

SOUTH AFRICA / JUDGMENT

WK Construction (Pty) Ltd v Brown (25092/2014) [2023] ZAGPJHC 1111 (31 January 2023) [2023] ZAGPJHC 1111

COURT

South Gauteng High Court, Johannesburg

BEFORE

A Friedman

CASE / FILE NUMBER

25092/2014

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no: 25092/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

WK CONSTRUCTION (PTY) LTD Plaintiff/Respondent and PAUL DONOVAN BROWN Defendant/
Applicant

JUDGMENT:

APPLICATION TO COMPEL DISCOVERY

FRIEDMAN AJ:

1 In this matter, the plaintiff (“WK Construction”) has sued the defendant (“Mr Brown”) for damages which it says that it sustained as a result of Mr Brown’s conduct when he was a director of WK Construction. Mr Brown resigned as a director of WK Construction on 1 August 2013.

2 The proceedings before me take the form of an interlocutory application brought by Mr Brown to compel WK Construction to produce, as part of the discovery process in respect of the trial, a collection of documents which the parties describe as the “Hay file notes” (and I shall do the same). The Hay file notes were generated by an attorney (“Mr Hay”) acting for WK Construction and (it is common cause) record the contents of consultations conducted between the chairman of WK Construction at the time (“Mr Kusel”) and Mr Hay.

3 WK Construction seeks to avoid disclosing the Hay file notes to Mr Brown on the basis that, according to WK Construction, they are privileged. It is this stance which has caused the need for me to determine this application.

THE BACKGROUND

4 The facts of the main action are not directly relevant to the proceedings before me. It is, however, necessary for me to give a very cursory explanation of the underlying dispute because it is relevant to the arguments advanced by the parties. I should note, at the outset, that both parties have made clear that the facts of this matter are heavily in dispute. The true facts will no doubt emerge during the trial. In the founding affidavit, the facts from Mr Brown’s perspective were set out, and it was accepted that they are “hotly contested”. In the very short answering affidavit filed by WK Construction, it was accepted that, only for the purposes of this application, the facts as set out on Mr Brown’s behalf in the founding affidavit in this interlocutory matter could be taken to be correct (without a concession that they are correct for the purposes of the trial). What

I say below is therefore taken from the founding affidavit on the basis of this agreement, and I do not express any view on the

correctness of these facts.

5 As already mentioned, Mr Brown was a director of WK Construction until 1 August 2013. During the period May 2010 to June 2010, Mr Brown conducted an investigation into the viability of a coal mining operation at Chibondo mine in Zimbabwe. To cut a long story as short as possible, it would appear that WK Construction decided to take over the mining operations on the basis of a falsified report which incorrectly concluded that the body of coal at the mine consisted of good quality coking coal. The decision to take over the mining operations at Chibondo resulted in WK Constructing buying the shares in the company, described in the papers as PMS, which had up until then been conducting the mining operations there. A few months after that agreement was concluded, the fact that the quality of the coal had been misrepresented in the report was discovered by WK Construction and Mr Brown.

6 A special board meeting was called in December 2010, once the falsification of the coal’s quality came to light (which was, apparently, in October 2010). Mr Brown explained the problems arising from the report and presented two options to the board; one which would have involved stopping the mining and one which would not (but involved “washing” the impure coal). The board decided to press on with the mining. After Mr Brown resigned as a director, WK Construction

instituted the action described above; it did so on 10 July 2014. In essence, WK Construction says that Mr Brown breached his employment contract because, by not acting with due care, skill and diligence, he presented the board with inaccurate information which caused it to embark, to the detriment of WK Construction, on the mining operations at Chibondo mine.

7 The decision to purchase PMS was taken at a board meeting held on 28 June 2010. The Hay file notes relate to the period between 29 June 2010 and 26 October 2010. In a letter sent by WK Construction's attorney on 25 February 2022, which I mention again below, it was explained that the advice given by Mr Hay related to the purchase of the PMS shares and a range of related issues.

THE STANCE OF THE PARTIES

8 As part of engagements between the parties before this interlocutory application was launched, WK Construction provided Mr Brown with redacted versions of the Hay file notes. In these proceedings Mr Brown seeks disclosure of the full, unredacted version.

9 This interlocutory application raises primarily issues of law; indeed, WK Construction did not really address the facts of this matter in its answering affidavit and made it clear that the only reason it filed an answering affidavit at all was to record its agreement that the facts as set out in Mr Brown's founding affidavit may be treated as correct for the purposes of this application. The only reason why I need to explain the stance taken by the parties – and Mr Brown in particular – in the papers in any detail is that the nature of Mr Brown's cause of action appears to have metamorphosised, at least in part.

The position taken by Mr Brown in the papers

10 Although there was a somewhat churlish exchange of correspondence on this issue, the parties agree that the Hay file notes are relevant to the pending trial. Therefore, the only issue is whether they are privileged.

11 In our law, there has been a general acceptance of the broad category of “legal professional privilege”; that is, acceptance that documents falling under this category do not need to be disclosed in litigation even if relevant to the pending proceedings. Under this main category, there is general acceptance that there are two sub-categories: the litigation privilege and the legal advice privilege. The litigation privilege relates to documents which were generated in contemplation of litigation. The legal advice privilege relates to general legal advice given by an attorney (or counsel) to his or her client.

12 In the founding affidavit, Mr Brown's explanation for contending that the Hay file notes are not privileged was primarily that the litigation which was launched in 2014 – ie, the main trial action to which this interlocutory application relates – could not possibly have been contemplated at the time when the Hay file notes were generated. This was also the stance taken by Mr Brown in correspondence before the interlocutory application was launched. Curiously, though, in explaining the legal basis for the application in the founding affidavit, Mr Brown's attorney lists the requirements which are commonly considered to be applicable to asserting the legal advice

privilege. Given its importance to what I say below, it is perhaps prudent for me to reproduce verbatim the way in which the argument was framed in the founding affidavit:

“41. At the time when the said consultations occurred no litigation could have been contemplated against the applicant. The chronology of events as illustrated above makes that clear.

