BEFORE THE ARMS PROCUREMENT COMMISSION

SUBMISSION ON BEHALF OF FERROSTAAL GMBH

1. Introduction

1.1 Ferrostaal GmbH ("**Ferrostaal**") has been requested to make a submission to the Arms Procurement Commission (the "**Commission**") relating to the procurement of three submarines by the South African Navy and forming part of South Africa's Strategic Defence Procurement Package ("**SDPP**").

1.2 Ferrostaal emphasises that it has and will continue to co-operate with South African authorities regarding any investigation related to the SDPP, and in particular the Commission. However, as set out in correspondence with the Commission previously, and referred to where necessary below, there are various practical hurdles that have combined to prevent Ferrostaal from being in a position to make detailed factual submissions to the Commission.

1.3 These submissions are therefore made primarily to assist the Commission in its understanding of Ferrostaal's position. The structure of the submission is as follows:

1.3.1 We sketch the history of Ferrostaal and the practical difficulties Ferrostaal faces in providing information to the Commission;

1.3.2 We then provide an overview of Ferrostaal's involvement with SDPP in South Africa.

1.3.3 Finally we provide submissions on the legal position regarding the Debevoise and Plimpton report that has arisen repeatedly before the Commission.

2. The history of Ferrostaal

2.1 Ferrostaal, originating from the Dutch company Ferrostaal N.V. and the German company Gutehoffnungshütte Aktienverein für Bergbau und Hüttenbetrieb, is a global provider of industrial services in plant construction and engineering. In 1968, in cooperation with HDW Werft in Kiel, Ferrostaal became a sales partner for frigates and submarines.

2.2 Ferrostaal was founded in The Netherlands in the 1920s. The business expanded to a number of countries and from 1950 onwards the company started to build industrial plants. In 1960, Ferrostaal began manufacturing diesel railcars and rail-buses. In 2004 it was renamed as MAN Ferrostaal AG, developing itself into the sales and distribution platform of the MAN Group, one of Europe's foremost industrial players in transport-related engineering.

2.3 In 2009, the Abu Dhabi government owned investment company, International Petroleum Investment Company ("**IPIC**"), purchased over 70% of the shares of Ferrostaal AG from MAN AG, and MAN Ferrostaal AG changed its name to Ferrostaal AG.

2.4 In 2012, the Hamburg-based MPC Industries GmbH group acquired Ferrostaal signifying a complete change in ownership of the company. The MPC group is engaged in financial services, shipping and shipbuilding as well as in commodity trading and machinery business. Following the

takeover, Ferrostaal's name changed to Ferrostaal GmbH with its headquarters in Essen, Germany.

2.5 With each of the above changes in control of Ferrostaal, as well as with the passage of time, there were changes in personnel, as well as management processes and internal structures. Ferrostaal has specifically adapted its business policy in accordance with the aspirations of the new owner, who, cognisant of the past, has set the focus of the company on new business goals, the most significant of which include integrity and an improved public image.

2.6 Therefore, persons who had been directly involved in Germany and the Republic of South Africa in the pursuance and the execution of offset-projects are no longer employed by Ferrostaal. Furthermore, to a very large extent the files and documents relating to the offset-projects have been destroyed given the lengthy passage of time and the discharge of the contractual obligations flowing from them. It follows that this response may not be complete and may contain gaps or inaccuracies, but in these circumstances these are unavoidable.

3. Involvement in the Strategic Defence Procurement Package

3.1 The SDPP allowed for the acquisition of up to four submarines for the South African Navy. Invitations to bid were submitted to 11 countries during September 1997. The South African Department of Defence ("**DOD**"), in consultation with Armscor, evaluated the responses and a shortlist of possible suppliers was recommended and approved in 1997.

3.2 The German Submarine Consortium ("**GSC**") was shortlisted and finally selected in 1999 as the preferred bidder to supply three submarines to the South African Navy as part of the SDPP (the "**submarine project**").

3.3 The terms of the agreement entered into by the GSC required certain offset obligations to be fulfilled by the GSC. The offset obligations were governed by separate agreements signed between Armscor, the DOD and the Department of Trade and Industry ("**DTI**").

