REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/32777

(1)	REPORTABLE: ~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3)	REVISED.

....
SIGNATURE **DATE**

In the matter between:

ANGLO AMERICAN SOUTH AFRICA LIMITED Applicant

and

KABWE AND 12 OTHERS First to Thirteenth Respondents

IN RE:

KABWE AND 12 OTHERS First to Thirteenth Applicants

and

ANGLO AMERICAN SOUTH AFRICA LIMITED Respondent

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] Before this court are two interlocutory applications. In the first, the extension application, the applicant, Anglo American South Africa Limited (“Anglo”), sought an order extending the time for the filing of its answering affidavit in an application to certify a class action against Anglo ("the certification application"). In the second, the compelling application, Anglo sought to compel the respondents to disclose certain documents referred to in their founding affidavit, supporting affidavits and annexures, pursuant to Rule 35(12), alternatively Rule 35(13) and (14), alternatively in terms of the court's power to regulate and protect its own process in section 173 of the Constitution.

[2] The proposed class action is exceptional. The respondents intend to claim damages in tort from Anglo on behalf of children and women of child-bearing age who reside in the Kabwe district in Zambia, due to alleged lead pollution from the Kabwe Mine, which operated in the town of Kabwe from 1906 to 1994. Kabwe, previously known as “Broken Hill”, has some of the highest levels of lead pollution in the world. The cause of action is based upon Anglo’s alleged involvement in the affairs of the mine between 1925 and 1974, thus starting and ending 97 and 47 years ago respectively. All the respondents (who are the intended class representatives and the applicants in the certification application) and the estimated 100 000 people comprising the proposed classes, reside in Kabwe and the cause of action is said to be governed by Zambian law.

[3] Not only is the proposed class action itself a novelty in the South African jurisprudential landscape, but so too is the estimated costs and funding model. The Zambian clients are represented primarily by Leigh Day Solicitors (“Leigh Day”) who are based in the United Kingdom (“UK”) and, secondarily, by South African attorneys

Mbuyisa Moleele Attorneys ("MM Attorneys") as well as several counsel. The primary role of the UK solicitors is evident from the "Budget Summary" annexed to the respondents' answering affidavit, which indicates that their fees are projected to exceed the combined total of the South African attorneys' and counsels' fees by over 270%. All parties to the funding scheme (bar MM Attorneys) are located outside of South Africa and thus not subject to this court's jurisdiction. Unlike other funding agreements in previous class actions in South Africa, the funding for this matter is not furnished through a foreign law firm. The proposed class action is funded by a third-party funder, Kabwe Finance Limited ("Kabwe Finance") which is registered in the UK. Kabwe Finance is a majority-owned subsidiary of Augusta Cayman Limited (a Cayman Islands company) and is managed by Augusta Ventures Limited ("AVL"). It was established solely to fund the proposed class action and is funded through investment vehicles managed by Bybrook Capital LLP ("Bybrook"), a UK-based fund manager. Anglo avers that, despite the respondents' averment that the funding scheme is *"comprehensively addressed in the founding papers"* it is not clear who the ultimate source of the funding is, but only that it is channelled through Bybrook's subsidiaries registered in Luxemburg.

[4] MM Attorneys estimate that the costs of the class action will be approximately R95 million "to trial". The respondents allege that Kabwe Finance will pay for all budgeted disbursements and 62% of the budgeted legal and consulting fees of MM Attorneys, South African counsel and Leigh Day, with the remaining 38% of the budgeted and unbudgeted fees and costs to be contingent on a successful outcome in the litigation. Legal fees, consulting fees and disbursements to be paid by Kabwe Finance are paid in terms of a "Case Budget". On a "successful outcome" in the litigation (as variously defined in the respective agreements which the respondents

have thus far disclosed) Kabwe Finance is entitled to a return on its investment (a “Funder’s Return”), being 25% of any award which the class may receive plus all taxed costs (except for unbudgeted costs which accrue to the lawyers). Kabwe Finance has taken "after-the-event” ("ATE") insurance with International General Insurance Co (UK) Ltd (“IGI”), ostensibly to meet an adverse costs order if the litigation is unsuccessful.

THE EXTENSION APPLICATION

[5] In the extension application, Anglo sought an order extending the time for the filing of its answering affidavit in the certification application until end August 2021, alternatively, it sought condonation for the late filing of its affidavit. On the day of the hearing this court granted an order (with reasons to follow) and allowed Anglo to file its answering affidavit on 31 August 2021.

[6] Anglo brings the extension/condonation application in terms of Uniform Rule 27. It is trite that remedies provided in this Rule “cannot be had for the mere asking” and require demonstration of “good cause". What is more, the explanation given must be reasonable. The respondents contended that Anglo had breached the rules and agreed deadlines; that it had failed to properly explain its failures; and that the extension application was an abuse of process.

[7] The primary reason for granting the extension was because it was in the interests of justice to do so.[1] Anglo had filed a comprehensive and detailed affidavit explaining the reasons for the extension application. The facts giving rise to the proposed class action pertain to events at the mine which occurred as far back as nearly 100 years ago. Anglo's alleged involvement in the mine started in 1925 and came to an end in

[1] Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. See *Van Wyk v Unitas Hospital and Another* 2008 (2) 475 (CC) at [20].

1974 by which time it had been nationalised by the Zambian Government. The case is premised on extensive historical, technical and factual allegations, mostly contained in records in an archive in Zambia, where effective access has been difficult and hampered by COVID-19. The respondents rely on extensive expert evidence which needs to be evaluated and responded to, which equally requires access to information primarily in Zambia. The founding papers exceed 2 600 pages filed in 13 lever-arch files, which include eight reports from experts. The respondents and their legal representatives have spent at least 3 years preparing the application and investigations and other work into the case goes back more than 17 years before it was launched.

[8] Taking into consideration the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, and the importance of the issue to be raised in the intended class action, Anglo's application for a four-month extension to file its answering papers, was reasonable in context. The interests of justice required that Anglo be provided a proper opportunity to answer the respondents' case on certification, and the opposition to its extension application was not justified.

THE APPLICATION TO COMPEL

[9] Anglo launched this application, to compel the production of 11 categories of documents. With respect to five categories of documents, the respondents have either now produced the requested information or have provided explanations why they cannot do so. Anglo persists in seeking six categories of documents to be produced, all of which relate largely to the respondents' proposed funding scheme in the class action. They are:

1. The copies of the "Class Member Retainer" or "Client Funding Agreement" as signed by persons purporting to be or to represent class members (prayer 1.1);

2. The Funding Application (prayer 1.4);

3. The Case Budget (prayer 1.5);

4. The full, unredacted ATE Insurance Policy (prayer 1.8).

5. The reports as specified in the March 2020 and December 2020 Consultancy Agreements between MM Attorneys and Leigh Day. (prayers 1.10 and 1.11 respectively).

[10] It is common cause between the parties that the court, in assessing whether the interests of justice favour the certification of the class action, will take into account several issues. They are, including amongst others, whether the class representatives are adequately funded to run the litigation; whether there exists any conflict of interest between the class members, the class representatives, the legal representatives and the funder, Kabwe Finance; the extent to which the class representatives and class members exercise control over the litigation; and whether Kabwe Finance (and others) are in a position to exert undue influence over the litigation. [2]

[11] Anglo submits that the documents sought are relevant to determine the central issues in the certification proceedings. This includes the appropriateness and adequacy of the funding of the litigation, including Kabwe Finance's understanding of the risks and benefits attendant upon the funding arrangement. It is submitted that the documents will, *inter alia*, show whether Kabwe Finance's return on investment —25% of the claims plus all budgeted costs and disbursements — is a reasonable

[2] *Mukaddam v Pioneer Foods (Pty) Ltd and Others* [2013] ZACC 23; 2013 (5) SA 89 (CC) at [34].

ex ante reward for the risk assumed and who is in control of the litigation and whether Kabwe Finance, incentivised by profit, may be able to take over and control litigation for their own benefit at the risk of the respondents and proposed classes. It is submitted that the respondent's proposed class action significantly exceeds the anticipated complexity and cost of a typical class action due to the several extraordinary features, which Anglo says should "raise serious questions regarding the interests of justice in the certification application".

[12] The respondents contend that Anglo's requests for the relevant documents are abusive and a mere delaying tactic as they have already delivered a total of 660 documents, in response to 279 itemised requests. The respondents argue that the remainder of the documents sought are firstly not relevant, and secondly that some are subject to legal privilege. It is contended that Anglo's repeated complaints about the novelty, scale and sophistication of the funding arrangements, does not warrant a departure from the standard rules on the production of documents in motion proceedings, nor does it provide a basis to override the respondents' rights to legal professional privilege. Moreover, because the estimated costs to trial are substantial, these costs could never be covered by the respondents and the proposed class members, who are predominantly children and their parents or guardians living in deprived communities in Kabwe. Nor would it be feasible for these costs to be covered by a single legal firm. Accordingly, the respondents' attorneys have secured third-party funding for this litigation from Kabwe Finance, a member of the Augusta Group, which is the UK's largest litigation funder, and who has committed over GBP 266 million to more than 200 cases.