42. Hence, the test for legal professional privilege is not passed, such test being that the Hay communications with the respondent as recorded in the Hay file notes would be privileged if
- (1) Hay was acting in a professional capacity at the time, (2) Hay was consulted in confidence, (3) the communication was made for the purpose of obtaining legal advice and (4) the advice does not facilitate the commission of a crime or fraud.
43. The applicant has no difficulty in accepting that elements 1, 2 and 4 are met. However, element 3 cannot possibly be met. It is unfathomable why legal advice would have been sought against the applicant during the period 29 June 2010 to 26 October 2010. I submit that if it is to be contended that Hay was consulted in order to obtain legal advice against another party (for example, the shareholders of PMS) such does not constitute a ground for raising privilege as against the applicant. In addition, I submit that it would be highly unlikely for the respondent to have sought to obtain legal advice against PMS (or any other party) during the period 29 June 2010 to 26 October 2010 given the events which occurred during such period.
44. Accordingly, I submit that the reliance on legal professional privilege is misplaced.”

13 It may be seen from this description of the legal basis for the application that there is something of a conflation between the litigation privilege and the legal advice privilege. The stance taken in the last two paragraphs – that no legal advice was likely to have been sought and that therefore the requirements of the legal professional privilege have not been met – must be taken to be a non-sequitur, unless one interprets it to refer to advice in contemplation of litigation against Mr Brown.

The position taken by Mr Brown in argument

14 In the heads of argument filed on behalf of Mr Brown, the above-mentioned conflation does not appear. There is a detailed description of the law relating to the two categories of privilege mentioned above, and it is said that, since WK Construction relies on the legal advice privilege and not the litigation privilege, the latter does not arise in this case. There was, in other words, a clear appreciation of the difference between the two subcategories of the legal professional privilege, unlike in the founding affidavit.

15 In the heads of argument, the main point taken on behalf of Mr Brown is that, in basing its refusal to disclose the documents on the legal advice privilege, WK Construction relies solely on the say-so of the attorney acting for the company that the documents are privileged. Mr Brown contends that it is impossible to discern, from the redacted versions of the Hay file notes

provided by WK Construction, what was discussed during the relevant period of time – ie, between June and October 2010 – but that it is likely that the acquisition of PMS, and the assumption of mining by WK Construction (having taken over the operations from PMS), would have been the subject of the discussions between Mr Hay and Mr Kusel.

16 Placing heavy reliance on the judgment of Binns-Ward J in *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) (“A Company”) Mr Brown contends that the appropriate solution to the problem – ie, the fact that neither Mr Brown nor the court has any insight into what is contained in the Hay file notes – is for me to order a “judicial peek” of the documents.

The concept of a judicial peek is something that I return to discuss below. In essence, it would involve (as it arises in this case) me making an order that either I, or the trial court, should look at the Hay file notes and make a decision as to whether they fall under the legal advice privilege. On the basis of this determination, the documents would either have to be disclosed or the judge (ie, either me or the trial judge) would confirm that WK Construction is entitled to withhold the unredacted version of the documents on the basis of the legal advice privilege.

17 In sum, therefore, Mr Brown’s stance in his heads of argument was (a) the mere say-so of WK Construction’s attorney that the legal advice privilege applies is insufficient (b) we are therefore left with no insight as to whether the privilege has been appropriately raised and (c) the solution to this problem is for a court to take a judicial peek of the documents to determine whether they fall under the legal advice privilege.

18 Mr Brown’s heads of argument were drafted by Mr Steyn, who continued to act on behalf of Mr Brown in the oral argument before me. But, by then, he was led by Mr Hellens, who argued the matter on behalf of Mr Brown. Mr Hellens persisted in arguing that, given the lack of any meaningful information as to the contents of the Hay file notes, a judicial peek was an appropriate solution. But, he raised two other arguments; one of which had not featured in the papers or the heads of argument. First, on the basis of the decision in *A Company*, he submitted that WK Construction had failed to discharge the onus of giving a proper explanation for its assertion of privilege. This could lead me to decide that a judicial peek was appropriate. But, according to the argument, I could also simply grant access to the documents now (ie without needing to order a judicial peek) on the basis that WK Construction had failed to discharge the onus of justifying its assertion of privilege.

19 The second argument was based on the fact that, at the time when the Hay file notes were generated, Mr Brown was a director of WK Construction. Mr Hellens argued that, had Mr Brown asked to see the documents at the time, there could have been no lawful basis for Mr Kusel (or the board of WK Construction) to withhold them. According to this argument, there cannot now be any lawful basis for WK Construction to raise the privilege, since it would not have been able to prevent Mr Brown from having access at the time when the documents were generated. I shall refer to this argument below as the “incumbent-director submission”.

20 As I understood Mr Brown's stance in oral argument, viewed as a whole, his position was: (a) on the basis of the submissions just summarised, I should simply order the disclosure of the documents (b) however, if I was not inclined to go that far, I should then order a judicial peek, along the lines first suggested in the heads of argument.

WK Construction's stance

21 As already mentioned, WK Construction did not deal with the facts of this matter in its answering affidavit. WK Construction made clear that its opposition to this application raises issues of law, which would be addressed in argument.

22 In WK Construction's heads of argument, great emphasis is placed on the "shifting" nature of Mr Brown's case. It is pointed out that, in the correspondence which was exchanged before the interlocutory application was launched, WK Construction made clear that it relied on the legal advice privilege and not the litigation privilege. Despite this, the founding affidavit is framed in a way which suggests that Mr Brown understood the privilege to relate to litigation. WK Construction also pointed to another shift; in the notice of motion, Mr Brown simply seeks disclosure of the documents. In the heads of argument, however, no real attempt is made to justify that order. Rather, as shown above and as highlighted by WK Construction in its heads of argument, the stance which is adopted is that, because none of us has any knowledge of the contents of the Hay file notes, a judicial peek is warranted.

