

31 JANUARY 2020

TAX & EXCHANGE CONTROL ALERT

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Waiver of legal professional privilege - practical considerations for tax disputes

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Waiver of legal professional privilege - practical considerations for tax disputes

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In the recent Supreme Court of Appeal (SCA) case of *Contango Trading SA & Others v Central Energy Fund SOC Limited & Others* (533/2019) [2019] ZASCA 191, in which judgment was handed down on 13 December 2019, the SCA revisited and discussed the requirements for the implicit waiver of legal professional privilege.

Facts

In the course of review proceedings, the Appellants applied to the Western Cape High Court for an order to compel two of the Respondents, being state-owned entities (SOE), to comply with a notice, served in terms of Rule 35(12) of the Uniform Rules of Court, for the production of various documents. Specifically, the Appellants sought the disclosure of three categories of documents:

1. the "Legal Review";
2. the documents prepared by the SOE's auditors, PWC and KPMG (Auditors Reports); and
3. two opinions furnished to the Respondents by senior counsel.

After the High Court dismissed the Appellants' application to compel delivery, an appeal was brought to the SCA.



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At the outset, the SCA acknowledged that the process of determining whether any right, privilege or similar interest has been waived is founded primarily on the intention of the party to whom such right or privilege attaches.

In respect of the opinions drafted by senior counsel, the Respondents asserted that the opinions were protected by legal professional privilege and therefore were not capable of disclosure to the Appellants. It was the Appellants' case that the Respondents had made reference to the documents in their founding affidavit to the main review proceedings and that the documents, in terms of Rule 35(12), stood to be produced by the Respondents as the reference thereto in the founding affidavit meant that legal professional privilege had been waived.

Although the Respondents only made brief mention of the opinions in their founding affidavit, and further asserted that the opinions were subject to legal professional privilege, the Appellants argued that the Respondents had implicitly waived privilege by disclosing that the opinions supported that which had been set out earlier in the affidavit, thereby disclosing the content of the opinions.

The proceedings in the SCA dealt with each of the categories of documents sought by the Appellants separately and ultimately, it was the wording used in the Respondents' founding affidavit that was determinative of the SCA's findings.

Judgment

At the outset, the SCA acknowledged that the process of determining whether any right, privilege or similar interest has been waived is founded primarily on the intention of the party to whom such right or privilege attaches. The test to be applied is an objective test comprising of three principles:

1. The intention to waive is judged by its outward manifestations;
2. Mental reservations that are not communicated to the other party are of no legal consequence; and
3. The outward manifestations of intention must be judged from the perspective of a reasonable person standing in the shoes of the party to whom the right or interest does not attach.

An intention to waive is self-evident when a party expressly waives privilege, as would be the case when a privileged document is voluntarily disclosed to a litigious opponent. However, when there has been no express waiver, but the conduct of the relevant litigant is such that waiver of privilege can be inferred, it may be that privilege has indeed been waived.

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Even if a litigant did not intend to waive privilege, if such litigant's conduct is inconsistent with the maintenance of confidentiality, that conduct may result in a waiver of privilege.

South African case law predominantly classifies this type of waiver as an "implied" waiver. However, it has been suggested that reference to an "imputed" waiver would be a more suitable term for waiver in the absence of an express manifestation of the intention to waive. In *Peacock v SA Eagle Insurance Co Ltd* 1991 (1) SA 589 (C) the court reasoned that privilege cannot be implicitly lost when the party losing the privilege did not intend to waive the privilege and therefore, when no actual intention to waive can be inferred from the facts, privilege can only be waived by imputation of law in the specific circumstances.

The SCA performed a thorough exposition of both foreign and South African case law in order to ascertain whether the difference in terminology is purely semantic or whether there are substantive grounds for the differentiation. The SCA took the view that the terms "waiver by imputation" and "waiver by implication" are synonymous and that the distinction is purely terminological. In this regard, the SCA agreed that "disputes pertaining to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect." As such, even if a litigant did not intend to waive privilege, if such litigant's conduct is inconsistent with the maintenance of confidentiality, that conduct may result in a waiver of privilege.