[13] The respondents further submit that the respondents, in their founding papers in the certification application, made full and detailed disclosure, which is among the

most extensive of any certification application filed in South Africa to date. It is submitted that the terms of this funding are set out in the Litigation Funding Agreement concluded between MM Attorneys, Leigh Day and Kabwe Finance, which has been fully disclosed to this court. It is contended that the documents already provided to Anglo make clear that Kabwe Finance will have no control over the litigation, but will be entitled to regular updates on the progress of the litigation from MM Attorneys and Leigh Day. The respondents also deny that the ultimate source of the funding is unclear as Kabwe Finance has disclosed the source of its funds, which are investment vehicles managed on behalf of institutional investors by Bybrook Capital LLP. In addition, Kabwe Finance has secured ATE Insurance coverage from IGI to meet an adverse costs order in the event the litigation is unsuccessful and to ensure that the class members will not be required to make any payment in respect of adverse costs. Mr Robert Hanna, managing director of AVL further confirmed, under oath, that Kabwe Finance has sufficient committed capital to fund this litigation and emphasises that no Augusta company has ever failed to meet a contractual obligation to provide funding, in over 200 cases funded to date. It is contended that this disclosure will provide the certification court and Anglo with ample basis to assess the adequacy of the respondents' legal representation and the funding arrangements. In addition, the respondents contend that their attorney, Ms Zanele Mbuyisa, from MM Attorneys, (who have engaged a team of five counsel, including three senior counsel,) and Mr Richard Meeran, a partner at Leigh Day, who both deposed of affidavits, have decades of combined experience in class action litigation, and MM Attorneys has repeatedly confirmed on affidavit and in all of the agreements that it has the ultimate control over the litigation. It is therefore submitted that any allegations made by Anglo to the contrary, are baseless and unworthy.

The Discovery Process

[14] Discovery assists the parties (and the court) in discovering the truth and, by doing so, assures a just determination of the case. No party, however, has an absolute right to discovery and the process must not be "*abused or called in aid lightly*."[3]

[15] The overwhelming majority of the documents sought by Anglo fall within the ambit of Rule 35(12). Rule 35(12) provides that:

> "*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 a 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."*

[16] Under Rule 35(12), where there has been reference to a document in an affidavit, and may be relevant, it must be produced. A detailed reference is not required, and the reference may be direct or indirect.[4] In addition, reference to a document in annexures to an affidavit may be subject to production under the rule, provided that the requesting party indicates the basis for requesting the document.[5] There is no need for the requesting party to show exceptional circumstances.[6]

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[3] *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999(3) SA 500 at 513G-H.

[4] See *Democratic Alliance and Others v Mkhwebane and Another,* 2021 (3) SA 403 (SCA) at [28].

[5] *Democratic Alliance* at [36] and [40].

[6] *Democratic Alliance* at [41].

[17] Rule 30A affords a court a discretion to allow or refuse disclosure under Rule 35(12). In *Centre for Child Law v Hoërskool Fochville*,[7] the Supreme Court of Appeal ("SCA") held that courts should steer away from determining an application for discovery strictly on the basis of who bears the *onus*, but should rather determine it on the following basis:

> "For my part I entertain serious reservations as to whether an application such as this should be approached on the basis of an onus. Approaching the matter on the basis of an onus may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the disharmony on the point. That notwithstanding, it is important to point out that the term onus is not to be confused with the burden to adduce evidence (for example, that a document is privileged or irrelevant or does not exist). In my view the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant."

[18] The respondents submit that, in striking this balance, a court must be particularly mindful of the rights of the parties at stake in the class action, including the best interests of the children and the constitutional right of access to justice. The applicants in the class action are predominantly children, assisted by their parents or guardians. They have expressly invoked sections 28(2) of the Constitution and section 14 of the Children's Act[8] in bringing the certification application.

[19] In this regard, this component of the interests of justice test in certification proceedings is no less weighty just because the proposed classes include many children. The court, as the guardian of the child's best interests, has a heightened duty to scrutinise the funding arrangements. Because the purported claims of

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7 *Centre for Child Law v Hoërskool Fochville and Another* 2016 (2) SA 121 (SCA).

8 Act 38 of 2005.

thousands of Zambian children may be rendered *res judicata* by an action in a foreign jurisdiction, it is the duty of the court to ensure that these claims are adequately pursued, by way of funding arrangements that are not only sufficient, but that do not deliver extortionate profits for third party funders at the cost of the children and that insulate the classes and their lawyers from undue influence from Kabwe Finance. It is therefore irrelevant that Anglo is not, similarly, required to reveal its funding arrangements. It is not required to disclose its funding, because, unlike class members, Anglo is not dependent on the court to safeguards its interests against (hypothetically) unscrupulous funding arrangements.

[20] The discovery process in class certification matters is novel, not because different rules apply, but because the process necessarily requires the applicant for certification to make extensive disclosures upfront. Applicants must disclose their cause of action before even issuing summons and must also disclose financial arrangements, and make disclosures regarding the competence and capacity of their legal representatives. The US Supreme Court[9] has held that because of their nature, certification proceedings may therefore require of the court to "probe behind the pleadings before coming to rest on the certification question", a process which requires "rigorous analysis" of whether the requirements for certification are met.

Relevance

[21] A party may only obtain inspection of documents and tape recordings relevant to the issues on the pleadings. The respondents do not dispute that they are in possession of the documents sought, but contend that the majority of the documents sought by Anglo are not relevant to the certification proceedings.

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[9] *General Telephone Co of Southwest v Falcon* 457 U.S. 147, 160 - 161.

[22] The SCA recently had the occasion to revisit Rule 35(12) and how relevance is to be tested under this rule. In the matter of *Democratic Alliance and Others v Mkhwebane and Another,*[10] the court held that relevance is assessed in relation to Rule 35(12), not on the basis of issues that have crystallised, as they would have, had pleadings closed or all the affidavits been filed, but rather on the basis of aspects or issues that might arise in relation to what has thus far been stated in the pleadings or affidavits and possible grounds of opposition or defences that might be raised. The court held that the question to be addressed is whether the documents sought might have evidentiary value and might assist the applicants in their defence to the relief claimed in the main case. Supposition or speculation about the existence of documents or tape recordings to compel production will not suffice. The court, adopted the approach in *Hoërskool Fochville* and held as follows:

> "The court will have before it the pleading or affidavit in question, the assertions by the party seeking production as to why it is required and why it falls within the ambit of the rule and the countervailing view of the party resisting production. The basis for requiring the document, at the very least, has to be provided. The court will then, based on all the material before it, exercise its discretion in the manner set out in Hoërskool Fochville."[11]

[23] The burden is therefore on the respondents to adduce evidence that the documents are either irrelevant or privileged.

Privilege

[24] The respondents assert legal privilege over four of the five requested documents, namely, the Funding Application, the Case Budget, the unredacted ATE Policy, and the reports in terms of the Consultancy Agreements. With respect to the

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[10] See footnote 4. *Democratic Alliance and Others v Mkhwebane and Another* 2021 (3) SA 403 (SCA) at [41].

[11] *Democratic Alliance* at [40].

reports in terms of the Consultancy Agreements, the respondents assert privilege on their own behalf as well as on behalf of Kabwe Finance.

[25] Adv. Budlender SC, counsel on behalf of Anglo, submits that as the respondents have embarked on a course of action to certify an extraordinary class action, subject to an extraordinary funding scheme, the respondents conducted themselves in a manner that anticipated the type of disclosures sought in this compelling application. This equally applies to their legal representatives, Kabwe Finance, the investors and other parties to the scheme. He contends that, as the parties to the agreements explicitly undertook to make disclosures in order to satisfy the court's requirements in the certification process, it is apparent from the disclosed agreements framing the proposed funding scheme that all parties entered into those agreements with the knowledge and expectation that their dealings and arrangements would not be confidential. In any event, so it is argued, even if certain information in the requested documents was privileged (which Anglo denies), any privilege has been impliedly or imputably waived. In addition, privilege may, depending on the facts of a particular case, be outweighed by countervailing considerations. It is contended that in the circumstances of this case, the public interest and the interests of justice require that the disclosure be made to ensure that the certification court has a full view of the ramifications of its decision.

[26] Adv. Marcus SC, on behalf of the respondents, submits that our courts have long held that the rules on privilege are not merely procedural or evidential rules, but are grounded in substantive rights and public policy. The purpose of these rules is to promote the administration of justice by allowing clients to engage freely with their legal representatives, thereby securing access to justice and promoting the

functioning of the adversarial legal system.[12] These rules take on even greater significance where the rights of child litigants are at stake. If an order for disclosure as demanded by Anglo be granted by this court, it would not only deprive the respondents of the protections of legal privilege, but would also have a chilling effect on litigants' ability to obtain litigation funding and insurance in order to have their disputes resolved in court. The effect would be that parties, like the respondents, who are unable to afford the costs of litigation out of their own pocket, and are reliant on others to fund the litigation or to provide insurance, will forfeit the protection of legal professional privilege when they communicate with funders and insurers. Furthermore, this court and the SCA has confirmed that third-party litigation funding can play a role in promoting access to justice and is consistent with section 34 of the Constitution. It is submitted that Anglo's approach to privilege undermines these rights, and if accepted would establish a bifurcated system of privilege, in which litigants who are reliant on third-party funders or insurers would be stripped of protection in respect of their confidential communications. By contrast, wealthy, self-sufficient litigants like Anglo would not only be protected by privilege but would be granted unfettered access to their opponent's most sensitive legal advice and strategy and a vast number of common litigation funding arrangements would be affected.[13]

The law on privilege

[27] Firstly, a party may assert legal advice privilege or litigation privilege. The Supreme Court of Canada[14] summarised the differences between the two species of privilege as follows: for information to be eligible to be legal advice privilege, the

[12] See *Astral Operations Ltd v Minister for Local Government, Western Cape* 2019 (3) SA 189 (WCC) at [6] – [9]. *S v Safatsa and Others* 1988 (1) SA 868 (A) at 885 – 886.
[13] See *Centre for Child Law v Hoërskool Fochville* 2016 (2) SA 121 (SCA) at [26]; *Goldfields Ltd v Motley Rice* 2015 (4) SA 299 (GJ) at [103]; *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) at [43] – [46].
[14] *Blank v. Canada* [2006] 2 S.C.R. at [28].

respondents must show that: (a) the information is legal advice; (b) which is given by a legal advisor; (c) in confidence to a client; and (d) in respect of which privilege is claimed. Litigation privilege, on the other hand, protects communications between litigants or their legal advisor and third parties, if such communications are made for the purpose of pending or contemplated litigation. Litigation privilege has two established requirements: (a) 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, (b) litigation was pending or contemplated as likely at the time. The court stated that there are at least three important differences between the two. Solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. It is therefore crucially important to distinguish between “litigation privilege” and “solicitor-client privilege”.

