) SA 224 (E), per O'Hagan J, at 227G; Lenz Township Co (Pty) Ltd v Munnick and Others 1959 (4) SA 567 (T), per Williamson J, at 572-3. See also the authorities collected in *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 745-8, a judgment of Wynne J, which was described in the *Lenz* case (at 573) as a veritable thesaurus of the decisions on discovery.'

And, at 320F-H, that-

'. . . the Court, in determining whether to go behind the discovery affidavit, will only have regard to the following:

(i) the discovery affidavit itself; or

(ii) the documents referred to in the discovery affidavit; or

(iii) the pleadings in the action; or

(iv) any admissions made by the party making the discovery affidavit; or

(v) the nature of the case or the documents in issue.

See *Continental Ore v Highveld Steel and Vanadium* (supra at 597H-598A); *Schlesinger v Donaldson* (supra at 56); *Lenz Township Co (Pty) Ltd v Munnick and Others* 1959 (4) SA 567 (T) at 573D-F; *Federal Wine and Brandy Co Limited v Kantor* (supra at 749G-H).'

[21] The plaintiffs argue that the documents sought in items 4, 5, 6, 7, 8, 10, 11 and 12 of the first notice in terms of rule 35(3) would establish the capacity in which the defendant arranged the relevant trips for the plaintiffs; whether the defendant engaged with the service providers in his own capacity, as agent for the plaintiffs or on behalf of or through any other entity. The account transactions in respect of the bank account transactions required to be produced in item 9 of the first notice in terms of rule 35(3), so argue the plaintiffs, 'will show how and by whom the applicants' funds were used', which 'has a direct bearing on the question of the

identity of the party with whom the applicants had a legal relationship, and the terms of that relationship.' They argue that the identities of the parties to the non-disclosure agreement required in item 17 of the first notice in terms of rule 35(3) and the terms of those agreements 'speak centrally to the relationship among the applicants, the respondent and each of the service providers'.

[22] The documents which establish the defendant's income as declared to the revenue collecting authorities, the source of his income and the expenditure incurred by the defendant requested in items 2, 3 and 4 of the second notice in terms of rule 35(3), so argue the plaintiffs, 'would show where the respondent derived his income and what effect the relevant trips (and any profit thereon) had on such income'. They further argue that '[t]he documents underlying those returns are not only needed to test the veracity of the returns, but more importantly to establish in what capacity the respondent acted at what time'. All income tax returns, other tax forms, returns and supporting documents used to calculate the income of the PTA entities required in items 5 and 6 of the second notice in terms of rule 35(3), so argue the plaintiffs, are also relevant since 'the income and expenditure pertaining to the relevant trips would only be reflected in those entities' books and documentation' if the defendant's principal contention that the plaintiffs' legal relationship was with the PTA entities, is correct.

[23] The defendant's objection that the documents sought to be discovered are not relevant, however, is premised thereon that they will only serve to advance his own case and do not support the plaintiffs' claim nor do they undermine his defence. The test for relevance was thus stated in *Swissborough*, at p 316E-317B:

'The requirement of relevance, embodied in both Rule 35(1) and 35(3), has been considered by the Courts on various occasions. The test for relevance, as laid down by Brett LJ in *Compagnie Financiere et Commerciale du E Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, has often been accepted and applied. See, for example, the Full Bench judgment in *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A, where it was held that: After remarking that it was desirable to give a wide interpretation to the words "a document relating to any matter in question in the action", Brett LJ stated the principle as follows: "It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or

to damage the case of his adversary. I have put in the words “either directly or indirectly” because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences." See also *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 596H and *Carpede v Choene NO and Another* 1986 (3) SA 445 (O) at 452C-J.

Counsel for the plaintiffs laid special emphasis on the indirect relevance a document may have, that is a document which may fairly lead him to a chain of enquiry which may advance the plaintiffs' case or damage the case of the first defendant. Reference was made hereto as “indirect relevance” or “secondary relevance”.

The broad meaning ascribed to relevance is circumscribed by the requirement in both subrules (1) and (3) of Rule 35 that the document or tape recording relates to (35(1)) or may be relevant to (35(3)) “any matter in question”. The “matter in question” is determined from the pleadings. See in this regard *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) at 385A-C; *Schlesinger v Donaldson and Another* 1929 WLD 54 at 57, where Greenberg J held

“In order to decide the question of relevancy, the issues raised by the pleadings must be considered . . .”,

and *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 753D-G.’

