

## IN THE HIGH COURT OF SOUTH AFRICA



## GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/8826

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED:

In the application of:

**VBS MUTUAL BANK (IN LIQUIDATION)**

Applicant

versus

**KPMG INCORPORATED**

Respondent

**Coram:** Wepener J**Date of hearing:** 16<sup>th</sup> August 2022**Date of Judgment:** 18<sup>th</sup> August 2022

This judgment is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge his secretary. The date of this judgment is deemed to be 18 August 2022.

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## JUDGMENT

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### **Wepener, J:**

[1] This is an interlocutory application in which the applicant (VBS) seeks that the respondent (KPMG) to be compelled to furnish to it certain identified documents in terms of Rule 35 of the Rules of Court.

[2] After discussing the matter amongst the parties, prior to the hearing, I was advised that VBS persists with its application for documents in three categories:

- 2.1. the insurance documents;
- 2.2. audit working papers;
- 2.3. manuals of KPMG.

[3] The insurance documents, it was submitted, were those documents that passed between KPMG and its insurers and which, it is alleged, that no privilege can be claimed. KPMG claims, principally, on the basis that these documents are indeed privileged due to the fact that their existence was following it having contemplated litigation and the documents fall in the class protected by a legal privilege.

[4] Two principles are to be considered. The first is that a court will not easily go behind the affidavit of a deponent who asserts that documents are privileged unless it is clear that that assertion is incorrect or mistaken.<sup>1</sup> The second principle is that documents claimed to be privileged are such if it was obtained or brought into existence

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<sup>1</sup> *Turkcell Iletisim Hizmetleri AS and Another v MTN Group Limited and Others* [2020] ZAGPJHC 244 (6) October 2020 at 67-68.

for purposes of a litigants' submission to a legal advisor for legal advice and that the litigation was pending or contemplated as likely at the time.<sup>2</sup>

[5] KPMG, in its affidavit, asserts that the documents all, in the main, fall into the category of legal privilege. That is really the only question to be answered. KPMG claims that the insurance documents were either sent to its legal advisors for advice but more specifically, that litigation was contemplated.<sup>3</sup> It relied on the wording in *ArcelorMittal* and submitted that even disciplinary hearings would be 'litigation' as would be criminal proceedings.

[6] I do not agree that internal disciplinary hearings would qualify as litigation, nor do I accept that criminal charges against a specific individual would clothe KPMG with the right to claim that it envisaged litigation and thus a claim for privilege can be made on those documents. If a claim of privilege in criminal proceedings exists for purposes of this civil claim, it is certainly a claim for the accused to raise. It was not suggested that KPMG was the accused in that 'litigation' and the claim that the documents brought into existence for purposes of the criminal charges or disciplinary hearings, in my view, are not covered by the rule of privileged documents as far as KPMG is concerned.

[7] As far as the documents that do not relate to the aforesaid two topics are concerned, the affidavit of KPMG is to be considered. The affidavit must be read holistically and it says, unequivocally, that KPMG had contemplated litigation since VBS was placed under curatorship on 10 March 2018. Since that time it was necessary to seek legal advice and communicate with its insurers should a claim against it realise. I am of the view that, accepting this statement, all documents that passed between KPMG and its insurers after 10 March 2018, are indeed documents covered by the privilege claimed by KPMG. I consequently conclude that the documents in existence prior to 10 March 2018 and all documents that were brought into existence after that date having a bearing only on the criminal and disciplinary proceedings against individuals that are in the possession of KPMG, are not privileged by reason of the contemplated litigation against KPMG.

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<sup>2</sup> See *Competition Commission of South Africa v ArcelorMittal South Africa Limited and Others* [2013] 3 All SA 234 (SCA).

<sup>3</sup> See *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others* 1979 (1) SA 637 (C) at 651A.

[8] The result is that VBS succeeds in its application for the limited category of documents (criminal and disciplinary proceedings) sought by it.

[9] The audit documents which are sought pertain to the VBS audit performed by KPMG in 2016 and 2018, the years prior to and subsequent to the audit that led to the current damages claim. Firstly, there is no reference in the claim or the defence to the audits performed in those years. Secondly, the request is based on a wish to compare the 2017 audit with audits performed during those two years. It is not clear that the audits so performed are relevant at all, save for a wish to see if something may emerge for VBS to latch onto.<sup>4</sup> This is clearly not sufficient to make all those documents relevant to the 2017 audit. Indeed the submission was that these documents 'may be relevant' to the 2017 audit. That, in my view, is not sufficient.

[10] The last category of documents are the manuals in possession of KPMG. VBS seeks certain manuals which guided the auditing procedure adopted by KPMG. The affidavit filed by KPMG is at least, ambivalent. It indicated that there are indeed relevant matter in these manuals in the way that the affidavit is worded. Counsel for KPMG submitted that it was intended to say there are no relevant portions in these manuals. The submission cannot replace the actual wording contained in paras 93 and 94 of the answering affidavit which leaves one to conclude that relevant information are contained in these manuals that would lead to an order to discover the manuals.

[11] The issue of costs also featured. That is that the application was brought in very broad terms and that the success is limited indeed. There was also an argument that KPMG was willing to make available documents as was set out in a letter and that VBS jumped the gun by bringing an application.

[12] In my view, VBS is entitled to bring an application and entitled to succeed in the issues which I have referred to above. That success should entitle it to costs, although having regard to the limited success, not all the costs. However, the costs of the hearing should indeed be borne by KPMG.

[13] In the circumstances, I issue the following order:

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<sup>4</sup> *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 26.

1. KPMG is ordered to furnish to VBS the documents identified in para 23 of the request and which relate to disciplinary hearings or criminal proceedings against persons other than KPMG, and within its possession, within ten days of date of this order.
2. In respect of para 16, 17 and 18 of the request, KPMG is ordered to furnish to VBS within ten days of date of this order:
  - 2.1 The KPMG audit manual which governed the 2017 audit of VBS;
  - 2.2 The KPMG quality control manual which governed the 2017 audit of VBS;
  - 2.3 The ECQR Policy as it related to the 2017 audit of VBS.
3. KPMG is ordered to pay 20 percent of the costs of the application, save that it is to pay 100 percent of the costs of the hearing on 16 August 2022, such costs to include the costs of two counsel.

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**W.L. Wepener**

Judge of the High Court of South Africa

Counsel for the Applicant: M.M. Antonie SC with E. van Vuuren SC and G. Singh

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Counsel for the Respondent: M. du P. van der Nest SC with M. Mbikiwa

Attorneys for the Respondent: Bowmans