23 In addition to emphasising the shifting nature of Mr Brown's case, WK Construction's heads of argument rely on the high threshold which must be overcome to go behind a statement on oath that a document is privileged. WK Construction argues that Mr Brown has not even attempted to provide any basis to go behind the sworn statement of WK Construction's attorney that the Hay file notes are privileged. WK Construction argues that, in any event, the documents are clearly privileged. It is necessary for me to explain this submission in more detail.

24 Counsel representing both parties are in agreement as to the applicable test to determine whether the legal advice privilege applies. Both sets of heads of argument set out the test. It is that:

24.1 The legal advisor was acting in a professional capacity at the time that the notes were taken.

24.2 The legal advisor was consulted in confidence.

24.3 The communication (in this case, the meeting between Mr Hay and Mr Kusel, subsequently recorded in the Hay file notes) was made for the purposes of obtaining legal advice.

24.4 The advice does not facilitate the commission of a crime or fraud.

25 Binns-Ward J, in *A Company*, adds a fifth requirement: ie, that the privilege must be claimed (see paragraph 1 of the judgment). This might seem not to add

much, but it does. The authorities make clear that the legal professional privilege only applies when it is invoked by the client,

which means that it cannot be invoked by another party and certainly not by a court of its own accord.

26 With reference to the founding affidavit, WK Construction points out that Mr Brown accepts that the first, second and fourth requirements are met in this case. So, the only dispute is whether the communication was made for the purpose of obtaining legal advice. The simple submission made by WK Construction on this issue is that Mr Brown has not suggested that there was any plausible reason, other than to obtain legal advice, for Mr Kusel to consult with Mr Hay. Relying on certain well-accepted authorities, WK Construction argues that our courts have repeatedly held that “consultations and records of consultations between legal advisers and clients are privileged”. The best authority on this point is *Allen v Kirkinis* (which has the neutral citation [2017] ZAGPJHC 327 (10 October 2017), and is available on Saffli at <https://www.safflii.org/za/cases/ZAGPJHC/2017/327.html>),

in which the court held that consultation notes generated as a memorial of the consultations between “legal counsel” and client are covered by the legal advice privilege (see the very comprehensive discussion at paragraphs 44 to 64, and in particular

paragraphs 63 and 64 of the judgment in *Kirkinis*).

27 On the question of the proposed judicial peek, WK Construction points to authority of the Constitutional Court (in *President of the Republic of South Africa v M & G Media Limited* 2012 (2) SA 50 (CC); 2012 (2) BCLR 181) that the use of a judicial peek is a course of action of last resort. WK Construction argues that no basis has been given in the papers for a judicial peek “although WK Construction would of course have no objection should the court be inclined to do so in the exercise of its discretion”.

28 In oral argument, Mr Broster, who appeared for WK Construction with Ms Pudifin-Jones, essentially advanced the same submissions as summarised above. On the new incumbent-director submission raised by Mr Hellens, Mr Broster pointed out that it is not ventilated on the papers. He argued that the question relating to Mr Brown’s status as a director is not straightforward and I should avoid deciding it because it has not been properly pleaded. During the course of argument, Mr Broster also undertook that his team would upload onto Caselines two Australian cases which he said demonstrate that Mr Hellens’ contention is in any event wrong and that WK Construction could raise the privilege even though Mr Brown was a director at the time when the documents were made. This was done, and I refer to those cases in due course. They are *Hammond v Quayeyeware* and *State of South Australia v Barrett* and I give their full citations below.

29 A further argument made by Mr Broster was that it would be impossible to describe the contents of the Hay file notes, other than in general terms, without breaching the privilege. He made this argument as part of a broader submission which I believe is fairly summarised as follows: when a person goes to consult with his or her attorney, it is reasonable to proceed from the premise that the purpose is to obtain legal advice. Since one cannot disclose the actual contents of the advice without breaching the privilege, some mileage must be obtained from this

underlying premise. One then adds into the mix the high threshold for going behind a statement made under oath that the document is privileged, and the very strong starting point has to be that a statement under oath that the records of a consultation between a company and its lawyer are privileged must be respected, unless some proper basis is given for going behind the oath.

The supplementary

submissions

30 As I noted above, the argument which I have described as the incumbent-director submission was raised for the first time at the hearing of this matter. The question whether Mr Brown was entitled to rely on that argument, having not run it in his founding affidavit in the interlocutory application, was debated briefly. As I have already said, Mr Broster argued that the issue did not arise on the papers and should not be considered further. Mr Hellens contended that the incumbent-director submission was a legal contention which arose from a fact which was common cause on the papers – ie, that Mr Brown was a director of the company throughout the time in which the Hay file notes were generated – which could be ventilated.

31 My initial impression, when the argument was first raised by Mr Hellens, was that it had the potential to be the decisive issue in this case. I had still to consider whether the argument could be advanced despite not having been pleaded. But leaving that issue aside, I considered the argument at least to be potentially very important to the ultimate outcome of this application. I therefore issued a directive in which I invited the parties to make further written submissions on the point. I did so because I considered the way in which the issue had, to that point, been ventilated to be less than ideal. Mr Hellens argued the point (characteristically) persuasively and Mr Broster responded briefly. Mr Broster's team had clearly considered the point, because the two Australian cases which I mentioned above were immediately to hand and mentioned briefly by Mr Broster in his argument (and had in fact been brought to the attention of Mr Brown's attorneys some time before the hearing). But I still felt that I did not have the benefit of full submissions on the point, and felt that I should at least give the parties a chance to address it more comprehensively. (I should note, while dealing with the topic of the directive, that I made the mistake of advertising my intention in the directive to hand down judgment by 15 December 2022. It turned out to be impossible for me to do so, for a range of reasons, including that this case turned out to be more complicated than I anticipated, and I wished to take a proper opportunity to reflect on the issues. I can only apologise profusely for misrepresenting the timetable (albeit without any malice) in that way.)