[24] In his answering affidavit, the defendant states:

‘9. I have always denied, and I still deny, that I have ever concluded any agreement with either of the applicants in my personal capacity. I have maintained throughout the course of the litigation that the applicants concluded contracts firstly with Passage to Africa (a private company that was registered and incorporated in the Republic of Mauritius) (*“Passage to Africa”)* and later with Lebombo Safaris (a partnership) and that I only ever dealt with the applicants in my capacity as a representative of these businesses.’

[25] And the defendant continues to state the following:

36. For the sake of avoidance of any doubt, and as I have already stated under oath in my answering affidavit:

36.1 I have never concluded any agreement with the applicants;

36.2 I have not received additional monies from Passage to Africa (or from Lebombo Safaris after May 2013), or from any service providers for that matter, as a result of

being in charge of and/or arranging the applicants' African expeditions and safaris that were booked through Passage to Africa (or Lebombo safaris after May 2013);

36.3 I have never received any private commissions or secret profits as a result of being in charge of and/or arranging the applicants' African expeditions and safaris that were booked through Passage to Africa (or Lebombo Safaris after May 2013);

36.4 all of the applicants' expeditions and safaris were arranged by the applicants through Passage to Africa (and Lebombo Safaris after May 2013);

36.5 every one of the payments that was made by the applicants, up and until May 2013, was made to Passage to Africa. After May 2013 all payments that were made by the applicants in respect of their African safaris were made to Lebombo Safaris. In fact, even the applicants' own internal records reflect the 'vendor' to which payments were made as "Passage to Africa";

36.6 the suppliers' invoices relating to the expenses incurred in relation to the applicants' African expeditions and safaris were made out to Passage to Africa;

36.7 all the payments to suppliers and for expenses related to the applicants' African expeditions and safaris (such as accommodation, fuel, helicopter and airplane charter, etc.) were made by Passage to Africa (and post May 2013 by Lebombo Safaris);

36.8 all the profits that were made in respect of the applicants' African expeditions and safaris accrued to Passage to Africa (and after May 2013 to Lebombo Safaris)."

[26] Furthermore, the defendant states that the plaintiffs (by means of subpoenas *duces tecum* issued to various entities all over Africa that were contracted between the period 2011 to 2014 to render services to the plaintiffs on their African expeditions and safaris) have come into possession of hundreds of documents (two lever arch files), almost all of which clearly demonstrate that Ms Nicky Williams, an employee of the PTA entities, communicated with the third party service providers and booked the relevant services for the applicants and that the third party service providers rendered invoices relating to the plaintiffs' African expeditions and safaris to the PTA entities and not to him. The defendant's unchallenged evidence is that those documents demonstrate that he, in his personal capacity, never contracted with any service provider that rendered any services to the plaintiffs during any of their African expeditions and safaris; almost all correspondence relating to the plaintiffs' African expeditions and safaris that were booked by the plaintiffs through the PTA entities were between the service providers and Ms Williams; PTA's name appears on various email correspondence between employees of the PTA entities

and service providers; invoices were made out by the various service providers to the PTA entities; and the plaintiffs' names appear as the client on various invoices that were made out to the PTA entities.

[27] As far as the requested documents is concerned, the defendant states on oath that the goods and services were provided by the relevant service providers 'in consequence of arrangements that were made with them by either Passage to Africa or Lebombo Safaris'; that the invoices, receipts, quotations, or other financial documentation provided by the service providers as requested in item 5 of the first notice in terms of rule 35(3) were provided by the relevant third party entities to the PTA entities; that agreements were concluded between the PTA entities and the relevant third party service providers and that no agreement or memorandum of understanding between himself and the PTA entities were concluded and therefore does not exist; that all documents recording, referring to and/or explaining any credits, rebates, discounts, compensation, deposits, commissions or other benefits or fees, refunds and/or cancellations which related to, were applied or were applicable in respect of one or more of the relevant trips were provided by the third party service providers to the PTA entities and/or by the PTA entities to the plaintiffs; that the bank statements and application of funds that are sought relate to the bank account that was utilised by the PTA entities; that non-disclosure agreements were concluded between the PTA entities and the relevant third party operators/suppliers and that he never concluded any non-disclosure agreement with any of the relevant operators/suppliers in his personal capacity and for this reason no such agreement exists; and that none of the income that he declared to the South African revenue Service was derived from the plaintiffs' expeditions and safaris and the documents requested are not relevant.

[28] The plaintiffs did not depose to their founding and replying affidavits in this interlocutory application. The affidavit evidence of the defendant is not and could not be refuted by the deponent to the plaintiffs' founding and replying affidavits, Mr Michael-John Spargo, who is an attorney practicing as an associate at the plaintiffs' attorneys of record. It is correct, as the plaintiffs contend, that the basis of their interlocutory application is an analysis of the pleadings to determine what the issues are between the parties, an analysis of the type of documents sought, and 'the

likelihood of whether such documents will speak to the issues'. But Mr Spargo is in no position to dispute the defendant's evidence relating to the contents of the documents, in other words that they do not support the plaintiffs' claim or undermine the defendant's defence.