[28] Anglo contends that certification proceedings are not litigation in the ordinary course. Class certification proceedings are unique in many ways, especially because certifying courts have the duty to inquire into and, if necessary, halt proceedings, if the funding arrangements are inadequate. This may be the case, for instance, if the prospective classes do not have adequate funding or if the funding arrangements are unlawful or otherwise creates conflicts within the classes or with their lawyers and funders. It is submitted that the respondents fail to appreciate the principles underlying the protection of legal professional privilege. Those principles serve to protect confidential communications between lawyers and their clients for the purpose of seeking legal advice. They are not there to protect otherwise “sensitive”

communications with funders in which clients are not involved – particularly not in the context of an application for certification of a class action.

[29] In *A Company and Others v Commissioner, South African Revenue Service*[15] Binns-Ward J held that legal professional privilege protects *"the actual communications between the client and the lawyer involved in the seeking and giving of the advice … or references in other documents that would disclose their content or from which their content might be inferred that are the matter in respect of which legal advice privilege may be claimed."* He reached this conclusion with particular reliance to the House of Lords decision in *Three Rivers District Council (No 6)*.[16] That line of authority was applied in *Edwardian Group Ltd v Singh*,[17] ("*Edwardian Group*"), a judgment of the Chancery Division of the High Court of England and Wales. In *Edwardian Group,* a group of shareholders relied on third-party litigation funding to bring a claim. In response, an application was launched to compel discovery of a broad category of documents referred to as "Litigation Funding Documents", which encompassed the shareholders' efforts to obtain third-party litigation funding over a number of years, including their funding applications and related correspondence. Morgan J noted that legal advice privilege is not confined to communications between clients and their lawyers for purposes of legal advice, but "extends to other material which "evidences" the substance of such communications. Three sets of documents were ultimately withheld or redacted, namely: (1) back and forth parts of correspondence with funders or brokers; (2) discussions between the Petitioners/their solicitors and funders relating to the terms of the funding and the

[15] 2014 (4) SA 549 (WCC) at [31].

[16] *Three Rivers District Council v Governor and Company of the Bank of England* (No 6) [2004] UKHL 48.

[17] [2017] EWHC 2805 (Ch).

reasons for those terms and the acceptance or rejection of those terms; and (3) references to the Petitioners' legal advice as to the merits and/or strategy.

[30] Secondly, it is well established that a court will not readily go behind a party's affidavit explaining why certain documents are privileged, which is conclusive as to the status of the documents, unless the other side can prove that the invocation of privilege is wrong to a "reasonable degree of certainty".[18] This principle was recently affirmed by the court in *Turkcell Iletisim Hizetleri AS and Another v MTN Group Limited and Others,*[19] a case in which the respondent's attorneys successfully invoked privilege on behalf of MTN. The case concerned an application to compel MTN and its former directors to discover documents that were explicitly referenced in an investigation report into alleged unlawful conduct in Iran. Those documents included witness statements and notes obtained during the course of the investigations, over which MTN and its former directors asserted privilege. The attorney deposed to an affidavit on behalf of MTN resisting discovery of these documents. The court took the attorney at his word that these documents were privileged and refused to second-guess his assurances. It held that the threshold to successfully impeach factual allegations supportive of privilege is high, and restated that it must be shown to be *"wrong to a reasonable degree of certainty."*[20] Wepener J, referred to *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd,*[21] with approval in which it was held that:

> "Subject to the exceptions mentioned below, the statements in the affidavits of documents are conclusive with regard to the documents that are... in the

[18] *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T). See also *Sports Direct International Pic v Minor* [2015] IEHC 650 at [39].

[19] [2020] ZAGPJHC 244 (6 October 2020) at [115] – [117].

[20] Turkcell at [67].

[21] See Footnote 27 at [67]. *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T).

> possession... of the party giving the discovery, both as to their relevancy, and as to the grounds stated in support of a claim of privilege from production for inspection.
>
> So when production for inspection is sought it will only be ordered where the Court is reasonably certain from the affidavit of documents itself, or from the nature of the case, or of the documents in question, or from the admissions made by the party in his pleadings or in any other affidavit, that he has erroneously represented or misconceived their nature or effect."

[31] The same point was made in the *Edwardian Group* matter. Morgan J concluded that legal advice privilege extends to communications with a third-party litigation funder or prospective funder, including funding applications, which would give an opponent "a clue to the advice given" by the legal representative or "betrays the trend of the advice being given". The court thus rejected the applicants' attempts to go behind the explanation provided by the shareholders' solicitor as to the privileged content of these documents. He held that a court could only go behind these statements if it was "reasonably certain" that the solicitor was wrong. Judge Morgan summarised the test, in relevant part, as follows:

> "It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from: (a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed … . (b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect … . (c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points … ."

[32] Thirdly, legal professional privilege extends to common interest privilege. Common interest privilege entails the preservation of legal professional privilege where the third party, recipient or creator of a communication has a common interest in the subject of the privilege with the primary holder. The key principle is that privilege is not lost where there is limited disclosure for a particular purpose or to

parties with a common interest. In *Turkcell*,[22] the court found that joint and common interest privilege forms part of South African law by virtue of the provisions of section 42 of the Civil Proceedings Evidence Act[23], but even if it did not, joint and common interest privilege would be an appropriate development of the common law, because it gives effect to the underlying public policy of legal privilege to: a) encourage and promote full and factual disclosure by clients to their legal advisors when seeking legal advice; and b) support the functioning of the adversarial legal system of litigation. I agree with Adv Marcus SC, that the sharing of privileged communications with a third-party funder or insurer can be added to these clear examples of common interest privilege. All have a shared interest in the outcome of the litigation and all have a common interest in ensuring the confidentiality of their communications.

[33] Fourthly, privilege is a right that vests in the client and "once privileged always privileged", unless the client waives that right. Disclosure of privileged documents and advice to a third-party funder, on a confidential basis, does not change the privileged nature of the documents or the client's rights. In *Contango Trading SA v Central Energy Fund SOC Ltd,*[24] the SCA explored the difference between implied and imputed waiver. After consideration of domestic and foreign case law the court concluded that there is no difference between implied waiver and a waiver imputed by law, but that they are different expressions referring to the same thing. The court held that implied or imputed waiver arises where two requirements are satisfied: First, disclosure of some or all of the privileged material is objectively inconsistent with the intention to maintain confidentiality, and second, that disclosure introduces into the claim or defence contentions that could only fairly be responded to if there

[22] At [106].

[23] Act 25 of 1965.

[24] 2020 (3) SA 58 (SCA) at [34].

was full disclosure. Wallis J further confirmed there is no general overarching principle that privilege can be overridden on grounds of fairness alone. The court further held that *"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"* and there is "*no automatic waiver as a result of partial disclosure"* of privileged material. Whether there has in fact been implied waiver of privilege must be decided based on the facts of each case.

[34] I am satisfied that in the current matter there could be no suggestion that sharing legally privileged material with the funder or insurer, in confidence, constituted an implied or imputed waiver: objectively, it could never be suggested that such communications entail an intention to abandon all rights of confidentiality. On the contrary, clause 5 of the Litigation Funding Agreement includes an express confidentiality clause which sets out the common undertaking of confidentiality in respect of privileged information.

[35] With these principles in mind, I will now turn to address each of the documents sought by Anglo in turn.

THE CLASS MEMBER RETAINER

[36] The Class Member Retainer is an agreement referred to in the "Claim Funding Agreement", an annexure to the respondents' founding papers in the certification application.

[37] Anglo seeks access to all 1055 signed copies of the Class Member Retainer.[25] Clause 1.1. of the Claim Funding Agreement defines the Class Member Retainer as

[25] In Anglo's note in reply to the respondent's further note, it requests only a "fair sample of the signed agreements".

“a client-attorney agreement between MM Attorneys and the class members, which the class members will either execute directly or will be deemed to have acceded to pursuant to a court approved opt out regime, and pursuant to which the class members agree that Kabwe Finance is entitled to share in the proceeds in accordance with the Claim Funding Agreement.”

[38] The respondents have not denied the existence nor the relevance of the Class Member Retainer. In the founding affidavit in the certification application, the respondents stated that some 1,055 class members signed the Class Member Retainer pursuant to which they are represented in this class action and annexed thereto a *pro forma* **class representative-specific** version of the Client Funding Agreement. In this application to compel the respondents have annexed a *pro forma* **member specific** version of the Client Funding Agreement to their answering affidavit in the certification, claiming that it is identical to the Client Funding Agreement signed by the class representatives, with the only difference being that references to the duties of class representative were removed. (Emphasis added).