32 As part of my directive offering the parties the chance to make further submissions, I posed the following questions:

32.1 Is it correct that, in South African law, the question whether a document is privileged is assessed at the time when the document was generated?

32.2 If so, would it not follow that the reasoning in *State of South Australian v Barrett* cannot be correct and/or cannot apply in South African law?

32.3 Leaving aside *Barrett*, is there any guidance in South African law either to confirm or contradict the proposition that, at the time when the Hay file notes were generated, Mr Brown could have insisted that they be provided to him?

32.4 If it is correct that Mr Brown could have so insisted, does it not follow that, if the answer to question described in paragraph 32.1 above is – yes – then WK Construction cannot now assert the privilege over the Hay file notes?

33 I pause to point out that the question summarised in paragraph 32.1 above arises from a debate in *Barrett*, which I discuss again below.

34 Both parties took up the opportunity to file further written submissions. The parties appear to agree that there is no decided South African case (at least, which can be found through the usual research channels) on the implication (if any) for a claim of privilege arising from the proposition (if correct) that Mr Brown could have insisted on access to the Hay file notes at the time when they were generated in 2010.

The supplementary submissions of Mr Brown

35 In essence, the supplementary submissions made on behalf of Mr Brown were the following: the time at which the privilege is to be assessed is the time when the communication was made. At the time when Mr Kusel consulted with Mr Hay, both Mr Kusel and Mr Brown were directors of WK Construction. It is inconceivable – according to Mr Brown’s argument – that Mr Kusel would have been able to refuse to disclose the Hay file notes to Mr Brown at the time when they were generated. The advice in question was sought by one director of the company on behalf of the company (ie, not in his personal capacity). All of the directors of the company at the time would, therefore, have been entitled to access the written reflection of the advice given to the company. This is because they would all have stood in the same fiduciary relationship to the company. Reasoning from all of these premises, it is argued on behalf of Mr Brown that it cannot be correct to say that a document “which was never privileged between [WK Construction or Mr Kusel] and [Mr] Brown and the other directors at the time somehow magically became privileged when [Mr] Brown was no longer a director. The question of whether communication or advice is privileged must be tested at the time when the communication takes place and when the advice is given”.

36 In the supplementary submissions, Mr Brown also contends that the Australian cases which I mentioned above are wrongly decided and/or distinguishable from the facts of the present case.

The supplementary submissions of WK Construction

37 The centrepiece of the submissions made by WK Construction is the contention that I should not decide the questions summarised in paragraph 32 above because they do not arise on the pleadings. Relying on the decision of the Supreme Court of Appeal (“SCA”) in *Fischer v*

Ramahlele 2014 (4) SA 614 (SCA) (“Ramahlele”), WK Construction points to the adversarial nature of our system. It says that Ramahlele emphasises that parties may choose to take, or not take, a particular point for a variety of reasons and it would (and I paraphrase slightly here) be inappropriate for the court to foist its own views onto the parties when it comes to what issues should or should not be decided. Since the founding affidavit does not raise the incumbent-director submission at all, this should be taken (according to WK Construction’s argument) as evidence that it had elected (for whatever reason) not to take the point. On the basis of Ramahlele, it would therefore be inappropriate for me (in essence) to take the point on behalf of Mr Brown and decide the application on that basis.

38 An important component of WK Construction’s argument in this regard is its reliance on a letter sent by its attorney (“Alexander Cox”) to the attorneys acting for Mr Brown on 3 November 2021. A meeting had been held in November 2020 in which, amongst other things, the parties agreed to attempt to resolve any dispute about privilege. In the November 2021 letter, reference was made to this meeting, and it was explained that the advice given by Alexander Cox to WK Construction was that the Hay file notes were privileged and the “once privileged, always privileged” rule applied. It was then explained in the letter that Alexander Cox had researched the question of whether a former director is entitled to see privileged documents of the company. The two Australian cases mentioned above were named and briefly described. Having provided an extract from one of the cases, Alexander Cox said that the Hay file notes were clearly privileged and the only question was whether WK Construction was willing to waive the privilege. It then advised that it was seeking the advice of counsel as to whether the documents were privileged and in the meantime invited Mr Brown to indicate the basis on which he contended that the documents were not privileged.

39 The point made by WK Construction in the supplementary submissions is that Mr Brown’s legal team was told, almost a year before launching the interlocutory application, the basis on which WK Construction asserted the privilege, including its contention that Mr Brown’s status as a former director did not destroy the privilege. In this context, Mr Brown had to be taken to have elected not to pursue access to the documentation on the basis of his status as a former director (or to put it slightly differently, his status as a director at the time when the document was generated). On the authority of Ramahlele, it would therefore be wrong of me to raise and decide the point now. It is implicit in this argument that it would be wrong of me to do so, despite the fact that Mr Hellens raised the point in argument.

ANALYSIS

40 The submissions summarised above raise, in my view, the following questions:

40.1 Am I precluded, on the authority of Ramahlele or otherwise, from deciding the incumbent-director submission now?

40.2 If not, does Mr Brown’s status as a director of WK Construction at the time when the Hay file notes were generated preclude WK Construction from asserting the privilege over them now?

40.3 If not, must Mr Brown's application (either for full access or for an order that a court take a judicial peek of the documents) succeed on any other ground?