[29] I am not reasonably satisfied that the defendant's denial of relevancy is incorrect and I am unable to hold that it is reasonable to suppose that the required documents contain information which may either directly or indirectly enable the plaintiffs to advance their own case or damage the defendant's case. A probability has not been shown to exist that the defendant is either mistaken or false in his assertion of irrelevance. The only documents that are not included in this finding are the emails 'on record' sought in terms of item 13 of the plaintiff's first notice in terms of rule 35(3) dated 13 May 2016 and the tax-related documentation sought in terms of item 4 of the plaintiffs' second notice in terms of rule 35(3) dated 22 June 2016.

[30] The plaintiffs have requested the defendant to furnish to them all documents which establish his income as declared to the revenue collecting authorities, the source of his income and the expenditure incurred by him for the period 2009 to 2014. He refused to deliver these documents, claiming that they are irrelevant and, in any event, not in his possession and he is unaware of their whereabouts. In this regard he states:

'155. . . . None of the income that I declared to the South African Revenue Service was derived from the applicants' expeditions and safaris and the documents, if they exist, would therefore not be relevant. . . .

156. In any event, and as I have stated in my response to the applicants' request, the requisitioned documents are not in my possession or under my control and I do not know in whose possession or control they would be. I must have had the documents in my possession when I completed the tax returns. I have searched everywhere and I simply cannot locate any of these documents. I assume that most of these documents were kept on my computer, which computer crashed in 2015 as a result of which the hard drive had to be replaced.

157. Lastly, as my earnings did not exceed the threshold that was determined by the South African Revenue Service at the time (which if I recall correctly was R750 000-00 per annum) I was not required to register for VAT. For this reason no VAT returns or any documents that usually relate to VAT returns exist.'

[31] The plaintiffs also required production of '[a]ll e-mails "on record" where the defendant requested any party to "channel all travel requests associated with Paul or Jody's travel through the Defendant", as appears on page 1 of "PA63" to the founding affidavit (page 168 of the paginated motion bundle)'. The e-mails requested here are emails to which the defendant referred to in his email of 16 April 2014 to the second defendant's Mr Bill Benack. Therein the defendant stated that he made 'repeated' requests to channel all travel arrangements in respect of the plaintiff and his sister through him, and that there are '[e]mails to this effect … on record'. The defendant states that he has disclosed all the documents which he has in his possession or under his control, and that he is not aware in whose possession or under whose control further documents falling within this category may be located.

[32] An affidavit of discovery is generally taken as conclusive against the party seeking further discovery in respect of the possession of documents. In *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E) at 67D-F, Kannemeyer J said the following:

'After a review of the authorities, O'HAGAN, J., said in *Marais v. Lombard,* 1958 (4) SA 224 at p. 227 –

"What these cases establish, in my view, is that when a party making discovery has sworn on affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is either mistaken or false in his assertion . . . The sources from which the Court may infer that a discovery affidavit is wanting in the respects mentioned, has been referred to in *Schlesinger v Donaldson and Another,* 1929 W.L.D. 54, as being the pleadings in the action, the discovery affidavit itself, the documents referred to in such affidavit as well as admissions of the party evidenced elsewhere."

In my view this approach is also applicable when the possession as opposed to the relevance of a document is in issue.'

[33] Having regard to the admissible sources, I am not persuaded that a probability has been shown to exist that the defendant is either mistaken or false in his assertions that the category of documents that underlie and support his tax returns and the emails 'on record' are no longer in his possession and their

whereabouts unknown to him. The defendant's discovery affidavit must, therefore, be taken as conclusive as to the possession of these documents.

[34] I now turn to prayer 2 of the plaintiffs' notice of motion in this interlocutory application in which they seek an order, in terms of rule 21(4) of the Uniform Rules of Court, compelling the defendant 'to deliver an adequate reply to paragraphs 2.4 to 2.8 and 2.9.1' of their 'request for admissions sought and further particulars for trial dated 27 May 2016'. Rule 21(2) in its presently relevant part provides as follows:

'After the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting only such further particulars as are *strictly necessary to enable him to prepare for trial*.'

(Emphasis added.)

[35] Erasmus *Superior Court Practice* at D1-252 states, and this is settled law, that-

'[t]he purpose of permitting a party to call for further particulars for trial is (a) to prevent surprise; (b) that the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations; and (c) having regard to the aforegoing nevertheless not to tie the other party down and limit his case unfairly at the trial.'