The exposition done by the SCA also highlighted the various requirements and considerations to which regard must be had when determining whether privilege has been implicitly waived. In coming to its final conclusions, the SCA held that there are four factors that, in the present case, had to be considered cumulatively to determine whether the Respondents had waived privilege in respect of the opinions, specifically:

- a) That there is no difference between implied waiver and a waiver imputed by law;
- b) That an implied waiver may be inferred from the objective conduct of the party claiming the privilege in disclosing part of the content or the gist of the material;
- c) Whether the disclosure impacts upon the fairness of the legal process and whether the issues between the parties can be fairly determined without reference to the material; and
- d) That there is no general over-arching principle that privilege can be overridden on grounds of fairness alone.

Ultimately, the SCA held that the Respondents had not waived privilege in respect of the opinions furnished by senior counsel.

It was found that the reference to the opinions in the Respondents' founding papers was included solely to supplement the Respondents' application for

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condonation for the late filing of the review application and was not included in connection with the substantive issues in dispute between the parties. As such, it was unnecessary for the Appellants to respond to the contents of the opinions and the non-disclosure thereof did not impact on the fairness of the legal proceedings.

Furthermore, even though the preceding paragraphs of the founding affidavit had hinted at the content of the opinions, the SCA reiterated 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, as the Respondents had clearly asserted privilege over the opinions when reference thereto was made, it was held that privilege had not been waived. In the result, the SCA dismissed the Appellants appeal in respect of the opinions furnished to the Respondents by senior counsel.

Comment

Litigation proceedings between SARS and taxpayers in the Tax Court are regulated by the Tax Court Rules, promulgated in terms of Section 103 of the Tax Administration Act 28 of 2011 (TAA). Rule 36 of the Tax Court Rules operates in a similar fashion to Rule 35 of the Uniform Rules of Court and makes provision for either party to request the disclosure of documents that are relevant to the dispute, and subsequently to request that such documents are made available to the extent necessary.

Importantly, Rule 36(4) of the Tax Court Rules makes provision for either SARS or a taxpayer to object to the disclosure of a document if a valid reason for such objection exists, including where the document in question is covered by legal professional privilege.

There are several aspects pertaining to legal professional privilege, and specifically also to the implied waiver thereof, that must be borne in mind by litigants in the Tax Court.

Firstly, taxpayers must be aware that legal professional privilege does not extend to communications between a taxpayer and its auditors, accountants or tax advisors, who do not qualify as legal advisors. Any such communications will not be protected by legal professional privilege and will have to be disclosed to SARS should such disclosure be required.

As discussed in a [previous article](#), the communication between a taxpayer and its legal advisor will be covered by legal professional privilege where the communication pertains to legal advice that has been sought and given in a professional capacity, and where the communication between the taxpayer and the legal advisor has been made in confidence. It is also necessary that legal professional privilege be asserted by a taxpayer in respect of a communication.

It is trite that once a communication is covered by legal professional privilege, that communication will enjoy an enduring protection benefit until such time as the

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Taxpayers should be aware that the partial disclosure of a document that is privileged may constitute implied waiver of the privilege that attaches to the whole document.

legal professional privilege is waived by the holder thereof. As legal professional privilege is the right of the taxpayer, it cannot be waived by a legal advisor or a third party. Furthermore, it is noteworthy that once privilege in respect of a communication has been waived, it is not possible for that document to regain its previously privileged status. Consequently, it is very important that taxpayers are aware of what conduct may constitute an implicit waiver of legal professional privilege.

Generally, in order for waiver to be implied, it is necessary for the privilege holder to:

1. have full knowledge of the rights so held; and
2. have conducted himself in such a manner that, objectively speaking, an inference can be drawn that he intended to abandon those rights.

A party to a dispute in the Tax Court will be regarded as having implicitly waived legal professional privilege if that party's conduct is objectively inconsistent with an intention to maintain confidentiality and if such conduct will unfairly fetter the opposing party's ability to adequately

respond to the case advanced in reliance on the privileged communication.

Therefore, if a litigant places reliance on a privileged document and incorporates the contents of that document into its case such that the document forms part of the cause of action in respect of which the opposing party is required to respond, the privilege attaching to that document may be implicitly waived and disclosure thereof will then have to be made. This may be the case notwithstanding any express reservation by the litigant of the right to invoke privilege.

Furthermore, taxpayers should be aware that the partial disclosure of a document that is privileged may constitute implied waiver of the privilege that attaches to the whole document.

In the interests of safeguarding confidential information shared between taxpayers and their legal advisors, it is imperative that taxpayers take cognisance of the limitations of the doctrine of legal professional privilege and the forms of conduct that may lead to an inference of implied waiver.

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