

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2019/00395

In the matter between:

RAPHAEL HIJANGUNGO KAPIA

1ST APPLICANT

SAMUEL PURIZA

2ND APPLICANT

and

MINISTER OF URBAN AND RURAL DEVELOPMENT

1ST RESPONDENT

ZERAEUA TRADITIONAL AUTHORITY

2ND RESPONDENT

MANASSE MEUNDJU CHRISTIAN ZERAEUA

3RD RESPONDENT

FABIANUS UASEUAPUANI

4TH RESPONDENT

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA

5TH RESPONDENT

Neutral Citation: *Kapia vs Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00395) [2021] NAHCMD 71 (24 February 2021)

CORAM: MILLER AJ

Reserved: 26 January 2021

Delivered: 24 February 2021

Flynote: Practice – Rule 76 (6) application seeking further documents – First respondent forming the view that discovery made is complete – Applicant seeking papers containing legal advice upon which the first respondent utilised in arriving at its decision – First respondent raising legal privilege on documents sought by applicant – Court to determine whether such documents fall indeed under legal privilege or not – Principles applicable discussed.

Summary: This matter involves an opposed interlocutory application for the delivery of a rule-compliant record of decision. The application is based on the notion that the first respondent filed an incomplete record of proceedings under review, causing the applicant to file a notice in terms of rule 76 (6), seeking further documents. The first respondent, however, formed the view that the requested documents sought is privileged and cannot be discovered as requested by the applicants and further that the dispute between the parties can proceed without the legal opinion as it has no bearing on the relief sought.

Held – It is clear that the review record must contain all documentation that are required, whether utilised or not, that is or was relevant in assisting the decision-maker to arrive at its decision, whether such decision was correctly made or not.

Held – It is common cause that the legal opinion which the first respondent obtained from their counsel falls within the ambit of legal professional privilege, and that the adversary to the party asserting such privilege would normally not be entitled thereto.

Held – I lean to the finding that the first respondent did not in clear terms waiver his legal privilege to the decision sought, primarily on the stance that he did not in clear terms waiver the privilege by merely referring to it, not necessarily disclosing the contents thereof sufficiently to impliedly waiver same.

ORDER

- (a) The applicant's application is dismissed.
 - (b) The costs are awarded to the respondent, limited to N\$20,000.00 in terms of rule 32 (11).
 - (c) The matter is postponed to 3 March 2021 at 08h30 for a status hearing.
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RULING

MILLER AJ:

[1] Before me is an opposed interlocutory application for the delivery of a rule-compliant record of decision. The basis upon which the application is based is premised on the notion that the first respondent filed an incomplete record of proceedings under review, causing the applicant to file a notice in terms of rule 76 (6), seeking further documents.

[2] Responding to the rule 76 (6) notice, the first respondent filed an affidavit stating that the record as filed was complete and constitutes the complete record. The applicants, not in agreement, hence filed the application before me.

[3] Before proceeding any further, the brief background of the matter before me is necessitated to determine the basis of the rule 76 (6) notice and it can be summarised as follows.

[4] The first applicant is the alleged designated successor as Chief of the Zeraeua Traditional Community in accordance with their customs, customary laws and traditions. The second applicant is a member of the Chief's Council of the Zeraeua Traditional Community and a member of the Zeraeua Royal Family.

[5] Despite the first applicant's alleged designation as successor, the first respondent approved the third respondent's designation as Chief of the Zeraeua Traditional Community.

[6] On 2 July 2018 and at a meeting, the first respondent indicated that he decided to recognise the third respondent as Chief without giving reasons. Later on the first respondent called the parties back and retracted his earlier statement, indicating that his decision in recognising the third respondent as Chief was based on wrong advice given from the government attorney's office. The first respondent allegedly further informed the parties present at the meeting that he was supposed to have submitted the advice obtained from the government attorneys' office to the office of the attorney-general for a final legal opinion.

[7] It is this purported advice that the applicant submitted its rule 76 (6) notice as it formed the view that the said opinion or documents are of relevance in that they were used in the decision-making process, therefore necessitating that it also forms part of the review record.

[8] The first respondent, however, formed the view that the requested documents sought is privileged and cannot be discovered as requested by the applicants and further that the dispute between the parties can proceed without the legal opinion as it has no bearing on the relief sought.

[9] The principles relating to the rule 76 (6) notice is quite clear and various judgments were delivered by this court. In *Hollard Insurance Company of Namibia Limited v Minister of Finance*,¹ this court succinctly summarised the position as follows:

[20] Accordingly what must be disclosed is all information relevant to the impugned decision as otherwise the provisions of Rule 76 would be rendered meaningless. The Rule in any event requires this in express terms. The rule also clearly envisages the grounds of review changing later. 'Relevance' should thus be assessed as it relates to the decision sought to be reviewed, not with reference to the case pleaded originally in the founding affidavit. In this regard it can thus be said that, what must be disclosed - and it is here that I would think that the material change comes in - are all those '... documents/materials that could have any tendency, in reason, to establish any possible/potential review ground in relation to the decision to be reviewed, i.e. all materials relevant to the exercise of the public power in question ...'. It follows - and I thus uphold the submission - that the word 'relevance' as used in Rule 76(6) is 'wide(r) in its scope and meaning' in these respects. The concept thus differs in its scope and the way and from how it is applied in action- and also in motion proceedings in general. It is thus also not limited only to the actual material serving before the decision-maker but it so also includes all material available to the decision-maker – whether considered or not – for as long as it is relevant to the decision to be reviewed - and in any event it includes the material that is incorporated by reference. In this regard it was thus correctly submitted that 'an applicant in a review will be entitled to documents that are relevant to the case pleaded in the founding affidavit, and/or(my insertion) to any other information that relates to the decision sought to be reviewed even if the relevance does not specifically appear from the pleadings'.