[36] The plaintiffs have, in paragraphs 2.4 to 2.8 of the request for further particulars, requested particulars pertaining to the defendant's role in negotiating and concluding agreements with ultimate providers of goods and services for purposes of the relevant trips, the identity and role of any other entities involved in that process, the calculation of costs pertaining to the relevant trips (and whether any profit was made and by whom), and whose funds were used to fund the relevant trips. The defendant refused to furnish these requested particulars on the grounds that the requested particulars relate to admissions, are not strictly necessary to enable the plaintiffs to prepare for trial and/or are unrelated to the issues as defined in the pleadings.

[37] The particulars requested in terms of paragraphs 2.4 to 2.8 of the request for further particulars relate to paragraph 7 of the defendant's plea, which, in turn, is his response to paragraph 9.1 of the plaintiffs' declaration, wherein the plaintiffs made the following averments:

'Prior to any payments by the plaintiffs, Kirkinis emailed the plaintiffs a final itinerary/breakdown of costs, which reflected the costs of the trip.'

In paragraph 7 of his plea, the defendant responded as follows:

'Save to state that it was either the defendant or Nicky Williams who sent the e-mails reflecting the quotations for the plaintiffs' trips in relation to the trips, the remainder of the content of this paragraph is admitted.'

[38] The plaintiffs contend that the requested particulars in those paragraphs of the request for further particulars 'are all directly relevant to the issues in dispute as they speak to the capacity in which each entity involved in relation to the relevant trips acted and whether the respondent acted in his own capacity, on behalf of the applicants or on behalf of another entity' and that they 'are strictly necessary for the purposes of preparing for trial'.

[39] The particulars requested by the plaintiffs, in my view, are not strictly necessary to enable them to prepare for trial on the narrow factual issue raised in paragraph 9.1 of the declaration read with paragraph 7 of the plea. The defendant admits the plaintiffs' allegation that prior to any payments by the plaintiffs, a final itinerary/breakdown of costs, which reflected the costs of the trip, was e-mailed to the plaintiffs. The only issue is whether the defendant e-mailed the itinerary/breakdown to the plaintiffs, as they allege, or whether it was either the defendant or Nicky Williams who had sent the e-mails, as the defendant alleges.

[40] The plaintiffs have, in paragraph 2.9.1 of the request for further particulars, requested particulars pertaining to the bank account operated by the defendant during the period 2010 to 2014. The defendant refused to provide the further particulars on the grounds that they are requested in respect of a bare denial, are not strictly necessary to enable the plaintiffs to prepare for trial and/or are unrelated to the issues as defined in the pleadings.

[41] The particulars requested in terms of paragraph 2.9.1 of the request for further particulars relate to paragraph 9 of the defendant's plea, which in turn is his response to paragraph 9.3 of the plaintiffs' declaration, wherein the plaintiffs made the following averments:

'Once an itinerary had been accepted by the plaintiffs, and Kirkinis had put into place the necessary arrangements, he would request, where necessary, an up-front payment from the

plaintiffs, either as a payment in full or for payment of a deposit, and would thereby secure the relevant services. The amount requested would be deposited by the plaintiffs into Kirkinis' nominated bank account.'

In paragraph 9 of his plea, the defendant responded as follows:

'9.1 It is denied that any monies were ever deposited by the plaintiffs into the defendant's nominated bank account.

9.2 The defendant admits that he and/or Nicky Williams requested the plaintiffs to make payment of the costs-to-plaintiffs in respect of quotations that had been accepted by the plaintiffs, into the nominated bank account of Passage to Africa (Pty) Ltd or Lebombo Safaris, depending on which of these entities organised the trip in question.

9.3 The remainder of the contents of this paragraph is denied.'

[42] The plaintiffs deny that the requested particulars in that paragraph of the request for further particulars relate to a bare denial and they contend that the requested particulars-

'. . . simply seek information about an issue which is within the exclusive purview of the respondent, and which issue bears directly on the action. The applicants are not aware of any bank accounts used by the respondent, other than the bank account stipulated in para 21 of the response to the request for further particulars. The applicants must be allowed to investigate the respondent's (and the PTA entities') sources of income and to trace funds which he may have received pertaining to the relevant trips. This the applicants cannot do as they have not been furnished with information pertaining to the respondent's (and the PTA entities') other bank accounts as sought above.'