[39] There are differences between the *pro forma* version of the **class member-specific** Agreement attached to the respondents answering affidavit and the **class representative-specific** version of the Agreement. Notably, the nature of the claim which MM Attorneys has advised the class members have good prospects of success, differs from the nature of claim they have advised the class representatives on. With respect to the class representatives, they have been advised on prospects in respect of a claim for persons *"who have been residents of the Kabwe District, near the operation of the Kabwe mine for a significant proportion of their residence between 1925-1974.”* The qualification as to the period of the claimants' residence in Kabwe is removed in the *pro forma* class member-specific version of the Agreement.

This indicates a difference in how the scope of the claim and the definition of the classes are to be conceived. This may have ramifications in the certification court's assessment of the cause of action, the existence of the class, as well as the suitability of the class representatives.

[40] The issue, however, is not the difference between the *pro forma* agreements, it is whether it is necessary for Anglo to have the **signed** version of the Class Member Retainer in order to consider the grounds of its defence. The respondents argue that it is irrelevant as Anglo has a copy of the *pro forma* Class Member Retainer and copies of the signed Class Representative Retainer. The respondents stated that the document signed by the class members is the same as the *pro forma* version provided. Anglo contends that the mere say-so of the respondents that the agreements are the same is not sufficient, and that they should be compelled to discover the signed copies.

[41] Anglo has been provided with the *pro forma* version of the class member-specific Client Funding Agreement / Class Member Retainer, which was concluded between MM Attorneys and 1055 prospective class members. The founding affidavit in the certification application indicates that retainers were concluded prior to the institution of the certification proceedings. Anglo and the certification court have sufficient confirmation to assess the respondents' compliance with the legal and ethical requirements for certification of the class. There is no factual basis to find that there is a difference between the *pro forma* copy and the signed Retainer. I can find no logical basis to compel discovery of the signed copies whilst Anglo is in possession of a *pro forma* copy of the Retainer. The signed copies can have no relevance to the certification proceedings and disclosure is refused.

THE FUNDING APPLICATION

[42] It is common cause that a Litigation Funding Agreement was concluded between MM Attorneys, Leigh Day and Kabwe Finance. The Litigation Funding Agreement has been discovered by the respondents.

[43] Prior to the conclusion of the Litigation Funding Agreement, a funding application (“the Funding Application”) was completed and submitted to secure third-party litigation funding. It is a document constituting the application to Augusta for litigation funding by Leigh Daly and MM Attorneys and was presented for the approval of Kabwe Finance’s investment committee. It was completed by Kabwe Finance’s due diligence team in close cooperation with Leigh Daly. The Funding Application is referenced in the Litigation Funding Agreement, but no reliance is placed on it in the respondents’ founding affidavit in the certification proceedings.

[44] Anglo seeks discovery of the Funding Application. The respondents refuse discovery on two bases: firstly, that the Funding Application is irrelevant; and secondly, if it is found to be relevant, that the document is privileged.

[45] Anglo alleges that the Funding Application is severable and comprises of different “sections” or “documents”, including a know-your-customer ("KYC") assessment carried out by Kabwe Finance, a due diligence report (to be carried out by Kabwe Finance in respect of Leigh Day and MM Attorneys), and a case summary prepared by Leigh Day. Its understanding of the Funding Application was drawn from the agreements the respondents attached to their founding papers in the main application. The respondents dispute that the Funding Application can be severed and contend that it is one document and that the whole of the document addresses

the legal and evidential intricacies of this case and summarises the potential arguments to be raised for and against the claim.

[46] The respondents contend that the Funding Application can have no conceivable relevance to these proceedings as it, *inter alia*, predated the conclusion of the Litigation Funding Agreement, which is conclusive as to the terms of the funding relationship between the parties. It is submitted that the only reason Anglo wants insight in the Funding Application is because it wants to gain an advantage in this litigation by having advance access to the respondents' legal arguments and their litigation strategy. Anglo, on the other hand, argues that if regard is had to the following facts namely: that the parties to the funding scheme are located in several jurisdictions; Kabwe Finance itself appears to be a shell or pass-through vehicle with no investment policies, agreements or business plan; and, that the ultimate source of the funding is unknown, the Funding Application would, at the very least, on the face of it, clarify the extent to which Kabwe Finance, AVL, Leigh Day and MM Attorneys have assessed their own compliance with laws, regulations and ethical constraints in implementing the current scheme. With reference to the matter of *De Bruyn v Steinhoff international Holdings N.V. and Others*,[26] in which the court held that a certification court must determine whether the particular reward for the funder is *ex ante* a reasonable return for the risk assumed in funding the litigation, it is contended that the Funding Application will assist the court in assessing Kabwe Finance, AVL, Leigh Day and MM Attorneys' compliance with the laws, regulations and ethical constraints applicable in several jurisdictions across which the funding scheme operates. It is contended that it will further show Kabwe Finance's understanding of the commercial risks and benefits attendant upon the arrangement, which will in turn show whether its contemplated return in excess of 25% of the rewards of the

[26] [2020] ZAGPJHC 145; 2020 JDR 1405 at [94] and [95].

litigation is *ex ante* reasonable. In addition, with reference to *Fehr v. Sun Life Assurance Company of Canada,*[27] *("Fehr"),* a judgment of the Ontario Supreme Court, Anglo contends that the Funding Application may show the extent of the alignment of interests between the class members and Kabwe Finance, as well as the role of the legal representatives in respect of those interests. It may also provide insight on the role-players actual control over the case.

[47] As far as the compliance with the laws, regulations and ethical constraints are concerned, the respondent's attorney, Ms Mbuyisa, stated under oath, that the level of detail required of the Funding Application is reflected in the resulting Litigation Funding Agreement. She stated that both MM Attorneys and Leigh Day had to warrant the accuracy of the information contained in the Funding Application and warrant that they were not aware of any matter, fact and/or circumstance not disclosed to Kabwe Finance which could have a material adverse effect on the case, the likelihood of obtaining a successful outcome, and the successful enforcement of any award. She stated that it is clear that the parties regard themselves to be legally and ethically compliant from the fact that the Litigation Funding Agreement was concluded and this fact is also confirmed in the all the affidavits filed thus far.

[48] When it comes to Kabwe Finance's understanding of the commercial risks and benefits, this court is not convinced that Kabwe Finance's opinion will have any influence on the certification court's task in determining whether this return is indeed reasonable. This is so, because Kabwe Finance's view is irrelevant. The Funding Application will, therefore, not assist the certification court in assessing this question, but the agreement that was ultimately entered into between the parties, namely the

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[27] *Fehr v Sun Life Assurance Company of Canada*, 2012 ONSC 2715 (CanLII).

Litigation Funding Agreement, will show whether Kabwe Finance's return on investment is a reasonable, *ex ante* reward for the risks assumed.

[49] Anglo further insinuates that the funding application will *"show the alignment of interests between the class members and Kabwe Finance"* and that it will *"provide insight on the role-players' actual control over the case"*. There are no facts to substantiate these insinuations of impropriety. They are conclusively answered by the clear terms of the relevant agreements governing the relationship between the parties and the affidavits filed in the certification application. The Litigation Funding Agreement clearly provides that: *"[n]either Kabwe Finance nor Leigh Day will exercise control over the Case, which will be conducted by MM acting justly and reasonably in the interests of the Class Members".* It is repeated in clause 4.6 that *"MM will have care and conduct and control over the conduct of the Proceedings".* This is confirmed in Ms Mbuyisa's founding affidavit, where she affirms that "*Mbuyisa Moleele will act as the attorneys for the Client and will have control of the conduct of the litigation"* and that *"Kabwe Finance, AVL and other members of the Augusta Group will have no control over the litigation, but will be entitled to be regularly updated by Mbuyisa Moleele and Leigh Day".* It is further confirmed by Mr Hanna in his affidavit, where he emphasises that AVL and, by extension Kabwe Finance, are bound by the Association of Litigation Funder's Code which prohibit third-party funders from *"taking steps that cause or are likely to cause the funded party's counsel to act in breach of their professional duties"* and *"seeking to influence the funded party's counsel to cede control or conduct of the dispute".* What is more, the respondents are represented by highly experienced attorneys and a team of five independent advocates, including three senior counsel. The insinuation that the respondents' legal team would somehow be party to an elaborate ruse, in which

control is handed over to a funder, in breach of the clear terms of all funding agreements and commitments made under oath, is unfounded.

[50] It is trite that a court will not readily go behind a party's affidavit explaining why certain documents are not relevant. I am not convinced that the Funding Application is relevant to reasonably anticipated issues in the certification proceedings. Accordingly, Anglo's request for the funding application has no basis and must be dismissed. In any event, it will still be the prerogative of the certification court to exercise its discretion and request further documentation on these issues during the hearing of the matter, if it so requires. This is in line with what the Constitutional Court said in *PFE International and Others v Industrial Department Corporation of South Africa Ltd:* [28]

> "Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules."

That ought to be the end of the matter. But, the application to compel discovery must also be refused because it is privileged. I say so for the following reasons.