3.4 The National Industrial Participation Programme ("**NIPP**") consisted of investments generated through the SDPP. The NIPP terms specified how the obligations would be measured in terms of investment, export sales and local sales.

3.5 Ferrostaal was responsible for the execution of certain portions of the Industrial Participation obligations of the GSC as stipulated under the Submarine Agreement dated December 3rd, 1999. Ferrostaal was to offset the NIPP obligation and the majority of the Defence Industrial Participation ("**DIP**") obligation.

3.6 The following projects, the implementation of which has contributed to the discharge of Ferrostaal's offset obligations, have been funded directly or indirectly by Ferrostaal. More detailed information can be obtained from the DTI. The DTI and Armscor have confirmed in writing that all NIPP obligations have been discharged in full. Projects that did not receive credits or funding are not listed.

3.7 **NIPP Projects:**

3.7.1 Atlantis Training Centre

A training centre was financed for professional training of young people in the Atlantis community in order to foster basic skills for better job opportunities in the local industry. The original partner in the project was the Atlantis Economic Development Trust, IT no. 2809/2002 Atlantis Industria, Western Cape Province ("**AEDT**"). AEDT was the founder of the training centre. Ferrostaal funded the setting up of the Atlantis Training Centre through a loan to AEDT. The Western Cape provincial government later took over ownership and management from AEDT. A facility, including refurbishment and training equipment, was purchased. 13 direct jobs were created and the facility caters for approximately 500 students.

3.7.2 MAGWA Tea

MAGWA Tea Plantation was rescued and a restructuring of the tea plantation contracted. JV Gokal was introduced as expert partner. The project was managed under the auspices of the Eastern Cape Development Corporation. Magwa Tea is one of the largest employers with jobs more than doubling during picking season in an area with generally few job opportunities. The tea processing was streamlined and equipment was refurbished or exchanged. Opening of international marketing opportunities through the expert partner was targeted.

3.7.3 Call Centre

A high quality call centre for the very lucrative outsourcing market for English language services was set up in Midrand. The project partner Avanti Call set up 150 call centre seats. Skills were created based on know-how transfer and extensive in-house training.

3.7.4 SAMES

The microchip manufacturing company SAMES, Pretoria, specialising in the design and manufacturing of low-voltage microchips was rescued through financing. The funding enabled SAMES to manage a turnaround process. The funding enabled SAMES to contract a significant order from Finland. SAMES managed to introduce some products for growth potential in new markets.

3.7.5 MDM Ferroman

MDM Ferroman was established through an acquisition of MDM. The new company residing in Randburg specialised in general contracting for the mining industry. Combining of the MDM expertise in the mining industry and technology with the project development capacities of Ferroman offered a significant upside multiplying the turnover prospects of MDM. Apart from the project development capacity, the financial strength and the international footprint of Ferroman, the inclusion offered many BEE related opportunities.

3.7.6 Ferroman

Ferroman was created as a BEE company for project development and acquisition of industrial projects. Ferroman combined the project management capacities for industrial large scale projects of Ferrostaal.

3.7.7 Ferisa

Ferrostaal set up Ferrostaal Investments South Africa (Pty) Ltd ("**Ferisa**") as a project company to develop and execute Industrial Participation ("**IP**") projects. The main task was to contribute to the discharge of the IP obligations but the company was targeted to become the core driver for Ferrostaal‘s business in SADC. The funding and staffing was done accordingly.

3.7.8 HOSAF

HOSAF, a spin off business from the former Hoechst South Africa business active in the production of PET fibres. HOSAF built a facility for the production of PET granulate to feed its own fibre production. The PET granulate is produced from recycled PET bottles. This project has a significant environmental and job creation impact though the collection and use of recyclable PAT bottles. Ferrostaal financed the project vis-a-vis HOSAF.

3.7.9 Oil & Gas Saldanha

Ferrostaal invested in the rehabilitation and modernisation of the former MOSGAS production site in Saldanha for the construction of structures and platforms for the oil and gas industry. Saldanha has a strategic

geographical position to acquire business from operations of western Africa. A special purpose company was put into operation with the inclusion of a 20% BEE shareholding.