[43] The particulars requested by the plaintiffs pertaining to the bank account operated by the defendant during the period 2010 to 2014, in my view, are also not strictly necessary to enable them to prepare for trial on the factual issues raised in paragraph 9.3 of the declaration read with paragraph 9 of the plea. The plaintiff requested the defendant to furnish full details of the nominated bank accounts of Passage to Africa and Lebombo Safaris referred to in paragraph 9 of his plea, which further particulars the defendant provided in paragraph 21 of his reply to the plaintiffs' request for further particulars. The defendant's allegations, in paragraph 186 of his answering affidavit, that the plaintiffs '. . . are fully aware of the fact (and it is within their personal knowledge) that they only ever made payments for the African expeditions and safaris, into the bank account which details appear at paragraph 21 of [his] reply to the applicants' request for further particulars', are

undisputed. The relevant issue, for present purposes, raised in paragraph 9.3 of the declaration read with paragraph 9 of the plea, is therefore whether the account referred to in paragraph 21 of the defendant's reply to the plaintiffs' request for further particulars, was the defendant's 'nominated account' during the period 2010 to 2014, as is alleged by the plaintiffs, or that 'of Passage to Africa (Pty) Ltd or Lebombo Safaris, depending on which of these entities organised the trip in question', as is alleged by the defendant.

[44] Finally, the counter-application. It is common cause that Messrs Dave Stewart and Kevin Hamilton, the plaintiffs' legal counsel at the time, met with the defendant at his home in France on 17 and 18 August 2013. They consulted with him as a witness in relation to pending litigation in which the plaintiffs and the first plaintiff's sister, Ms Jody Allen, were involved in the United States of America, which litigation is unrelated to the pending action between the plaintiffs and the defendants. The documents which the defendant seeks the production of, relate to those consultations which Messrs Stewart and Hamilton conducted with him. The defendant testified in those unrelated arbitration proceedings via teleconference on 6 September 2013.

[45] The defendant seeks to explain the relevance of the consultation notes and other documents by first explaining his understanding of the case against the plaintiffs and Ms Allen. In his founding affidavit in the counter-application, he states that he was requested by the second defendant's in-house counsel, Mr Stewart, to give evidence on behalf of the plaintiffs and Ms Allan in arbitration proceedings involving them and a certain Ms Traci Turner (the Turner arbitration). He states that he was told that Ms Turner's attorneys would focus on his relationship with the plaintiffs and Ms Allan in order to create the impression of bias on his part. Much of the preparation for his testimony, according to him, and the notes of those consultations that were copiously taken by the lawyers, focused on 'the exact nature of [his] relationship with the [plaintiffs] and Jody'. He states that he was required to satisfy the legal representatives of the plaintiffs and Ms Allen that he was not and never had been in their employ, nor had he ever acted as their agent and that he, at all relevant times, had been dealing with them as a representative of Passage to

Africa and Lebombo Safaris, through which businesses the plaintiffs booked their African expeditions and safaris.

[46] The plaintiffs, in their answering affidavit deposed to by their in-house counsel, Mr Stewart, deny that the defendant was ever a witness, nor anticipated to be one, in relation to the Turner arbitration in respect of which proceedings he seeks the disclosure of documents. He was not deposed, and did not give evidence at the Turner arbitration. There were no consultations attended by Messrs Stewart and Hamilton with the defendant in relation to that arbitration, and the role of the defendant in organising the relevant trips was never an issue in that arbitration nor was it discussed with the defendant. Mr Stewart admits that some notes were taken at the consultations with the defendant on 17 and 18 August 2013, but denies that they were copious or that they will demonstrate that the plaintiffs and Ms Allen were at all times aware of the fact that he was not their agent and that the expeditions were arranged through Passage to Africa and Lebombo Safaris.

[47] The plaintiffs in their answering affidavit refuted the defendant's version set out in his founding affidavit. His version in his founding affidavit simply does not accord with the objective facts that were presented in the answering affidavit, such as the interim and final arbitration awards and the court order confirming the arbitration award. Ms Turner was a former employee of the second plaintiff. She asserted employment-related claims in two separate lawsuits against the second plaintiff, the first on 26 September 2011 and the second on 27 January 2012. In both lawsuits filed by Ms Turner, the court granted the second plaintiff's motion to compel arbitration and stayed the litigation pending resolution of her claims in the arbitration proceedings in which evidence was heard on 26 November 2012. The defendant was not called to testify. The interim award on the merits was handed down on 21 December 2012. A final arbitration award was rendered on 7 March 2013, which confirmed the findings of the interim award. The costs order in the final arbitration award was later amended, on 30 June 2014, but no further hearings on the merits, or any other issue took place after March 2013, which precedes the dates of the consultation with the defendant at his home in France on 17 and 18 August 2013.