41 I consider these questions in the discussion below.

The implications of *Fischer v Ramahlele*

42 In *Ramahlele*, there was a dispute between Ms Fischer and the City of Cape Town, on the one hand, and the respondents, on the other, about whether the respondents had been spoliated from their homes. A simplified summary of what brought the matter before the SCA is this: structures were erected on Ms Fischer's property in the Cape Flats and the City of Cape Town demolished them. The respondents said that they had occupied the structures as their homes for some time, and had therefore been unlawfully spoliated. The City accepted that, if the structures were the respondents' homes, the demolition of those structures would have been unlawful. However, the City denied that the structures were their homes and presented evidence on affidavit to support its version. The judge hearing the matter referred to oral evidence, by agreement between the parties, the question of whether the structures were the respondents' homes. By virtue of the City's acceptance that, if they were, the demolition was unlawful, everything turned on this factual question.

43 When the matter came before the judge meant to resolve the factual dispute (*Gamble J*), he took the case in a totally different direction. Instead of hearing evidence on the factual dispute, he directed the parties to address him on two points, which he characterised as points of law. The first was whether the City had locus standi to conduct the demolition on private land. The second was on what basis the City contended its conduct to be lawful, in the light of the provisions of section 26(3) of the Constitution and the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act"). *Gamble J* heard argument on these matters and decided that, for reasons not relevant here, the first issue did not arise. However, *Gamble J* did decide the second issue and decided it against the City, finding the PIE Act to be applicable. As the SCA put it, the "factual basis upon which it [ie, *Gamble J*] did so is, however, unclear, although it appears to have involved deciding

factual disputes without evidence" (*Ramahlele* at para 10).

44 The SCA pointed out that everything in the case turned on the factual dispute which had been referred to oral evidence. In a sense, *Gamble J* inverted the proper order of enquiry by reaching the legal conclusion that the PIE Act applied without any factual basis for doing so.

45 Having explained the way in which the court a quo had decided the matter, the SCA emphasised the following important principles, some of which WK Construction relies on here:

45.1 In our adversarial system, "it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues (*Ramahlele* at para 13).

45.2 The SCA pointed to two exceptions to this proposition – first, where the parties may expand the issues by the way in which they conduct their case and, secondly, where the court raises a question of law of its own accord which emerges fully from the evidence and is necessary for the decision in the case. But this “is subject to the proviso that no prejudice will be caused to any party by its being decided” (Ramahlele at para 13). Other than in the application of these two exceptions, “it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone” (Ramahlele at para 13).

45.3 It is not for the court to raise new issues which were not traversed in the pleadings or affidavits “however interesting or important they may seem to it, and to insist that the parties deal with them” because the parties may have had their own reasons for not raising those issues (Ramahlele at para 14).

45.4 A court may sometimes suggest a line of argument or approach to a case which had not previously occurred to the parties, but it is for the parties and not the court to decide to go down that road. If the parties “wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in their pleadings or affidavits” (Ramahlele at para 14). In other words, judicial restraint is called for (Ramahlele at para 15).

46 It seems to be implied (undoubtedly with no ill-intent) by WK Construction that, in calling for the further submissions described above, I am guilty of the lack of judicial restraint highlighted by the SCA in Ramahlele. But the difference between the present case and the Ramahlele scenario is that, in the latter, Gamble J took the case in an entirely different direction unilaterally, whereas my request for

further submissions arose because of Mr Hellens’ argument. In other words, Mr Hellens raised the legal argument relating to Mr Brown’s status as a director, which is what prompted me to seek full submissions on the topic. It is not an idea which occurred to me (lacking, as I am, in jurisprudential imagination), but rather a submission made by one of the parties.

47 So, in the present case, we are not in a situation where the court has impermissibly taken the parties in a direction without their consent. One of the parties elected to raise a legal argument not previously ventilated on the papers, and the real question which now presents itself is whether that party is entitled to do so.

48 It seems to me that there is inherent tension in two propositions. On the one hand, as the SCA held in Ramahlele (and has been emphasised by our courts on multiple occasions), the parties are obliged to set out and define the nature of their dispute in the pleadings, which of course includes the affidavits. The cases in which this proposition is stated are too numerous to mention and one could reasonably describe the principle that parties may not raise points which have not been pleaded as trite. On the other hand, however, is the slightly less well-known (but certainly still familiar) proposition that parties are entitled to argue points of law as long as they emerge from the pleaded facts.

49 In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*

[2004] ZACC 15; 2004 (4) SA 490 (CC) at paras 26-7, O'Regan J applied a species of this latter principle when she held that the failure of a litigant to plead reliance on specific provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") was not fatal to its case as long as it was "clear from the facts alleged by the litigant that [PAJA] is relevant and operative".

In *My Vote Counts v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at para 177, the Constitutional Court held that a litigant should make out its case in its founding affidavit "and certainly not belatedly in argument". But it then referred to an exception which was that: "a point that has not been raised in the affidavits may . . . be argued or determined by a court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party".

50 Mr Hellens advanced the incumbent-director submission for the first time at the hearing. So, the question which has to be addressed is whether Mr Brown is entitled now to rely on this submission on the basis that it is "legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party".

51 Mr Hellens submitted that the argument was foreshadowed in the pleaded case because it was pleaded (and indeed, was common cause) that Mr Brown

was a director of WK Construction at the time when the Hay file notes were generated. That fact having been established, Mr Hellens' argument, in essence, is that it is open to him to advance legal submissions (such as the submission that Mr Brown would have been

entitled to the Hay file notes in 2010 and so they cannot be treated as privileged now) based on this fact.

52 WK Construction, on the other hand, argues that this issue was not pleaded at all. I have touched on this above, when summarising its case as presented in its supplementary submissions. It argues that Mr Brown relied, in the founding affidavit, on the wrong privilege and the application should be dismissed on that basis alone. It rejects the notion that Mr Brown is permitted to advance the argument relating to his status as a former director now, having not pleaded it adequately.