3.7.10 Oil & Gas A-Berth Cape Town

Ferrostaal invested in the rehabilitation and modernisation of the A-Berth in the Port of Cape Town for the refurbishment of structures and platforms for the oil and gas industry. Cape Town has a strategic geographical position to acquire business from operations of western Africa. A special purpose company was put into operation with the inclusion of a 20% BEE shareholding.

3.7.11 Abalone Farm

Ferrostaal financed the Benguela Abalone Group for the expansion of their abalone farming operations enabling the company, consequently, to increase market reach to international markets including China. The project has an environmental impact, as it helps to preserve the endangered wild abalone population. The operations are situated in the Western Cape Province.

3.7.12 Limpopo Tea

This project in the Limpopo Province was financially supported to sustain and streamline the operations of Limpopo Tea. Distinct from Magwa Tea, this project was to create a new brand of South African tea, Tshivase tea. Limpopo Tea is one of the largest employers, with jobs more than doubling during picking season in an area with a generally lower amount of job opportunities.

3.7.13 Yachtport

A Yacht launching facility was implemented through funding by Ferrostaal in the port of Saldanha Bay. This has facilitated a strengthening and significant growth for the local yacht industry.

3.7.14 HPVA Fund

Ferrostaal and Professor Hasso Plattner have jointly implemented a Venture Capital Fund, located in Stellenbosch and Johannesburg. The Fund is concentrating on start-up companies with a high-tech basis. Target industries are telecom and green-technologies. The primary aim of the Fund is to assist entrepreneurs in developing, commercialising and distributing new and innovative technologies.

3.7.15 Desmond Equipment

Ferrostaal invested in the form of a grant into Desmond Equipment SA CC ("**Dezzi**"). This company is a family-owned business with a 35-year entrepreneurial history. Dezzi manufactures various articulated dump trucks and front-end loaders for the mining, forestry, construction, sugar, ports and handling industries and is based in KwaZulu-Natal.

3.7.16 Long Walk to Freedom

Ferrostaal provided Videovision, a South African film company with funding for the production of the movie "A Long Walk to Freedom". This funding provided the necessary financial basis for the acquisition of the required significant financing in the market. This project is 100% BEE.

3.8 **DIP Projects:**

3.8.1 Fuses

The establishment of a South African produced self-destruct mechanical fuse for 40mm ammunition by technology transfer, local design adaption, local qualification and licensed production of a 40mm self-destruct fuse conforming to Ottawa Protocol CCW 7.

3.8.2 This project was supported by Armscor, Denel, Laingsdale Engineering and Tellumat.

3.9 In terms of the offset agreement entered into between the GSC and South Africa, Ferrostaal has submitted projects to the value of €1,700 million, contributing to the economic growth and development of South Africa. The DTI and Armscor have confirmed in writing that all National Industrial Participation Programme obligations have been discharged in full. In this regard we refer to the DTI report dated July 2002 and titled, *Leveraging Growth in the South African Economy* for further information. We understand that a copy of this report is in the Commission's possession and do not wish to unnecessarily burden the submission by attaching it to these submissions.

4. **Legal privilege**

4.1 During the Commission's proceedings there have been attempts to introduce the legally privileged and confidential report prepared by Debevoise & Plimpton LLP for Ferrostaal ("**the Debevoise Report**").

4.2 We underscore that the submissions in this section apply equally to any other legally privileged material that might be in the possession of any witnesses

and/or the Commission, including (without limitation) the report "Projekt Juli" Sachbericht Uboote Südafrika, Abschlussbericht Ferrostaal, dated 28 February 2011, which was produced under the auspices of the law firm Heuking Kühn Lüer Wojte (referred to, together with the Debevoise Report, as "**the Reports**").