[48] Mr Stewart states in the plaintiffs' answering affidavit that the consultations which he and Mr Hamilton held with the defendant on 17 and 18 August 2013 related

to a different arbitration, being an arbitration instituted against the plaintiffs and Ms Allen by one Mr RoseHaley, also a former employee of the second plaintiff. Those consultations, he states, were unconnected with any one of the issues which the defendant raises in his counter-application. In that arbitration, the centrality of the bias concerns, and the characterisation of the defendant's role as being merely a remote representative of a service provider, was, it is undisputed, not an issue. In reply, the defendant states that if he had been testifying in the RoseHaley arbitration, rather than the Turner arbitration, the issue of his relationship with the plaintiffs, Ms Allen, Passage to Africa, and Lebombo Safaris could not possibly have been relevant.

[49] But, states the defendant, the first plaintiff and the plaintiffs' legal team always led him to believe that he was required in litigation that was initiated by Ms Turner, and in fact, the first plaintiff, Ms Allen and the plaintiffs' legal team expressly told him that he would be testifying in the case that was instituted by Ms Turner. He states that he was never aware nor expressly otherwise told by the first plaintiff, Ms Allen and the plaintiffs' legal team that he testified in the case that was instituted by Mr RoseHaley. He never met Mr RoseHaley and he does not know 'who this person is'. He further states:

The only reasonable explanation for the respondents' version (namely that I could not have testified in the Turner matter as the evidence therein had been concluded by December 2012) is that the arbitrations that are referred to in the answering affidavit were not the only legal proceedings between the respondents and Turner.'

[50] I permitted the plaintiffs to file a supplementary affidavit to deal with the new matter – particularly that the plaintiffs, Ms Allen and the plaintiffs' legal team misled the defendant as to which matter he was testifying in and the insinuation that they misled this court by only addressing one of the arbitrations in which Ms Turner was involved - raised by the defendant in reply. In the supplementary affidavit Mr Stewart reiterates that the final arbitration award had already been issued in the Turner arbitration prior to August 2013 and he further states that 'there were no other proceedings in respect of Ms Turner, contrary to [the defendant's] speculations and conjecture'.

[51] The defendant's version that he never knew he was being prepared for the RoseHaley arbitration, was unaware that he gave any evidence therein, and was told by the defendants, Ms Allen and their legal team that he was required to testify in the Turner arbitration, is also not credible. Days after the consultation on 17 and 18 August 2013, the defendant was informed by Mr Hamilton, in an email on 29 August 2013, that:

'It is now looking that we would need you to appear by video conference for the RoseHaley arbitration on Friday, August 6.'

In his responding email dated 29 August 2013, the defendant confirmed:

'That's fine for me for 6 September.'

(The reference in Mr Hamilton's email to 'August 6' should have been a reference to 'September 6', and it appears that that is how the defendant understood it.)

[52] Further emails were exchanged among Messrs Hamilton, Stewart and the defendant from 3 to 5 September 2013, *inter alia* arranging and re-arranging the time when he would testify. The defendant testified by video conference on Friday, 6 September 2013. Later that same day, Mr Stewart sent an email to the defendant, saying:

'Mike,

Sorry about the moving schedule, but it went well from the courtroom. You were pitch perfect.

Apologies to Andrea [the defendant's wife] for messing up any dinner or evening plans.

Dave'.

The defendant replied:

'Please don't apologise Dave. We're still heading out now, it takes more than Rose-Hayley to mess up my dinner plans!

. . .

Mike'.

[53] It cannot be said that the version put up by the plaintiffs in the counter-application is 'far-fetched or clearly untenable' nor am I satisfied 'as to the inherent credibility' of the defendant's factual averments on the disputed issues. (See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635A-C.) On the contrary, I am of the view that the plaintiffs have refuted the defendant's factual averments on the disputed issues in the counter-application. I

am not satisfied that the plaintiffs' denial of relevancy is incorrect. A probability has not been shown to exist that the plaintiffs are either mistaken or false in their assertion of irrelevance.

[54] I am, however, for the reasons that follow, of the view that legal professional privilege attaches to the content of the consultations which were held between the second plaintiffs' lawyers and the defendant on 17 and 18 August 2013 and to the consultation notes made at the consultations. I nevertheless dealt fairly extensively with the factual disputes that have arisen on the papers in the counter-application in connection with the plaintiffs' denial of relevancy, in the light of the plaintiffs' request that a punitive costs order be made against the defendant. The defendant has made serious and scandalous allegations against the plaintiffs, Ms Allen and the plaintiffs' lawyers, which allegations have been refuted and proved to be unfounded. The defendant's conduct, in my view, is deserving of judicial censure through the imposition of a punitive costs order.

