Litigation Privilege: when and how can it be waived?

By Ivor Heyman

In South Africa, our courts have recognized that the content of statements by witnesses produced for a lawsuit are protected from disclosure by litigation privilege. The two requirements for raising litigation privilege over a document are (i) the document must have been obtained or brought into existence for the purpose of the litigant submitting it to a legal adviser for legal advice, and (ii) litigation must have been pending or contemplated at the time.

The leading case on litigation privilege is **Competition Commission v ArcelorMittal South Africa Ltd & Others** 2013 (5) SA 538 (SCA). In that case, the court listed the two requirements for raising litigation privilege mentioned above. It then went on to decide whether the fact that a document had been referred to in the pleadings of the matter amounted to a waiver of privilege over that document in terms of Rule 35(12) of the Uniform Rules of Court. That subrule allows a party to request disclosure of a document if it is referred to in the pleadings.

The court held in **ArcelorMittal** that in the circumstances there had been an implied waiver of the privilege because there was much more than a "bare or oblique" reference to the disputed document in the pleadings. Instead the pleadings contained a "full recital of facts" supporting the findings of the document. This, said the court, was enough to justify a waiver of the privilege.

While on the subject of waiver of privilege, the **ArcelorMittal** court also reviewed the other ways in which a litigant can waive its litigation privilege. According to the court, waiver of a privilege may be express, implied or imputed. Implied waiver occurs when a person who claims the privilege discloses the contents of a document or relies upon it in a court document (as was the case in **ArcelorMittal**). Imputed waiver occurs when fairness requires the court to conclude that the privilege was abandoned.

The issue of whether litigation privilege over a document had been waived arose recently in **Astral Operations Ltd v Minister for Local Government, Western Cape and Another** 2019 (3) SA 189 (WCC). This case concerned an application to compel compliance with a notice in terms of Rule 35(12) to disclose a particular memorandum, similar to the application in **ArcelorMittal**.

The pertinent facts, briefly stated, were that counsel for the first respondent (the Minister) had issued a memorandum to the attorney of the second respondent (the City of Cape Town) in which he laid out instructions for the preparation of three experts that were due to give evidence at the trial. The existence of the memo came to light when it was mentioned by one of the experts in an attachment to his affidavit that formed part of the pleadings in the matter.

The applicant, using the same argument as the one that was successful in **ArcelorMittal**, argued that the disclosure of the memo in the pleadings meant that the privilege attaching to the memo had been waived, alternatively that a waiver was to be imputed.

This time the court rejected the waiver argument and concluded that the memo was privileged. The court (per Binns-Ward J) was of the view that the mere mention of the memo in the pleadings, without disclosing its content, was not sufficient to find an actual or imputed waiver of the privilege.

At this point, we can safely agree with Cachalia JA's statement in **ArcelorMittal** that on the one hand "a bare reference to a document in a pleading, without more, may be insufficient to constitute a waiver, whereas the disclosure of its full contents may constitute a waiver" on the other hand. However, what about the grey area between these two extremes? The court stated that this grey area required a "value judgment" but stopped short of providing the criteria for exercising that judgment.

Several scenarios come to mind when considering situations that fall within the grey area. For example, is privilege over a disputed document waived where the pleadings either in the form of affidavits or particulars of claim (i) refer to the document several times, but do not disclose its contents; or (ii) state that further evidence arising from the document will be led at trial, but do not stipulate what that evidence is, or (iii) disclose that the document was relied on by that party's expert to form his opinion.

Many similar scenarios could be raised to illustrate the murkiness of this grey area, and one can only hope that the next court seized of this question will go to greater lengths to define the criteria needed to decide whether the privilege in a particular situation has been waived.

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