4.3 The Reports were produced by the respective law firms acting on the instructions of Ferrostaal under explicit attorney-client privilege and confidentiality obligations and Ferrostaal has not waived in any manner its right to legal privilege over any of the contents of either of the Reports. Of course, legal privilege applies both before courts as well as before Commissions such as the present one. This is made plain in the Commissions Act 8 of 1947,[1] which expresses a sound point of principle that has been confirmed by the courts. For instance, in ***Parry-Jones v Law Society and Others***[2] the court held:

> privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence.[3]

4.4 Earlier in the Commission's proceedings, there was an invitation extended by the Commission for Ferrostaal to waive privilege in relation to the Reports. This invitation was declined and Ferrostaal has reaffirmed its stance in all subsequent correspondence with the Commission. We submit that there are no new facts that change this position. And the record of the proceedings

---

[1] See section 3(4) of the Act.

[2] [1969] 1 E Ch 1 at 9D.

[3] This proposition was endorsed by our courts in ***Sasol III (Edms) Bpk v Minister van Wet en Orde en 'n Ander*** 1991 (3) SA 766 (T) ("**the *Sasol III* case**") at 772E.

before the Commission demonstrates that Ferrostaal has continuously claimed privilege over the Reports.

4.5 Therefore, Ferrostaal's position regarding the Reports has at all times been and remained: that the Reports are plainly legally privileged and confidential; that there has not subsequently been a waiver of privilege, of any kind, by Ferrostaal; that Ferrostaal did not cause the publication of the Reports (the Reports were leaked onto the internet without any authority to do so - and the documents are thus akin to a stolen document).

4.6 Put simply, there is no factual basis whatsoever before the Commission for the claim that the management of Ferrostaal wished to have the Reports distributed.

The prior rulings regarding the Debevoise Report

4.7 The Chairperson has on two prior occasions made rulings that Ferrostaal has not waived privilege in relation to the Debevoise Report and therefore that the Debevoise Report could not be admitted as evidence or referred to by any witness who testifies before the Commission.

4.8 The first ruling was made on 2 September 2014. The Chairperson found that Ferrostaal had not waived privilege in relation to the Debevoise Report and referred expressly to correspondence from Ferrostaal in this regard.[4]

4.9 Thereafter, on 6 October 2014, and notwithstanding the ruling of 2 September 2014, Mr Terry Crawford-Browne wished to refer to the Debevoise Report during the course of giving his evidence.[5]

---

[4] Record of the Commission's proceedings at 8017.

4.10 Because the Chairperson considered the issue to be an important one, he decided to reconsider the earlier decision taken on 2 September 2014. To facilitate this, fresh and full argument was invited and heard on the issue and, thereafter, the Chairperson made a decision. In the written Ruling made on 8 October the Chairperson found:

> It is undisputed that the report is a privileged document and that such privilege has not been waived by Ferrostaal. The document stands on the same footing as a stolen document It stands to reason that this Commission would be perpetuating an illegality if it were to admit it. In these Circumstances the ruling of the 2 September 2014 should stand. (Emphasis added)

4.11 We underscore two points. First, as noted by the Chairperson, it is undisputed as a fact before the Commission that Ferrostaal has not waived privilege. Second, the issue has already been fully resolved by the Commission twice. And, on the second occasion, a decision was only made after taking time to stand-down the proceedings in order to permit interested parties to appear, and after hearing full argument on the question. We submit that, on this score, the Commission has plainly acted reasonably and fairly to all parties involved. Below we demonstrate why these two prior decisions were correct as a matter of doctrine and as a matter of principle.

5. **The submissions on behalf of Mr van Vuuren**

5.1 On 20 October 2014, Geoff Budlender SC appeared at the Commission on behalf of Mr Van Vuuren, who had been subpoenaed as a witness before the Commission ("**counsel for Mr Van Vuuren**").[6] The purpose of the appearance was to submit that Mr Van Vuuren had sufficient cause not to

---

[5] Record of the Commission's proceedings at 8259.

[6] Record of the Commission's proceedings at 8659.

take the oath and answer questions before the Commission, in terms of section 6(1) of the Commissions Act.