[51] Firstly, the Litigation Funding Agreement that was entered into as a result of the Funding Application, expressly protects the confidentiality of communications between the parties. No direct reliance is placed on the Funding Application in the respondents' application for certification. There is no conceivable reason why Anglo should be granted access to this document in preparing its answering application. On the contrary, and striking a balance between the parties, it would be unfair to

[28] 2012 (1) SA 1 (CC) at [30].

grant access to the Funding Application. The respondents would be highly prejudiced if Anglo were given a “sneak peek” at their litigation strategy and the legal arguments that they intend to raise.[29]

[52] Secondly, Anglo’s reliance on *Fehr* to advance the argument that there is something inherently impermissible in sharing legal strategy and legal advice with a third-party litigation funder, is misdirected. In *Fehr,* the court was confronted with an *ex parte* application for the approval of the funding agreement in a class action, coupled with a request that the funding agreement should be kept secret and not disclosed to the other side. The court gave several reasons why, in the context of class actions, retainer agreements and the content and details of third-party funding agreements are not privileged. The court considered the fact that all class members have a right to understand and have full insight into the funding arrangements in the class action and should therefore be able, at any stage to demand access to the underlying documentation governing those arrangements. The court held that any privilege asserted over the content and details of the underlying agreements is therefore "more illusory than real". The court further held that in order to determine properly whether the proposed class representatives are suitable, it should not merely accept the certification applicants' answers relating to funding, and was required to delve further into the evidence. The reason is because the answers go to the independence and motivations of the representative plaintiff as well as the ability of the representative plaintiff to see the action through to completion. It will therefore be relevant for the court to know whether the third party has an interest in the litigation that is, or could be divergent from the interests of the representative plaintiff or the class. In the context of third party funding arrangements, the court in *Fehr* was particularly concerned to know the details of the arrangements with the third party to

[29] See *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 1585 (CanLII) at [45] – [46].

ensure that the representative plaintiff and not the third party is actually calling the shots. The court held that if it was established that the third party was not a member of the class and was supporting the litigation financially for collateral reasons, that alone might be reason to question the independence and suitability of the representative plaintiff.

[53] The court in *Fehr* further held that it was both unnecessary and wrong to include information in a third party funding agreement that disclosed counsel's legal opinion about the merits of the litigation or information that will reveal how counsel proposed to carry out the litigation beyond what might be imparted in the litigation plan (that would be disclosed for a certification motion). This is because it would mean that the third party had assumed control of the client's litigation, which is improper, and would cause the court to reject the third party funding agreement.

[54] Anglo therefore submits that if the respondents shared otherwise privileged information (including their litigation strategy) with Kabwe Finance in the Funding Application, then that would indicate that Kabwe Finance exerts inappropriate control over the litigation. It is therefore in the interests of justice for the court and Anglo to establish the extent (if any) to which the respondents furnished Kabwe Finance with otherwise privileged information.

[55] The facts in the present matter are distinguishable from the facts in *Fehr*. In *Fehr*, the court was commenting on the impermissibility of reproducing legal advice and strategy in the Litigation Funding Agreement. That would indeed be inappropriate, as it would suggest that Kabwe Finance has contractually bound the parties to pursue a particular legal strategy, which would give it control over the litigation. The Funding Application must therefore be distinguished from the Litigation

Funding Agreement. Confidential disclosure of legal advice and litigation strategy with a prospective third-party litigation funder in a funding application, in order for a funder to arrive at an informed decision on litigation funding, is different. In the matter of *Stanway v. Wyeth Canada*,[30] a decision of the British Columbia Supreme Court, it was held that such confidential communications between the plaintiff, her counsel and a private financer in respect of the merits of the litigation and the litigation budget, and other *"highly sensitive topics relating to the plaintiff's strategy and trial stamina"* are privileged.

[56] The Ontario Superior Court of Justice has also emphasised that third-party funders must protect the confidentiality of privileged information that they receive in the course of litigation. In *David v Loblaw*,[31] the Superior Court held that "*[t]o be approved, the third party funding agreement must contain a term that the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information.*"[32] In *Marriott v General Motors Company of Canada*,[33] the Superior Court approved of a funding agreement which contained the following protections, which the court held were consistent with its previous jurisprudence:

> (xiv) The Funding Agreement protects the confidentiality of any communication or document that may pass between counsel, the current plaintiff and any additional plaintiffs in this action and CFI [the third-party funder], and makes that information subject to solicitor-client privilege, litigation privilege, and settlement communication privilege; (Emphasis added)

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30 Stanway v. Wyeth Canada Inc., 2013 BCSC 1585 (CanLII) at [43] and [46].

31 David v. Loblaw, 2018 ONSC 6469 (CanLII).

32 Ibid at [12].

33 Marriott v. General Motors of Canada Company, 2018 ONSC 2535 (CanLII).

> (xv) Under the Funding Agreement, CFI can only use the information for the purpose for which it was provided and may not disclose the information to any person other than the plaintiff and the plaintiff's lawyers retained in the proceeding;
>
> (xvi) Pursuant to the order, CFI is bound by the deemed undertaking rule to the extent any evidence obtained from the defendants is provided to CFI;"[34]

[57] As discussed earlier, legal professional privilege is not confined to communications between a client and their attorney for purposes of advice, but also covers other documents, which reproduce or evidence the advice received by a client.[35] In short, funding applications which evidence legal advice, either by reproducing that advice, summarising its content, or otherwise providing "a clue to the advice given" by the legal representative or which "betrays the trend of the advice being given", are protected under the broad scope of legal advice privilege. This will necessarily include documents shared in confidence with prospective or current litigation funders that reproduce or evidence legal advice. This test echoes the test endorsed by the court in *Turkcell*. The Litigation Funding Agreement contains an express term protecting legal privilege. It can never be suggested that those communications with a third-party funder are not protected by privilege, when litigation funding agreements must safeguard that privilege. In these circumstances the Ontario approach is fully supportive of the respondents' position: there is nothing necessarily impermissible in sharing privileged information with a funder, and privilege is not lost in the process. The legal advice reproduced or summarised in the Funding Application was privileged in the hands of the respondents and "once privileged always privileged", unless waived by the respondents.

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[34] Ibid at [9].

[35] See *A Company* at [31].

[58] Thirdly, the respondents' attorney, Ms Mbuyisa, explained that the Funding Application is not a mere "Know Your Customer" due diligence exercise to *"ensure compliance with relevant laws and regulations"* as contended by Anglo, but addresses the legal and evidential intricacies of this case and summarises potential arguments to be raised for and against the claim. Ms Mbuyisa further explains that the Funding Application is privileged as it *"explicitly* ***references and reproduces*** *legal advice and opinions on these issues which were obtained by the respondents in anticipation of this litigation and were summarised for Kabwe Finance on a* ***confidential basis****".* (Emphasis added). Anglo's attempts to go behind Ms Mbuyisa's description of the content of the funding application and her explanation as to why it is privileged is not allowed, as Anglo failed to satisfy the court that her description was "wrong to a reasonable degree of certainty".

[59] Fourthly, as stated earlier, Anglo has made out no tenable case for waiver, express or imputed. Making a funding application to a third-party funder does not objectively evidence an intention to abandon confidentiality. On the contrary, Ms Mbuyisa confirms that the relevant legal advice and opinions were summarised "on a confidential basis". In any event, the funding application also falls within the category of joint or common interest privilege. The application was prepared in contemplation of this litigation, it was shared in contemplation of this litigation, and the parties have a common interest in its confidentiality.

[60] Lastly, Anglo alleges that the respondents do not differentiate between the various documents which comprise the Funding Application. In this respect Anglo contends that the "Case Summary prepared by Leigh Day" component of the Funding Application is the only document described in the definition of the Funding Application which may, at least theoretically, reproduce any advice or opinions on

the proposed class action. But, so it is argued, even if the respondents could assert legal privilege over the Case Summary prepared by Leigh Day, the respondents have provided no indication why the other documents comprising the Funding Application are privileged — including the due diligence report and the KYC Assessment. It is submitted that by definition, the due diligence report and KYC Assessment cannot be understood to contain legal advice relating to the class action. These are documents prepared by AVL for Kabwe Finance, neither of whom are parties to the litigation. Logically, these documents embody assessments of the risk profiles and financial and legal standing of the parties to the funding agreements. It is further contended on behalf of Anglo, that the respondents failed to draw a distinction between documents which are privileged *per se* and those that don't enjoy a "blanket privilege". As the Funding Application falls in the latter category, it must be produced – at worst for Anglo, duly redacted only for matter constituting a direct reference to legal advice. Anglo contends, with reference to the judgment in the Chancery Division in *Financial Services Compensation Scheme v Abbey National Treasury Services*,[36] that privilege would therefore only extend to parts of documents that make "direct" reference to legal advice, requiring the production of every other portion of the document.

[61] In *Sports Direct International PLC v The Financial Reporting Council*,[37] the English Court of Appeal summarised the general approach to redaction and the court's aversion to "fine arguments" and "hair-splitting". It held that in considering whether a document is covered by [legal advice privilege], the breadth of the concepts of legal advice and continuum of communications must be taken into account. It had the following to say:

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[36] [2007] EWHC 2868 (Ch).

[37] *Sports Direct International PLC v The Financial Reporting Council* [2020] EWCA Civ 177 at [55].

> v) Although of course the context will be important, the court is unlikely to be persuaded by fine arguments as to whether a particular document or communication does fall outside legal advice, particularly as the legal and non-legal might be so intermingled that distinguishing the two and severance are for practical purposes impossible and it can be properly said that the dominant purpose of the document as a whole is giving or seeking legal advice.
>
> vi) Where there is no such intermingling, and the legal and non-legal can be identified, then the document or communication can be severed: the parts covered by LAP will be non-disclosable (and redactable), and the rest will be disclosable (see, e.g., Curlex Manufacturing Pty Limited v Carlingford Australia General Insurance Limited [1987] Qd R 335 and GE Capital Corporate Finance Group Limited v Bankers Trust Company [1995] 1 WLR 172)."