53 In my view, it is not straightforward to determine on which side of the line the incumbent-director argument falls. I have a degree of discomfort in the notion that it is purely a point of law because I can imagine that, at least in some cases, further factual information might be relevant to resolve the implications, if any, of a party's status as a former director. This would imply that the issue would have to be pleaded comprehensively in the founding affidavit, to enable the respondent to reply to it properly. In any event, it is not necessary for me to decide this point, because, in my view, even if Mr Brown is entitled to raise the point now, it does not avail him. I am prepared to assume, therefore, that the issue is simply a question of law which may be advanced despite it not having been pleaded.

Mr Brown's status as a former director

54 There is rhetorical force in the argument advanced on behalf of Mr Brown. If privilege is indeed assessed at the time when the document is generated, then it seems persuasive to say that the documents cannot now be privileged. Put differently, if one teleports oneself back to the time when the Hay file notes were drafted, it would surely have been difficult for Mr Kusel to refuse to disclose the documents to Mr Brown on the basis that he had sought the advice confidentially. It is indeed easy to imagine Mr Brown retorting that (a) the advice was sought by Mr Kusel as an agent of the company (b) Mr Brown, too, owed fiduciary duties to the company and

(c) he was therefore entitled to see the advice given by Mr Hay to enable him to discharge those duties.

55 However, as both of the parties recognised in the supplementary submissions which they helpfully provided to me, this is an undeveloped area of our law of privilege. I conducted my own independent research and could not find case-law on this point. The issue arose in the Australian cases drawn to my attention by WK Construction. In *Hammond v Quayeyeware*

[2021] FCA 293 (“*Hammond*”), the court referred to a proposition advanced, and rejected, in the main judgment of Olsson J in *State of South Australia v Barrett* (a decision of the Supreme Court of South Australia dated 27 April 1995 and reported in

(1995) 64 SASR 73 (“*Barrett*”)) to the effect that “where privilege exists, it arises at the point of bringing the relevant document into existence”. Olsson J was doubtful as to whether that principle applied in the way in which it had been framed by the parties seeking access to documents in that case. Mullighan J, writing a concurring opinion, expressed himself in this way:

“It seems clear that the learned Judge [a reference to the court below] accepted the contention that the directors of the Bank and the Bank were, in effect, one and the same at the time when the documents came into existence and as the privilege arose at that time, it could not extend to them. This approach does not accord with relevant principle. The directors of the Bank and the Bank are not one and the same. A corporation is a legal entity separate and distinct from its members and officers. . . The privilege is that of the Bank and not of the directors of the Bank as individuals.”

56 In *Quayeyeware*, the Court (see paragraph 218) seems to have assumed that there is no inflexible rule, one way or the other, as to when the privilege is to be assessed.

57 In my view, Mr Brown's argument is excessively reliant on the notion that privilege is assessed at the time when the document is generated. If that principle applies in South African law at all – and I cannot say with confidence that it does – then it certainly cannot operate as an inflexible injunction in all cases. And it certainly cannot be used, in my view, to operate in a way which leads to outcomes which are entirely counterintuitive.

58 Why do I refer to counterintuitive outcomes? It is because the only reason why Mr Brown gets to advance this argument in the first place is because of his role as a former director. As an individual he had no right to, or interest in, any confidential information generated for the benefit of the company, which (it is trite) has a separate legal personality (see, for example, *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* [1995] ZASCA 53; 1995 (4) SA 790 (A) at 803H). At the time when he was a director, his entitlement to information or anything else confidential to the company arose only from the fiduciary duties he owed to the company. In that context, it would strike me as strange for him to be able to insist on access to documents which otherwise would clearly be privileged (which is the premise from which we must proceed for the purposes of this leg of the argument) simply because he would have been entitled to see them when he was a director. The fact of the matter is that he is no longer a director. In his capacity as a former director, he seeks to assert a right which is at odds with the interests of the company. It would be extremely odd if we could use his status as a former director – and the fact that he previously owed fiduciary duties to the company – as a basis for doing so.

59 This is essentially the conclusion reached in the Australian cases on which WK Construction relies. It is not necessary to discuss them in detail. In *Hammond*, a director of a company sought the provision of certain documents in circumstances not dissimilar to the present case. One notable, and interesting, difference, is that the party applying for access to documents which the company considered privileged, remained a director of the company at the time when the application to compel provision of the documentation was brought. Even so, the Court held that “directors’ rights of access, whether statutory or at common law” did not “override or abrogate a company’s right to maintain legal professional privilege immunity against a director in respect of confidential advice to the company relating to a dispute between it and the director” (at paragraph 195).

60 It is true that in *Hammond*, the advice in question was generated after the relationship between the company and the director soured. In other words, it was even easier to see how the company, with its separate legal personality and interests adverse to the director, had an interest in asserting the privilege which overrode any right which the director might have had to access the documentation. But, on the other hand, the director’s status as a current director might arguably have made her claim to access stronger; and, indeed, the dispute arose because of a long-standing fight between the director and the company about her right to access to information in her capacity as the representative of the minority shareholder. To me, the main issue is that any director of a company, whether past or present, only has any entitlement to access confidential information belonging to the company in his or her capacity as an agent of the company. It must follow that, if he or she ceases to be an agent, or finds himself or herself in a position where having access to that document would be adverse to the interests of the company, the right to access falls away. As the Court put it in *Barrett*:

“Once it is acknowledged that the right of a director to inspect documents of a corporation is limited in these ways, it may be seen that legal professional privilege may apply against directors. The privilege does not cease to apply merely because the documents came into existence at a time when the directors held that office. The privilege will apply when the directors seek inspection in their private or personal capacity. It will extend when they seek inspection after they have ceased to be directors, subject of course to waiver”.

61 Although this Court is not bound by the Australian cases, they are in my view a helpful guide to what should be done in a situation like this. Happily, their conclusion accords with logic and principle. I accordingly intend to adopt the same approach and conclude that Mr Brown is not entitled to access the Hay file notes as a result of his status as a former director; and, in particular, the fact that he could in principle have gained access to them at the time when they were generated had he known about them.