[55] Legal professional privilege has two components; litigation privilege and legal advice privilege. In *Competion Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA), Cachalia JA said the following about the established requirements of litigation privilege, with which we too are concerned in this case:

'[20] Litigation privilege is one of two components of legal professional privilege, the other being the privilege that attaches to communications between a client and his attorney for the purpose of obtaining and giving legal advice. Litigation privilege, with which we are concerned in this case, protects communications between a litigant or his legal adviser and third parties, if such communications are made for the purpose of pending or contemplated litigation. It applies typically to witness statements prepared at a litigant's instance for this purpose. The privilege belongs to the litigant, not the witness, and may be waived only by the litigant.

[21] 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 adviser for legal advice; and second that litigation was pending or contemplated as likely at the time.'

(Footnotes omitted.)

[56] It is common cause that the consultation notes meet the two requirements for legal privilege. But, argues the defendant, the plaintiffs could only have claimed

litigation privilege in the litigation that gave rise to the consultation notes and only during the time when that litigation was ongoing. Although legal advice privilege endures indefinitely, so the argument continues, litigation privilege does not enjoy indefinite duration and comes to an end upon the termination of the litigation that gave rise to the privilege. The defendant finds support for his contentions in the judgment of the Supreme Court of Canada in *Blank v Canada (Minister of Justice)* [2006] 2 S.C.R. 319, 2006 SCC 39 and in the judgment of the Irish Commercial Court in *University College Cork – National University of Ireland v Electricity Supply Board* [2014] IECH 135.

[57] The Supreme Court of Canada in *Blank* considered *inter alia* the distinction between solicitor-client privilege and litigation privilege. The conclusions of Fish J, who wrote the majority judgment, are thus concisely summarised in the headnote to that judgment:

'The litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences. Litigation privilege is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. The purpose of the litigation privilege is to create a zone of privacy in relation to pending or apprehended litigation. The common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. Unlike the solicitor-client privilege, it is neither absolute in scope nor permanent in duration. The privilege may retain its purpose and its effect where litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source. Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well.'

[58] The conclusion of the minority judgment, written by Bastarache J, as summarised in the headnote, is that-

'. . . litigation privilege has always been considered a branch of solicitor-client privilege. The two-branches approach to solicitor-client privilege should subsist, even accepting that solicitor-client privilege and litigation privilege have distinct rationales.

[59] Although recognising that it remains the position in England and Wales that litigation privilege automatically lasts forever (para 40), Ms Justice Finlay Geoghegan in *University College Cork* found the analysis, reasoning and conclusion of the Supreme Court of Canada in *Blank* in the majority judgment of Fish J 'in relation, in particular, to the distinctions in the purpose of legal advice privilege and litigation privilege . . . convincing and consistent with the judgments of [Ireland's] Supreme Court in *Smurfit Paribas* [[1990] 1 I.R. 469]'. She concluded thus:

'46. Applying the principles set out above to litigation privilege, it appears to me that the objective of litigation privilege, which is "in the public interest in the proper conduct of the administration of justice", is the creation of what has been referred to as a "zone of privacy" in the interests of the efficacy of the adversarial system to permit a party in litigation to prepare its position without adversarial interference and without fear of premature disclosure. In current litigation procedures, there may come a time in advance of the actual trial where disclosure is required. In other instances, disclosure may not occur in the course of the litigation *e.g.* if the action settles prior to trial. However, as the objective purpose is to give a party the opportunity to properly prepare its case without premature disclosure or interference from the opposing party, it appears to me that such objective purpose does not require such privilege to automatically continue beyond the final determination of either that litigation or, as has been identified by the Supreme Court of Canada in *Blank*, closely related litigation. Where the second proceedings are not closely related to the first proceedings, there is no objective of the proper conduct of the administration of justice which can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts.'

[60] In our jurisprudence litigation privilege and legal advice privilege are viewed as the two branches or 'components' of legal professional privilege. As was recognised in the majority and minority judgments in *Blank*, paras 31 and 71,

'[t]hough conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complimentary and not competing in their operation.'

For my part I find the distinction in duration of preserving the confidentiality of communications between a client and his legal adviser made between legal advice privilege and litigation privilege to be somewhat artificial. Limiting litigation privilege not to continue beyond the final determination of the litigation from which the privilege arose or closely related litigation erodes the right of a client to consult freely

with his or her legal adviser by clients as much as any limitation in duration would have eroded that policy in the case of legal advice privilege.