[62] The two cases cited in *Sports Direct* namely, the Queensland Supreme Court judgment in *Curlex v Carlingford*[38] and Lord Hoffmann's judgment in *GE Capital*,[39] are both instructive. Both judgments touched on when it would be permissible to withhold a document in its entirety because it contained privileged material. In *Curlex*,[40] the court held that a defendant could withhold a document where it would be "*impracticable*" to separate the privileged from the non-privileged contents. In *GE Capital*,[41] the court emphasised that regardless of whether a document is withheld in its entirety or is provided in redacted form, a party's claims to privilege on oath are as conclusive:

> "Bray's Digest of the Law of Discovery (2nd edn, 1910) pp 55–56 puts the matter succinctly:

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[38] *Curlex Manufacturing Pty Limited v Carlingford Australia General Insurance Limited* [1987] Qd R 335.

[39] *GE Capital Corporate Finance Group Ltd v Bankers Trust Co and others* [1995] 2 All ER 993.

[40] Ibid at 342.

[41] Ibid at 995.

> ‘Generally speaking, any part of a document may be sealed up or otherwise concealed under the same conditions as a whole document may be withheld from production … the party’s oath for this purpose is as valid in the one case as in the other. The practice is either to schedule to the affidavit of documents those parts only which are relevant, or to schedule the whole *document* and to seal up those parts which are sworn to be irrelevant …’

The oath of the party giving discovery is conclusive—

> ‘unless the court can be satisfied—not on a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of the case —that the affidavit does not truly state that which it ought to state …’ (See Jones v Andrews (1888) 58 LT 601 at 604 per Cotton LJ.)”

[63] Anglo has not made out no case for redaction of the Funding Application. Firstly, as far as the direct reference test is concerned, the judgment in *Financial Services Compensation Scheme v Abbey National Treasury Services*, was not followed in the subsequent Chancery Division judgment in *Edwardian Group*, referred to earlier. There Morgan J held that the judgment was in conflict with and ignored the binding Court of Appeal judgments in *Lyell v Kennedy*[42] and *Ventouris v Mountain*.[43] Those judgments favoured the broader test which protects documents that could give a clue to the advice given by the legal representative or which betrays the trend of the advice being given.

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[42] *(No 3)* (1884) 27 Ch D 1 (Lyell).

[43] [1991] 1 WLR 607.

[64] The approach followed in *Edwardian Group* was also followed by Binns-Ward J in *A Company*,[44] with which this court aligns itself. Legal advice privilege protects references in documents which "*either directly, or inferentially*" disclose legal advice.[45] It therefore extends to *"the actual communications between the client and the lawyer involved in the seeking and giving of the advice … or references in other documents that would disclose their content or from which their content might be inferred that are the matter in respect of which legal advice privilege may be claimed."*[46] (Emphasis added).

[65] Secondly, Anglo cannot get around Ms Mbuyisa's claims made on oath that the whole document is privileged. In this regard it is noted that Ms Mbuyisa and her legal team have already made a discerning assessment of the potential for redaction and severance by making available redacted copies of some documents, such as the ATE insurance policy and providing portions of others, such as the summary of the case budget. Thirdly, Anglo has offered no basis to conclude "to a reasonable degree of certainty" that it would be feasible to sever or redact any privileged material. Lastly, even if redaction or severance were possible, a redacted version of the funding application would contain nothing of relevance as the terms of the parties' relationship are fully embodied in the Litigation Funding Agreement.

[66] In the result, the discovery of the Funding Application is refused.

THE CASE BUDGET

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[44] *A Company and Others v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at [21] and [40].

[45] Ibid at [40].

[46] Ibid at [21].

[67] Anglo seeks production of the full Case Budget, as referred to in the respondents' founding papers. The full Case Budget is referenced in the Litigation Funding Agreement concluded with Kabwe Finance. It is defined in the agreement as the breakdown of the estimated amounts required in relation to the case, including, but not limited to: (1) the fees of MM Attorneys; (2) Leigh Day's fees; (3) counsel's fees; and, (4) disbursements as approved by Kabwe Finance or varied and approved by Kabwe Finance from time to time. While the respondents have resisted disclosure of the full Case Budget on the basis that it is privileged, they have nevertheless provided Anglo with a summary of the approved budget, reflecting an estimated cost to trial amounting to over R95 million and provided a breakdown of the estimated legal fees, included the attorneys' and counsel rates.

[68] Anglo denies that the Case Budget is privileged. Anglo submits that the sufficiency of the respondents' financial means to litigate the proposed class action to completion is plainly in issue before the certification court, as is the reasonableness of Kabwe Finance's and legal representatives' anticipated returns. Firstly, so it is argued, the sufficiency of the respondents' budget for the total costs "to trial" is demonstrably in doubt. On filing their founding papers, the respondents indicated that their estimated R78 million budget was sufficient. The respondents have indicated in these proceedings that the budget has had to be increased by some 18% to around R95 million. Absent the full Case Budget, one cannot assess whether the current allocated amount is not similarly a gross under-estimation. Secondly, the Case Budget may provide an indication of how much of the allocated amount has been expended and, in the result, whether the remaining funds are sufficient to take the case "to trial". This is especially relevant in circumstances where the respondents' legal representatives have been working on this matter since

2003, with significantly ramped-up efforts since 2017. Thirdly, the "budget summary" which the respondents provided with their answering affidavit, excludes the ATE insurance premium. It is accordingly unclear how the ATE insurance premium will be funded. It is submitted that there is no information to discern whether Kabwe Finance has the means to sustain the premium throughout the probable period of the action. Even if the ATE insurance premium were included in the budget under disbursements, which on the face of it is not the case, the information would still be insufficient. It is argued that the court cannot discern from the globular figure — without knowledge of the other projected disbursements or the premium charged on the insurance — whether the budget is sufficient. Fourthly, the Case Budget dictates how much costs, if and when recovered from Anglo, will redound to the benefit of Kabwe Finance and how much to the legal representatives. Without the Case Budget, there are no means accurately to assess the reasonableness of Kabwe Finance's anticipated return on its investment. It is submitted that the Case Budget is not only relevant but necessary to fill critical gaps in the information which the respondents have disclosed. Absent the Case Budget, so it is argued, the certification court will not be able to meaningfully determine the issues arising in the certification proceedings and Anglo is unable to formulate its defence.

[69] The respondents resist producing the Case Budget on the basis that it is privileged. Ms Mbuyisela stated under oath that the Case Budget evidences privileged material , as it *“makes reference to opinions received from counsel”* and further reflects legal advice given on matters of trial strategy and presentation including “*the amount of discovery and evidence gathering required, the number of experts and the nature of issues to be dealt with by each expert, and likewise for factual witnesses, and the likely expenditure and resources required for each phase*

of the litigation, based on legal advice." It also contains information as to the likely progress of the certification application, appeals arising from a certification application, and the expenditure and resources required for such appeals. It is submitted that it forms part of the same process undertaken between the legal team and Kabwe Finance as the Funding Application, in which privileged information was shared with Kabwe Finance on a confidential basis.

[70] Anglo argues that the Case Budget is a document created by AVL for Kabwe Finance which details the amount of funding required for a specific purpose and it was created in order for Kabwe Finance to assess and process drawdowns on the funding and any additional funding to be requested. The Case Budget, therefore neither communicated legal advice to the respondents, nor was it created in contemplation of litigation by or against Kabwe Finance for the dominant or definite purpose of giving legal advice. In the face of it, it was created by or on behalf of Kabwe Finance with the dominant or definite purpose to indicate to Kabwe Finance how much funding would be required, and at which stage of the litigation, to assess (a) how much funding to make available and when; and (b) what costs (if successfully recovered from Anglo) would be for Kabwe Finance's benefit.

[71] As alluded to earlier, legal advice privilege does not only relate to advice on the law, including procedural law, but also encompasses advice on matters of strategy and the presentation of the case. In *A Company*, the court dealt with two fee notes presented by the applicants' attorneys. The applicants applied for a declaratory order to declare the contents of these fee notes to be privileged, as part of their efforts to resist disclosure of unredacted copies to SARS. Binns-Ward J upheld the application in part and dismissed it in part, as he held that some references in the fee notes were privileged and others were not. In doing so, he drew a distinction between

documents that evidence the content of legal advice, which are privileged, and those that merely reflect the fact that legal advice has been sought or obtained, without giving any indication as to their content, which are not privileged. The court adopted and approved of the English law to this effect, and confirmed that the concept of what falls within the expression 'legal advice' for the purposes of legal advice privilege goes not only to advice on the law, but also, as pointed out by Taylor LJ in *Balabel and Another v Air India*,[47] *"legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context",*[48] including *"advice as to how a client's position or case should best be presented".*[49]

[72] In Ontario, the Superior Court of Justice generally bars the defendant from having sight of the full case budget. The Ontario Class Proceedings Act[50] places a specific statutory obligation on a party seeking to bring a class action to obtain prior court approval of the litigation funding agreement and case budget. But, despite that statutory obligation, the defendant does not have unrestricted access to the case budget. In *JB & M v Walker*,[51] the court held that the defendant was not entitled to see the full case budget. The court held that "*[t]his is appropriate in order to protect privilege and to ensure that the Defendant does not acquire a strategic advantage by virtue of being privy to the complete financial parameters of the funding body's commitment to the litigation*." This is in line with the earlier judgment of the Ontario Superior Court in *Berg v Canadian Hockey League*[52] and *Marriott v General Motors*

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47 [1988] Ch. 317.