5.2 During the course of his submissions, counsel for Mr Van Vuuren submitted that the Chairperson's ruling of 8 October 2014 was incorrect (he made the submissions as an aside to his main point about Mr Van Vuuren justifiably refusing to testify).[7]

5.3 While counsel for Mr Van Vuuren was not requesting the Commission to alter the ruling of 8 October 2014, for the purposes of completeness we wish to make some brief legal submissions on the points raised by counsel for Mr Van Vuuren.

6. **Counsel for Mr Van Vuuren's submissions**

6.1 Counsel for Mr Van Vuuren submitted:

> The law is quite clear. Can I read to the Commission, what was said in *Andersen versus Minister of Justice* 1952 (2) (SA) 473 (W) and the passage is at page 479. This is what His Lordship 5 Mr Justice Price said:
>
> *"Whitmore 3rd Edition, Section 2325 makes it clear that where ever privilege document is stolen or lost, the privilege is lost. On the principle that since the law has granted secrecy, so far as its own process goes, it leaves to the client and his attorney to take proper precautions to prevent the disclosure of the contents of the document to third parties and if insufficient precautions are taken, either by the client or the attorney, the privilege is lost."*
>
> Now, that is not the only authority in our law for that proposition. It is, with respect, a well-established proposition. I do not propose to argue it, here before the Commission. I do not think this is the appropriate point. But, to suggest that my client is relying on a flimsy complaint, I respectfully submit, is simply not right. There is authority for what he says.
>
> …
>
> [T]he finding in the, upholding in the Andersen case, the passage in Whitmore and as I said, there are other South African cases and English cases, are that

[7] See 8683 to 8685 of the Record of the Commission's proceedings.

> the document is admissible, as evidence itself, not just as a source of, as a derivative source.

6.2 We submit that counsel for Mr Van Vuuren's submissions were incorrect as a matter of authority. Moreover, the submissions were also incorrect when measured against the underlying normative foundation of legal privilege. In this regard, we structure our argument below as follows:

6.2.1 First, we demonstrate that the submissions incorrectly stated the legal position in South African law;

6.2.2 We then show that the submissions also misconstrue the position in English law; and

6.2.3 Thirdly, we submit that the proposition counsel for Mr Van Vuuren sought to posit is not supported by the normative basis underpinning the principle of legal privilege.

6.3 **South African law**

6.3.1 As regards the reliance on the ***Andresen*** case, we wish to make two points. Firstly, the case did not deal at all with the question of whether stolen documents which are made public by a third party lose their privilege. That is simply not the question the ***Andresen*** case sought to answer.

6.3.2 The ***Andresen*** case, rather, held that privileged documents were not exempt from seizure under a search warrant issued in terms of the Criminal Procedure Act. The Court held:

> The proper authority to decide whether documents are privileged is the Court, and the time at which such a decision is to be made is when the documents are tendered as evidence in a trial. If privileged documents are seized under a search warrant, then the remedy of the persons

> concerned, who may be aggrieved by the production of such documents, is to object to their being used in any litigation which may follow, and it seems to me that this is the only remedy available. It is altogether impracticable for the question of privilege or non-privilege to be decided at the time of the seizure or indeed at any intermediate stage. Privilege, as pointed out by Mr. *McEwan*, is not something existing *in vacuo*, but is related to litigation and is in point of fact a rule of evidence and not a substantive rule of law.

6.3.3 Accordingly, at best, the approval of the Wigmore passage cited by counsel for Mr Van Vuuren was *obiter*.

6.3.4 Secondly, our courts have continuously and robustly rejected the reasoning in the ***Andresen*** case. That is so because the reasoning in that case stemmed from a fundamental misconception of the very nature of legal privilege: that is to say, that legal privilege was merely a rule of evidence and not a fundamental right of the client.