62 It therefore becomes necessary to consider the rest of Mr Brown’s arguments, including his suggestion that I should order a judicial peek of the Hay file notes.

The decision of Binns-Ward J in A Company

63 As noted above, one of Mr Brown’s main contentions is that there is insufficient evidence on the papers as they stand for me to conclude with confidence that the Hay file notes are privileged. This should lead me either to grant the application (on the basis that WK Construction has not adequately substantiated its claim of privilege) or to order a judicial peek so that this Court (either through me, or the judge presiding over the trial) may determine the nature of the notes. For this proposition, reliance is placed on the decision of Binns-Ward J in A Company.

64 The issue in A Company was whether the applicants could assert the privilege over certain invoices issued by their attorneys. Their basis for asserting the privilege was that the legal advice which had been given by the attorneys could be discerned from reading the invoices. The dispute had arisen because the applicant companies had provided the respondent (“SARS”) with redacted versions of the

invoices and SARS was not satisfied by that.

65 One of the issues with which Binns-Ward J dealt during the course of an extremely comprehensive judgment was whether fee notes of attorneys are, in South African law, in all cases privileged; ie, as a blanket rule. Binns-Ward J considered certain foreign authorities and concluded that, since South African law in this field has historically been premised on English law, it was appropriate to follow the reasoning in the English cases. Although the position in English law (and New Zealand law, also considered by Binns-Ward J) was not without complexity, various English cases considered by Binns-Ward J (see, in particular, A Company at paragraphs 28 to 29), pointed to the conclusion that attorneys’ fee notes are not the subject of a blanket privilege. This led Binns-Ward J to conclude that the same applies to South African law, particularly because this approach was congruent with principle (A Company at para 30).

66 The fact that there was no blanket rule that attorneys' fee notes are privileged was not the end of the matter. This was because it was possible that such fee notes might "set out the substance of the advice" or contain "sufficient particularity of its substance to constitute secondary evidence of the substance of the advice" (A Company at para 31)). In other words, even if there was no blanket privilege attached to attorneys' fee notes, it might be that, on the facts of a particular case, an attorney's fee note would contain sufficient evidence of the advice given that its disclosure would entail the disclosure of privileged information. The solution to this problem would be for the party claiming the

privilege simply to redact the parts of the fee note reflecting the advice (see A Company at para 34).

67 The difficulty facing Binns-Ward J in A Company was that the founding affidavit disclosed "virtually no detail" to explain why the privilege was asserted in respect of the redacted parts of the invoices. It was in this context that he was invited to take a judicial peek to determine what had been redacted and whether it was covered by the privilege (A Company at para 37)).

68 Binns-Ward J, in considering whether to take up the invitation to take a judicial peek, pointed out that our courts have considered the taking of a judicial peek to be an intervention of last resort. This is entirely understandable, because the taking of a judicial peek is inimical to the open and adversarial nature of our judicial system (see A Company at para 38). This led Binns-Ward J to make the following remarks (at para 39), on which Mr Brown places reliance in his heads of argument:

"I draw attention to these considerations because I consider that a party in the position of the applicants in the current case should be astute to present its case in a manner directed as far as possible to avoid the necessity of the matter having to be decided on the basis of a secret inspection, or at the very least to minimise the one-sided effect of any private judicial inspection that might nevertheless remain necessary. In the current case that could have been done by providing a far more detailed contextual explanation in its founding papers of the bases for the non-disclosure of the allegedly privileged information. A party that asserts legal professional privilege should generally be able to provide a rational justification for its claim without needing to disclose the content or substance of the matter in respect of which the privilege is claimed. Failing such justification, there is nothing before court but the claim to privilege itself; the means for testing its validity is absent if resort is not had to the mechanism of judicial peeking, which, as has been noted, a court should generally be hesitant to undertake. Indeed, had SARS' counsel not agreed to my taking a judicial peek in the current case I might well have declined to do so — despite the fact that the application could not be determined without it — on the grounds of the applicants' failure to provide sufficient contextual justification of their claim to legal advice privilege in their founding papers."

69 In essence – and this is also how I understood the oral argument of Mr Hellens – the argument is that Mr Brown is in the same position in the present case as SARS was in A Company. This carries the implication that I should either reject the claim of privilege on the basis that WK Construction has not done enough to substantiate it, or I should order a judicial peek as the only mechanism to determine what is actually in the Hay File notes and whether it is privileged.

Application to this case

70 In my view, the facts of A Company are different to the present case in a material respect: in A Company, the fee notes were not the type of document which would ordinarily be privileged. Binns-Ward J was faced with the type of document which, at best, could constitute secondary evidence of the advice given, and he had the difficulty that no explanation had been provided as to why the document was privileged. Here it is common cause that the Hay file notes were generated by an attorney when a client (Mr Kusel, an agent of WK Construction) came to consult with him. It is common cause that the advice was sought in confidence. I agree with Mr Broster when he says that there could be no purpose in Mr Kusel consulting with Mr Hay other than to obtain legal advice. This conclusion is particularly compelling in the context of the authorities which say that one does not easily go behind the oath of an attorney who says that a particular document is privileged (see, for example, *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 73).