48 Ibid at 332.

49 *A Company* at [25].

50 1992, S.O.1992,c 6.

51 *JB & M Walker Ltd / 1523428 Ontario Inc. v. TDL Group*, 2019 ONSC 999 (CanLII) at [18].

52 *Berg v Canadian Hockey League*, 2016 ONSC 4466 (CanLII) at [15].

of Canada Company[53] which concluded that it was permissible to withhold information from the defendant that would "*provide them with tactical advantages in how the litigation would be prosecuted or settled.*" Recently, in *Drynan v Bausch Health Companies Inc*,[54] the Ontario Superior Court once again approved of these principles and withheld the full case budget from the defendant.

[73] Anglo further suggests that the budget is not protected because it is "not a document shared between client and legal representative", but is a document shared between Kabwe Finance's adviser (AVL) and Kabwe Finance itself. I agree with the respondents that this is a plain misreading of Ms Mbuyisa's affidavit. Ms Mbuyisa explained that the budget was prepared with direct input from the respondents' legal team. In any event, the general rule, "once privileged always privileged" applies and the fact that the ultimate document is in the hands of Kabwe Finance is inconsequential. Once it is accepted that it contains privileged material derived from the respondents and shared on a confidential basis it is privileged. Finally, Anglo again asserts that merely sharing the budget with Kabwe Finance on a confidential basis somehow amounted to imputed waiver. No case for waiver has been made out that would satisfy the *Contango* test.

[74] In the current matter, Ms Mbuyisa described in detail what is contained in the Case Budget. It clearly falls into this category of privileged content. It does not merely indicate the fact that legal advice has been given, but it is the legal advice and further evidences of advice as to litigation strategy, matters of law, case presentation and the like. Anglo's attempts to second-guess this description do not establish that it is wrong to a reasonable degree of certainty. Furthermore, the

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[53] *Marriott v. General Motors of Canada Company*, 2018 ONSC 2535 (CanLII) 2018 ONSC 2535 (CanLII) at fn 1.

[54] *Drynan v. Bausch Health Companies Inc*., 2020 ONSC 4379 (CanLII) at fn 6.

budget document that Anglo requests is different from a fee note or invoice. A litigation budget not only reflects costs already incurred, but sets out the costs that the respondents are likely to incur, based on legal advice as to the likely course of the proceedings and litigation strategy. I agree with the respondents that it is, of necessity, a roadmap to the litigation to follow. The budget is being monitored actively and variations are made where necessary. Mr Hanna of AVL confirms that the Augusta Group, which includes Kabwe Finance, have an ethical commitment to ensure that Kabwe Finance is adequately capitalised and further confirm that no Augusta Company has never defaulted on its obligations under a litigation funding agreement. Anglo's claim that the budget of over R95 million is "woefully insufficient" also demonstrates that it is fully capable of challenging the sufficiency of the respondents' funding without needing sight of the full case budget document. In these circumstances, Anglo has made out no case for gaining access to the full case budget.

[75] Anglo has also provided no basis to support its new claim to the disclosure of a "redacted" case budget. The case budget summary provided to Anglo and the court already achieves that purpose and provides more than ample information to assess the adequacy of the budget.

[76] In the result, prayer 1.5 is not granted.

THE UNREDACTED ATE INSURANCE POLICY

[77] A redacted version of the ATE Insurance Policy was attached to the respondents' founding papers in the certification application. Anglo seeks the production of the unredacted version of the ATE insurance policy. The respondents

have confirmed that the redacted portions relate to the premium paid on the policy, the contingent premium (i.e. the amount which Kabwe Finance must pay to the insurer on a successful outcome for the respondents in the litigation), and the terms applicable to the payment of the premium.

[78] Anglo submits that the unredacted policy is critically important to assessing the extent to which Anglo is insulated from loss in the event of an adverse costs order; the adequacy of the respondents' funds to take this matter "to trial"; the reasonableness of Kabwe Finance's Return; and the respective parties' control over the litigation. It is submitted that the court's hands should not be "tied by bald assertions", and that it is, ultimately, the court that must determine whether the respondents' claims to privilege sufficiently discharge their onus to prove that the premium, the contingent premium and the terms of the premium objectively reveal the ***substance*** of legal advice. It is submitted that the respondents have failed to do so and the unredacted ATE policy must be produced.

[79] The respondents oppose production on the grounds of privilege. It is submitted that the unredacted policy *"reflects legal advice on the prospects of success based on opinions and advice provided by the respondents' legal team in contemplation of this litigation".* The respondents contend that Ms Mbuyisa's answering affidavit explained the privileged nature of the premium clause in that the information is legally privileged, as the premium reflects legal advice on the prospects of success, based on opinions and advice provided by the respondents' legal team in contemplation of this litigation. It is submitted that this explanation is conclusive. It is submitted that it is no mystery as to how a premium is calculated (a premium is reflective of risk, which is determined by the prospects of success) and the discovery thereof would allow Anglo to infer the legal advice received by the respondents,

which was shared with Kabwe Finance and the insurer on a confidential basis. This again falls under the broad protection of legal advice privilege, which covers documents which evidence the content of legal advice, in that they provide a clue to the advice given by the legal representative.

[80] In *Barr and Others v Biffa Waste Services Ltd,*[55] Coulson J in the Queen's Bench Division of the High Court granted an application to disclose an ATE insurance policy, but ordered that the amounts of the premium be redacted. The applicants in *Barr* did not seek disclosure of the premium amount, to which the court stated that privilege will extend to material which would allow the reader to work out what legal advice had been given. Coulson J held as follows:

> "Here, the Claimants have indicated that the amount of the premiums stated in the Policy could be said to reflect legal advice as to the Claimants' prospects of success and, although I regard that as a little farfetched on the facts, I can see circumstances in which that point might have at least some force. Accordingly, it seems to me that the amounts of the premiums should be redacted from the disclosed ATE Policy document."

[81] In *Arroyo & Ors v BP Exploration Company (Colombia) Ltd,*[56] the Senior Master, sitting as a judge in the High Court, agreed that the premium was privileged and went further by holding that, in the circumstances of that case, the entire ATE insurance policy was also privileged. The Senior Master held that the terms of ATE insurance are most likely to have been individually negotiated and thus depart from the insurers standard conditions because of the Claimants' solicitors' advice on merits and prospects and on their overall litigation strategy. The court held that to reveal the terms to the defendant "*could inflict a severe tactical blow on the Claimants*". In *Re RBS Rights Issue Litigation,* [57] Hildyard J accepted that "parts of a

[55] [2009] EWHC 1033 (TCC).

[56] [2010] EWHC 1643 (QB).

[57] [2017] EWHC 463 (Ch).

policy (such as, possibly, the amount of premium, as in *Barr v Biffa*) may attract legal advice privilege and require redaction on the basis that the relevant part might allow the *"reader to work out what legal advice had been given".* In *Edwardian Group*, the High Court approved the legal test applied in both *Barr v Biffa* and *Arroyo* as to when documents are privileged to the extent that they "evidence" legal advice.

[82] This court is satisfied that, in the circumstances of this case, the premium is privileged as it evidences legal advice provided by the respondents' legal team on the prospects of success. Ms Mbuyisa confirms these facts in her affidavit. The fact that the insurance policy was concluded between Kabwe Finance and the insurer is of no consequence. Once it is accepted that the premium reflects legal advice given to the respondents and shared by the respondents' legal team, that brings it firmly within the protection of privilege. Anglo again insists that by sharing this legal advice with the insurer, the respondents somehow impliedly waived privilege. I agree with the respondents that this argument is not advanced with any conviction, presumably because it would be destructive of any form of litigation insurance.

[83] In any event, the amount of the premium cannot have relevance to the certification application or the further proceedings. Mr Hanna repeatedly affirms that Kabwe Finance is sufficiently capitalised and it cannot be seriously disputed that Kabwe Finance has sufficient means to cover any insurance premium. Equally, the premium has no bearing on any debates as to whether the amount of the insurance is sufficient. The respondents have disclosed that the total amount of liability covered under the policy is GBP 2 million. The premium has no bearing on the extent of the coverage.

[84] Anglo, as a last resort, claims that Ms Mbuyisa's affidavit does not draw a fine distinction between the premium, the contingent premium and terms related to the premium. The fact that the respondents have provided Anglo with a full copy of the ATE Insurance Policy, with only a single clause redacted, is sufficient demonstration that the respondents have not adopted an unthinking "blanket" approach to privilege. Ms Mbuyisa was clearly dealing with the whole premium clause when she emphasised that it reflects advice on the prospects of success and is therefore privileged. Anglo has failed to show that Ms Mbuyisa was "wrong to a reasonable degree of certainty", both as far as relevancy and privilege are concerned.

[85] In the result the discovery of the unredacted ATE Insurance Policy is refused.

REPORTS MADE IN TERMS OF THE AVL / KABWE FINANCE CONSULTANCY AGREEMENTS

[86] In its third notice, Anglo seeks *"[a]ny "reports", "written report' or "periodic reports" as referred to in clauses 5.2.4 to 5.2.6 and 6.2 of the March 2020 Consultancy Agreement".* This request was directed at the contents of the March 2020 version of the Consultancy Agreement between Kabwe Finance and AVL, which was not included in the founding papers, but was referenced in passing in Mr Hanna's initial affidavit. This agreement was provided to Anglo in response to its first Rule 35(12) notice. The March 2020 Consulting Agreement did not form part of any pleadings, and is not the proper subject of a Rule 35(12) request. Anglo can only succeed in its request if it can show exceptional circumstances warranting reliance on Rule 35(14), or if it can show that it is justified in terms of this court's inherent jurisdiction.