6.3.5 Our courts have made clear on numerous subsequent occasions that legal privilege is a fundamental right. For example, in ***Bogoshi v Van Vuuren NO and Others***[8] the Court, referring to a previous case in which ***Andresen*** had been disavowed, stated as follows:

> In ***Sasol III (Edms) Bpk v Minister van Wet en Orde en 'n Ander*** 1991 (3) SA 766 (T) Van Zyl J had to consider the correctness of the judgment in the ***Andresen*** case supra. It was in the latter case found that professional privilege does not protect documents from being seized in terms of a warrant issued in terms of the then current Criminal Procedure Act. The ratio was that privilege cannot be claimed in vacuo, but only in the course of actual litigation. Finding that legal privilege is a fundamental right and not a rule of evidence only, Van Zyl J declined to follow the ***Andresen*** case. I respectfully agree that the ratio in the ***Andresen*** case should not be followed. It is not in accordance with what was said in the ***Safatsa*** case supra. For that reason, and also for the reasons that appear from the ***Sasol III*** case, it may now be accepted as established that professional privilege is a fundamental right. It can therefore be claimed, not only in the course of actual litigation, but also to prevent seizure by warrant of a privileged document. (Emphasis added.)

---

[8] 1993 (3) SA 953 (T)

6.3.6 The ***Sasol III*** case which roundly rejected the reasoning in the ***Andresen*** case has, on the contrary, been endorsed by the Constitutional Court.[9]

6.3.7 We underscore that the proposition in ***Andresen*** has not merely been rejected in South Africa. Indeed, the highest courts of Australia, New Zealand, the United States of America and Canada have all, in recent years, come out very strongly and persuasively against the suggestion that such privileged material is seizable by the police.[10]

6.3.8 Thus, we submit, that even the (at best) *obiter* endorsement of the Wigmore passage stems from that fundamentally misguided premise.

6.3.9 Unfortunately, counsel for Mr Van Vuuren did not refer the Commission to any other authority endorsing the proposition he sought to defend.

6.4 **English law**

6.4.1 Counsel for Mr Van Vuuren also seemed to suggest that the position in English law demonstrates authority for an unequivocal proposition that stolen documents lose their privilege if disclosed by a third party.

6.4.2 With the greatest respect, this submission is mistaken. We do not give a detailed excursus of English law but for present purposes cite two cases which demonstrate that English law offers support for the position proffered by Ferrostaal.

---

[9] See ***Thint (Pty) Ltd v National Director Of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others*** 2009 (1) SA 1 (CC) at para 185.

[10] See ***Baker v Campbell*** decided in October 1983 (Australia); ***Re Director of Investigation and Research and Shell Canada Ltd*** decided in February 1975 (Canada); ***Upjohn Company v United States*** 499 US Reports 383 (United States); ***Commissioner of Inland Revenue v West-Walker*** 1954 NZLR 191 (New Zealand). [**SS to insert proper references**]

6.4.3 The first case is ***ITC Film Distribution v Video Exchange Ltd***[11] in which documents were obtained during the course of civil proceedings using fraud. The Court held that the public interest that litigants should be able to bring documents into court without fear that they may be stolen by their opponents and refused to regard the privilege as having been waived.

6.4.4 We submit that while this decision is authority for the proposition that a document stolen within a court building does not lose privilege, it would be illogical to distinguish between documents stolen at court and those stolen elsewhere, as the same underlying basis for the decision applies.

6.4.5 The second case is Al Fayed & Ors v Commissioner of Police of the Metropolis & Ors ("**the Al Fayed case**").[12]

6.4.6 The relevant question in this case was whether and in what circumstances a party who had inspected discovered documents (which were subject to legal professional privilege) but which had been voluntarily, but mistakenly, sent to him for inspection would need to return them or would be restrained from using them in the litigation in which they were disclosed.

6.4.7 The Court held that in circumstances where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too

[11] [1982] Ch 431.

[12] [2002] EWCA Civ 780.

late for him to claim privilege in order to attempt to correct the mistake by obtaining an interdict.

6.4.8 However, the court held that a court has jurisdiction to intervene to prevent the use of documents made available for inspection where justice requires this, "*as for example in the case of inspection procured by fraud*". Indeed, even in the absence of fraud the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.

6.4.9 This position (while not cited expressly by our courts) is clearly in line with the decision in ***Harksen v Attorney-General***,[13] which is a case with facts related in material respects.