[10] It is therefore quite clear that the review record must contain all documentation that were required, whether utilised or not, that is or was relevant in assisting the decision-maker to arrive at its decision, whether such decision was correctly made or not. However, in the present matter, the first respondent raised the defence of legal privilege in respect of the documentation sought by the applicant, giving rise to a peculiar situation.

¹ *Hollard Insurance Company of Namibia Limited v Minister of Finance* (HC-MD-CIV-MOT-REV-2018/00127) [2019] NAHCMD 9 (21 January 2020).

[11] It is common cause that the legal opinion which the first respondent obtained from their counsel falls within the ambit of legal professional privilege, and that the adversary to the party asserting such privilege would normally not be entitled thereto. In *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others*,² Friedman J referred to 'this fundamental right of a client', stressing the importance that:

'...inroads should not be made into the right of a client to consult freely with his legal adviser, without fear that his confidential communications to the latter will not be kept a secret.'

[12] Van Dijkhorst J in *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd and Others*³ said:

'The privilege claimed in respect of the attorney's notes is that of the client, the plaintiff, and not that of the attorney. Any waiver of such privilege is by the client, not by the witness (the attorney). Where the case is conducted by the client's legal representatives, they are in charge of the proceedings. A client is bound by the conduct of the case by counsel within the limits of his brief and subject to such specific instructions as he may have accepted. *R v Matonsi* 1958 (2) SA 450 (A) at 456 and 457; *S v Mathope* 1982 (3) SA 33 (B) at 34. The conduct of the action inter alia involves decisions as to waiver of privilege and the calling of witnesses. *Great Atlantic Insurance Co v Home Insurance Co and Others* [1981] 2 All ER 485 (CA) at 493h.'

Further at 629E-G:

'In my view a waiver of privilege in respect of a consultation between attorney and client or attorney and witness is a waiver of privilege in respect of the communications between them. This means that these communications may be made public. Surely, there can be no logical reason for the prevention of the disclosure of the record of such communications where their contents are already disclosable.

² *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others*, 1979 (1) SA 637 (C) at 643H – 644B.

³ *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd and Others* (2) 1983 (2) SA 626 (WLD) at 627F-H.

Why would the veil of secrecy which was lifted from the communication shroud the contemporaneous documentation thereof? The basis of privilege is confidentiality. When confidence ceases, privilege ceases.'

[13] In *Bogoshi v Van Vuuren NO and Others; Bogoshi and Another v Director, Office for Serious Economic Offences, and Others* 1996 (1) SA 785 (A) the court opined as follows at 793G-I:

'But privilege is not cast in stone; it has its limitations. It may be waived. Or it may be destroyed (see *R v Barton* [1972] 2 All ER 1192 (Crown Ct) and the comments of Botha JA on that case in *S v Safatsa and Others* 1988 (1) SA 868 (A) at 883E-F). There is also the possibility, referred to in *Safatsa* (at 886I), that the Court has the power to relax the rules of privilege. But most important for our purposes is the principle that privilege does not arise automatically. It must be claimed. This may be done not only by the client but by the attorney. Indeed, he is under a duty to claim the privilege. However, because the privilege is the right of the client, the attorney, in claiming it, must act not in his own interests or on his own behalf but for the benefit of the client. Unless he does so, his claim to privilege may be regarded as not genuine.'

[14] In *Alexander v Minister of Home Affairs and Others* (A 155/2009) [2010] NAHC 5 (3 February 2010), the court made the following remarks:

'[20] It was further said that each case has to be considered on its own facts, but from decided cases, they all support two general propositions, namely: (i) That a statement that reveals the contents of legal advice, even if it does so in a summary way or by reference only to a conclusion, will, or probably will, result in a waiver i.e. where it is stated that the party "has legal advice supporting this position/view"; and (ii) That a statement which refers to legal advice, even if it associates that advice with conduct undertaken or with a belief held by the client, will not result in a waiver i.e. where it is said that "on the basis of legal advice received, X believes ...'

[21] In *Switchcorp* the court perceived inconsistency between the particular statement and the maintenance of confidentiality of the advice referred to and found that there was a clear and deliberate disclosure of the gist or the conclusion of legal advice received by the defendant from its lawyers about the outcome of the proceedings. It found that it would be unfair if the defendant were to be permitted “to cast aside confidentiality of the advice in making the statement to the world at large so as to explain or justify its position and to then insist upon confidentiality when inspection is sought of an otherwise discoverable document.” On that ground the court found that there had been a waiver of privilege.’

[15] In the present matter, I find no qualms over the fact that the legal opinion upon which the first respondent based its decision falls within the legal privilege realm. However, as the decisions cited above dictate, such privilege can be impliedly waived.

[16] The first respondent indicated that prior to his decision, he awaited a legal opinion from the attorney-general’s office and once same as obtained, formed his decision in approving the third respondent’s designation as chief. Keeping the authority mentioned above, I lean to the finding that the first respondent did not in clear terms waive his legal privilege to the decision sought, primarily on the stance that he did not in clear terms waive the privilege by merely referring to it, not necessarily disclosing the contents thereof sufficiently to impliedly waive same.

[17] As a result, the following order is made:

- (a) The applicant’s application is dismissed.
- (b) The costs are awarded to the respondent, limited to N\$20,000.00 in terms of rule 32 (11).
- (c) The matter is postponed to 3 March 2021 at 08h30 for a status hearing.

K MILLER
Acting Judge

APPEARANCES:

APPLICANTS:

K Kangueehi

Kangueehi & Kavendjii Inc., Windhoek

1st RESPONDENT:

J Ncube

Office of the Government Attorney, Windhoek