71 If I understood Mr Hellens' argument correctly, he sought to rely on A Company to defeat that proposition. In other words, he sought to argue that the present case is more like A Company – where insufficient information was given to enable the court to determine whether the documents in question were privileged – than a case where one must, at least as a default, accept an attorney's word that a document is privileged. Some of the debate focused on a letter sent by WK Construction's attorneys to Mr Brown's attorneys on 25 February 2022. The letter was sent in response to a letter sent by Mr Brown's attorneys on 15 February 2022 in which it was made clear that Mr Brown sought access to the Hay file notes. Both letters were annexed to the founding affidavit in this interlocutory application. In the 25 February letter, WK Construction's attorneys explained the basis of asserting the privilege as follows (the reference to "Born Free" below is a reference to the company which I described as PMS above):

"Mr Hay gave legal advice to our client in respect of the Born Free Investments 467 (Pty) Ltd trading as Planet Mining ("Born Free") sale of shares agreement and ancillary documents and agreements. There was a continuum of communication between attorney and client recorded in the series of file notes dated from 29 June 2010 to 26 October 2010 in which Mr Hay gave legal advice to our client, inter alia, in regard to:

- 4.1. the draft sale of shares agreement prepared by the sellers including the fact that the company had other creditors and whether a sale of shares would be preferable to a sale of business;
- 4.2. the issue of mining law also requiring input from a Zimbabwean lawyer;
- 4.3. the structure of the transaction and the risk of buying a company with unknown creditors;

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- 4.4. advising in respect of a royalty deal as opposed to the procedure proposed in the documents provided to him;
 - 4.5. the undisputed debt of approximately R7 million owed by Born Free to our client;
 - 4.6. the issue of de-establishment;
 - 4.7. the question of future geological investigations and rights of preemption;
 - 4.8. the issue of the \$1 million advance on royalties;
 - 4.9. the labour problems;
 - 4.10. the revised draft of the agreements;
 - 4.11. section 38 of the Companies Act and whether the sale could be set aside at a later date;
 - 4.12. the loan account by Ellis and how this could be dealt with in regard to the price;
 - 4.13. the so-called cession agreement and the security that it provided;
 - 4.14. the contractual relationship between Garlpex and CoalBrick;
 - 4.15. the convoluted methodology in regard to the relationship between Garlpex and Planet Mining and whether there was unlawful externalising of profits;
 - 4.16. the financial due diligence, the lack of financial statements, effective date accounts and difficulties relating to warranties as to the amount of the liabilities of the company;
 - 4.17. the voetstoets problem;
 - 4.18. the question of minority protection;
 - 4.19. the danger of Garlpex cancelling their agreement and the consequences of the obligations imposed on Planet Mining in regard to production;
 - 4.20. the issue of the payment clause and the details in regard thereto;
 - 4.21. the implications of the warranties relating to tax issues;
 - 4.22. an ex-employee of Born Free claiming an investment in the company and the consequences thereof;
 - 4.23. the consequences of the dilapidated equipment and the warranty clause;
 - 4.24. the implications of the fact that the sellers had a fall-out considering and advising on separate agreements with the sellers;
 - 4.25. holding back payment against warranty claims in regard to the so called investors, CCMA claims, wages from employees, diesel claims and whether payments could be paid into a trust account and consequences thereof and the risk of cancellation; and

4.26. the sellers had fraudulently misrepresented the results and the legal consequence thereof including criminal and civil issues.

72 Although it is not really possible to discern the full context to each of the items on this list, I agree with Mr Broster that, in this situation, it would have been difficult for WK Construction's attorneys to give any further information without defeating the purpose of the privilege. With this starting point, we are then faced with documents such as the Hay file notes (which, as I mentioned above, our courts have held are ordinarily privileged), coupled with a statement from WK Construction's attorney that that document is privileged. In these circumstances, it would take some other compelling consideration or piece of evidence to dislodge the strong starting presumption that the document in question reflects a written memorial of legal advice given by an attorney to his client. There is nothing before me to dislodge that presumption.

73 In this regard, it is important to have regard to the way in which this case was pleaded by Mr Brown. As I have already mentioned, in his founding affidavit in this interlocutory application, while stating the four requirements of the legal professional privilege (which includes the legal advice privilege on which WK Construction relies), Mr Brown's case was essentially that the privilege could not apply because no litigation could possibly have been contemplated. In response to this, WK Construction pointed out that it did not rely on the litigation privilege, but rather on the legal advice privilege. It explained its position as follows:

"It is apparent from the file notes annexed to the founding affidavit [a reference to the redacted Hay file notes] that the broad subject matter of the advice sought by WK from Cox Yeats was how to implement the 28 June 2013 [sic, this should say 2010] board resolution of WK. The advice was sought by Mr Willie Kusel the then Chairman of the Board of Directors of WK. It was legal advice and it was sought in confidence. The notes are accordingly privileged."

74 It seems to me that, in the face of the contents of the founding affidavit, which seem to convey the view that only the litigation privilege could justify WK Construction's refusal to reveal the unredacted Hay file notes, the response in the answering affidavit was perfectly reasonable. It provides sufficient information to explain why the Hay file notes are privileged. As pointed out by Mr Broster, the information provided in the answering affidavit is consistent with what one would expect about the Hay file notes. Had the document in question been something similar to the invoices in A Company or some other type of document which one would ordinarily not expect to convey legal advice, the position might well have been different. But there is simply no reason to go behind the explanation in the answering affidavit in the circumstances of this case.

CONCLUSION

75 In the light of what I have said above, there is no basis for the relief sought by Mr Brown in this interlocutory application. It follows that it must be dismissed. Mr Brown accepted that, if I ordered a judicial peek, costs should be reserved for the determination of the trial judge. This was clearly sensible. But both parties took the view that, if I granted the application outright or dismissed it, costs should follow the result. It follows that Mr Brown should pay the costs of this

application. Both parties employed two counsel (at least in argument) and as may be seen from the discussion above, there were some complexities in this matter. At the very least, the eminent silks who argued this matter were no doubt ably assisted by their juniors in preparing the supplementary submissions which I invited. It is therefore appropriate, in my view, for the costs to include the costs of two counsel.

76 I accordingly make the following order:

1. The interlocutory application to compel discovery brought under case number 25092/2014 on 17 March 2022 is dismissed.
2. The applicant (defendant in the main trial action) is ordered to pay the costs of the respondent (plaintiff in the main trial action), including the costs of two counsel.

ADRIAN FRIEDMAN

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above 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 31 January 2023.

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