[61] As was stated by Du Plessis J in *Bogoshi v Van Vuuren NO and Others; Bogoshi and Another v Director, Office for Serious Economic Offences, and Others* 1993 (3) SA 953 (T), at 959H-960B:

The privilege between a client and his legal adviser, which is the privilege presently at issue, has in the past been regarded as an evidentiary rule. (See *Andresen v Minister of Justice* 1954 (2) SA 473 (W); see also the *obiter dictum* in *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 962H.) In *S v Safatsa and Others* 1988 (1) SA 868 (A) at 878G and further, the Appellate Division considered the nature of professional privilege. At 885 and 886 Botha JA quoted with express approval from the judgment of the High Court of Australia in *Baker v Campbell* (1983) 49 ALR 385. One of the passages thus quoted refers to professional privilege as 'a mere manifestation of a fundamental principle upon which our judicial system is based'. Another such passage reads that the

'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.

(The italics are mine.) The Appellate Division thus accepted that legal privilege is a right necessary for the proper functioning of our adversary system as a opposed to a mere evidentiary principle.'

[62] The application of the rule 'once privileged always privileged' to legal professional privilege, is as much part of our law as it is of English law. It contains no limitations, except, perhaps, where the rule is invoked as justification for the infringement of a fundamental right (see *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W), at 230F-G; *Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 (E), at 642I-644J), which is not presently at issue.

[63] I find *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others* 1979 (1) SA 637 (C) to be instructive on the nature of legal professional privilege. Friedman J said the following (at 643H-644G):

'It is important, therefore, that the protection which privilege affords should be applied strictly in accordance with the conditions necessary for the establishment of privilege. It is equally

important, however, that inroads should not be made into a 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. As *Wigmore* states (vol VIII para 2291):

"The policy of the privilege has been plainly grounded, since the latter part of the 1700s, on subjective considerations. In order to promote freedom of consultation of legal advisers, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent."

The necessity for preserving the confidentiality of communications between a client and his legal adviser has never been questioned in this country. To impose qualifications on the rule "once privileged always privileged" would, in my judgment, create an unwarranted inroad upon this fundamental right of a client. A client who consults his legal adviser in regard to contemplated legal proceedings, is entitled to do so confident in the knowledge that his communications with his legal adviser will not remain protected from disclosure only in regard to the litigation concerning which it is made, for, as *Wigmore* states (vol VIII para 2323):

". . . there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate. It has therefore never been questioned, since the domination of the modern theory (under which privilege does not end with the ending of the relationship), that the privilege continues even after the *end of the litigation or* other occasion for legal advice, and even after the *death of the client*."

Significantly *Wigmore* refers, in support of this statement, to *Bullock v Corry* [(1878) 3 QBD 356] and *Pearce v Foster* [(1885) 15 QBD 114] and states, in a footnote, "The rule is once privileged, always privileged". In *Estate Bliden v Sarif (supra)* [1933 CPD 271] SUTTON J accepted the principle of "once privileged, always privileged", and stated (at 274):

"The privilege is for the benefit of the client, and it should not matter what the nature of the subsequent proceedings is."

Mr *Knight* invited me to find that *Estate Bliden v Sarif* had been wrongly decided and to hold that I was not bound by it. I find it unnecessary to decide whether, on the facts, *Estate Bliden v Sarif* was correctly decided or not, as I am satisfied that the rule once privileged, always privileged is as much part of our law as it is of English law. The limitations to the rule suggested by the authors of Wills on *Evidence* and Phipson on *Evidence* are not supported by English authority. Our rules relating to discovery are taken from the English authority.

Our rules relating to discovery are taken from the English Rules and our Courts are accordingly guided by the decisions which the English Courts have given on those Rules. (See *Goldberg's* case *supra* at 500.) The rule as laid down in *Bullock v Corry* and the decisions which followed it, contains no limitation, and accords fully with the principles stated by *Wigmore* to form the basis of the rule. For these reasons I hold to the extent to which the

documents in annexure Z were privileged in the Conasupa action, they are also privileged in the present action.'

[64] The consultation notes, therefore, remain subject to privilege and the plaintiffs are not obliged to disclose them.

[65] In the result the following order is made:

(a) The plaintiffs' interlocutory application dated 25 April 2017, is dismissed with costs.

(b) The defendant's counter interlocutory application dated 11 May 2017, is dismissed with costs on the scale as between attorney and own client, including the costs of two counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	25 May 2017
Date of judgment:	10 October 2017
Counsel for plaintiffs:	JPV McNally SC (assisted by Z Navsa)
Instructed by:	Webber Wentzel, Johannesburg
Counsel for defendant:	J Mÿburgh
Instructed by:	Errol Goss Attorneys, Parktown North, Johannesburg