[87] Anglo seeks to enlarge the scope of its request going beyond what was sought in its third notice. The third notice was explicitly confined to any “reports” flowing from the March 2020 Consulting Agreement. When the respondents pointed out that the March 2020 agreement was superseded by a new Consulting Agreement, concluded by AVL and Kabwe Finance in December 2020, Anglo contends that it is also entitled to any reports referenced in the December 2020 Consultancy Agreement.

[88] Clause 5.2.4,5.2.6 and 6 of the Consultancy Agreement states as follows:

> ***“Duties of the Consultant [AVL]***
>
> *5.2.4 procuring, on behalf of the Company [Kabwe Finance], any reports considered appropriate to assist in identifying, analysing and critically considering the merits and demerits of the Case"*
>
> *5.2.6 preparing, compiling and distributing periodic reports in accordance with Clause 6;*
>
> ***6. REPORTING OBLIGATION***
>
> *6.1 The Consultant will report to the Company on a regular basis on such matters as the Consultant in its reasonable discretion considers are necessary, appropriate or prudent for the proper and transparent administration and supervision of the Litigation Investment.*
>
> *6.2 The Consultant will compile and, from time to time, distribute periodic reports in respect of the Case. Such reports will be distributed to the Company, the Company's parent and the parent's shareholders and the Lenders.*
>
> *6.3 The Consultant shall ensure that the Company is able to comply with all reporting requirements of the Company under the Finance Documents, including, but not limited to, the compilation and distribution of any reporting,*

and assisting the Company in agreeing such reporting required under the Facility Agreement."

[89] Under the March 2020 Agreement, the reports, written reports and periodic reports include: reports on the merits and demerits of the case; a written report from AVL to Kabwe Finance detailing its basis for recommending or not recommending the case, periodic reports compiled by AVL on the administration of the litigation investment and reports in respect of the case to be distributed to Kabwe Finance's company parents, the parent shareholders and the lenders of the litigation funding. The subsequent December 2020 Agreement, further specifies the reports to include reports or opinions as to the merits or likelihood of success; reports or opinions on tax and other accountancy issues; asset tracing; investigative or other services; a report on the basis for recommending the case; Kabwe Finance's report to its investment committee; and periodic reports on the progress of the case, the financial aspects of the case, the amount of funds required, and the anticipated rate of return from the litigation.

[90] The respondents admit to the existence of the reports but claim that the reports are "not a set of identifiable documents". Moreover, they claim that the reports are privileged.

[91] Firstly, there is no reference to a specific document in either the March 2020 or the December 2020 versions of the Consulting Agreement. Instead, both simply impose an ongoing obligation on AVL to prepare a broadly defined category of reports of indeterminate number on a loosely defined set of topics which reports AVL, in its reasonable discretion, considers to be "*necessary, appropriate or prudent*

for the proper and transparent administration and supervision of the Litigation Investment."

[92] I agree with the respondents that this was a description of a working method and a contractual obligation rather than a direct reference to a specific document. Anglo's request is therefore akin to the failed request for disclosure of a "legal review" in *Contango*. There the appellants sought disclosure of a legal review of certain transactions directed by the Minister of Energy, which was briefly mentioned in the founding papers. The "legal review" generated a range of documents and written correspondence, but it was not a specific document. Accordingly, Cachalia JA concluded that it fell beyond the scope of Rule 35(12) and held as follows:

> "[F]or a request to fall within the ambit of the subrule there must be a reference to a specific document, not to a general category of documents, which is in effect what Contango and Natixis' 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 subrule 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."[58]

[93] Secondly, the reports prepared for Kabwe Finance are plainly legally privileged, as explained in the respondents' answering affidavit. In paragraphs 91 to 92 of the answering affidavit Ms Mbuyisela explained as follows:

> *"91. Moreover, the Applicants and Kabwe Finance consider any reports to be legally privileged, as they recount the legal strategy and assessment of the progress of the litigation as reported by the Applicants' legal team. As such,*

[58] *Contango* at [27]

> *production of these documents to Anglo would unfairly prejudice the Applicants. These reports are shared with Kabwe Finance on a confidential basis and, in doing so, the Applicants have not waived privilege.*
>
> *92. Anglo is therefore not entitled to compel production of these documents."*

[94] The source and content of these reports could not be clearer from Ms Mbuyisela's description: they reproduce reports from the respondents' legal team on highly confidential matters of legal strategy and their assessment of the progress of the litigation. These reports therefore reflect legal advice and work products that would fit comfortably within the scope of both legal advice privilege and litigation privilege.

[95] Thirdly, reports made to Kabwe Finance on legal strategy and the legal team's assessment are also a classic example of joint or common interest privilege. This is reflected in clause 22.6 of the March 2020 Agreement which expressly bound AVL and Kabwe Finance to maintain common interest and legal professional privilege in respect of all confidential information shared by the law firms and counsel. It states as follows:

> *"The Company and Consultant share a common interest in maintaining the confidentiality of confidential information relating to the Case or Litigation Investment. The Company and Consultant agree to maintain common interest and legal professional privilege belonging to the Claim Participants in all documents and information supplied by the Law Firms and counsel. The Company and Consultant agree that the provision of privileged documents and information is not a waiver of privilege, and the Company and Consultant shall not use these for any purpose other than in relation to the terms of this Agreement."*

[96] Anglo's arguments for overriding this privilege are therefore unconvincing. Anglo has failed to show that the assertion of privilege is "wrong to a reasonable degree of

certainty". Its attempts to go behind this description of the privileged content of these reports, alleging that the assertion of privilege ought to have been more detailed, have failed as it is not supported by any facts. Anglo further argues that these reports could not be covered by privilege because they are ultimately prepared by AVL for Kabwe Finance. This is incorrect. Privileged matter does not lose privilege through mere communication, summation, or repackaging for the benefit of others who share a common interest, on a confidential basis. Anglo's bald assertions of waiver of privilege are again impermissible. Sharing privileged updates on the case and legal strategy with Kabwe Finance, on a confidential basis, could never be deemed to be objectively inconsistent with the intention to maintain confidentiality. Nor could this disclosure produce any conceivable unfairness to Anglo. The respondents have never sought to rely on these reports in their pleadings and Anglo is therefore at no disadvantage in responding.

[97] Finally, Anglo devotes much time and attention to speculating about the potential benefits that it may derive from having access to these reports. That, however, does not provide any basis for disclosure, let alone grounds to override the privilege attached to these documents. If this court were to uphold Anglo's request for disclosure of all reports to Kabwe Finance, on any of its pleaded bases, there would be nothing preventing Anglo from seeking disclosure of future periodic reports to Kabwe Finance throughout the course of the certification proceedings. Not only would that give Anglo an unfair advantage, but it would also inhibit the respondents' free communications with their legal team on matters of legal strategy. That is not consistent with the rights and public policy which underpin legal privilege.

CONCLUSION

[98] The respondents opposed the application to compel discovery on two grounds; relevancy and privilege.

[99] Anglo has not demonstrated that Ms Mbuyisa's descriptions of the documents, both as far as relevancy and privilege are concerned, are "*wrong to a reasonable degree of certainty*". As the court in *Turkcell* stated, this test sets a high bar to impugning claims of privilege made by an attorney on affidavit. Anglo's argument that Ms Mbuyisela's affidavit did not contain sufficient information to establish a claim of privilege and that the respondents claimed "blanket" privilege over documents, regardless of whether their contents are privileged, is unfounded. The relevant passages of the answering affidavit of Ms Mbuyisa, demonstrates that her explanations were more than sufficient and that there was no sweeping invocation of privilege. The respondents' attorneys adopted a discerning approach, in that they disclosed the full litigation funding agreement and related funding documents, redacted a single clause of the ATE insurance policy, provided a summary of the case budget, and chose to withhold the funding application and reports. As recognised in *Edwardian Group*, an attorney deposing to an affidavit in support of privilege must engage in a difficult balancing act and must be careful not to "*[make] disclosure of the very matters that the claim for privilege is designed to protect".*[59] By disclosing too much, an attorney may also give the other side grounds to claim imputed waiver, as Anglo has repeatedly sought to do in this litigation.

[100] In these circumstances, Anglo's application is without merit, and ought to be refused.

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[59] *Edwardian Group* at [42], citing *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) at [86].

[101] Anglo claims that it has already been "substantially successful" in the compelling application, regardless of the merits of its application, because the respondents disclosed "more than 300 pages" of documents in response to its application. This ignores the respondents' answering affidavit which explained that the respondents provided these non-privileged documents to expedite the proceedings, without conceding the merits of the requests. The respondents should not be deprived of their costs merely because they have taken the reasonable and pragmatic stance of favouring disclosure over protracted interlocutory skirmishing. I can therefore find no reason why the respondents should not be entitled to the costs of the compel application.

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

1. The application for extension is granted with costs, including the costs of senior counsel.

2. The application to compel discovery is dismissed with costs, including the costs of senior counsel.

_____

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(*Electronically submitted therefore unsigned)*

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 October 2021.

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Date of hearing:	5 July 2021 and 6 July 2021
Date of judgment:	26 October 2021