6.4.10 In this case Jurgen Harksen (a German National) had been arrested in terms of the local Extradition Act pursuant to allegations of fraud relating to misrepresenting investors (a warrant of arrest had been issued by a court in Hamburg). Harksen appointed an advocate from KPMG ("**Marais**") to conduct an investigation into his affairs and financial position and to assess his criminal liability. Marais faced difficulties in completing the investigation and withdrew prior to its finalisation. However, Marais had later been subpoenaed to give evidence in an enquiry in Harksen's insolvent estate.

6.4.11 In those proceedings, despite the objections by Harksen's attorney that the communications were privileged, Marais continued to give evidence. The attorney acting for Harksen's trustees had also been granted

[13] 1999 (1) SA 718 (C).

access to the KPMG files. Marais also deposed to an affidavit. When the State sought to make use of this affidavit and its annexures, Harksen raised that the documents were subject to legal privilege.

6.4.12 The State contended *inter alia* that the privilege had been impliedly waived because Harksen had annexed the Marais affidavit to his affidavit and thereby brought the documents into the public domain. It also argued that the reason for the protection of the privilege disappeared when the contents of the documents came into the public domain.

6.4.13 The court found that no reasonable observer could have considered Harksen's conduct as evincing an intention to abandon his rights (therefore, there was no implied waiver). The court also found that, having regard to the purpose for which the material in question was annexed to the founding affidavit, fairness did not dictate that the privilege attaching thereto should be regarded as having been waived by imputation of law.

6.4.14 We submit that the ***Harksen*** case plainly demonstrates that even where the holder of privilege has caused the documents made privileged documents public, they do not lose their privileged status. We submit, that it plainly follows, *a fortiori*, that the position as regards fraud or stolen documents would be the same in South African law as that expressed in the ***Al Fayad*** case.

6.4.15 Accordingly, there is a sound basis in South African and English law for the Commissions two rulings that the Report, *akin* to a stolen document,

is still governed by legal privilege and may not in any circumstances be admitted by the Commission.

6.5 The underlying rationale for legal privilege

6.5.1 Lastly, in addition to the arguments on the basis of judicial authority raised above, we now turn to submit that the proposition that legal privilege would be lost in circumstances such as the present (in which a document, on the same basis as a stolen document, is disclosed without the consent of the client) is squarely inimical to the underlying rationale for legal advice privilege.

6.5.2 Legal advice privilege arises out of the need for members of the public to be able to make full and frank disclosure to their legal advisers for the purpose of obtaining advice or giving instructions without fear that this information will subsequently be disclosed.

6.5.3 Similarly, in the ***Sasol III*** case, the court endorsed a later edition of Wigmore[14] in which it was stated that legal advice privilege was required:

> In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.

6.5.4 Propositions such as these are the very foundation of the adversarial legal system and have been endorsed in numerous jurisdictions around

---

[14] *On Evidence* (McNaughton revision 1961) para 2291 at 545.

the world. In ***Baker v Campbell***[15] the High Court of Australia neatly captured the reason that legal advice privilege must exist:

> [T]he privilege is necessary so that persons may confidently seek and receive advice about conduct which has, or may have constituted crime, fraud or a civil offence.

6.5.5 But, more significantly, the Court explained further that if legal privilege was not upheld —

> [t]he long-term tendency would be for law enforcement authorities to press for extra-judicial methods of investigation and decision-making.

6.5.6 For, as a matter of general principle, if one endorsed the approach that documents lose privilege if published in the public domain even where the document is stolen, it would essentially reward an approach in which people expressly targeted stealing documents from law firms and then quickly uploaded these documents onto the internet in order to defeat the legal privilege in a document.

6.5.7 That is what the approach suggested by counsel for Mr Van Vuuren would permit. And we submit that such an approach (like the ***Andresen*** case) fails to uphold the trite proposition that legal privilege is the *right* of the client.

6.5.8 Moreover, such an approach also fails to appreciate that the law regarding privilege is, we submit, developing to give more protection to legal privilege, not less.

6.5.9 As the House of Lords has held:

---

15 (1983) 153 CLR 52.

> [T]he law today gives a considerable degree of protection against the admissibility of evidence subject to LPP where it has been improperly obtained, or even accidentally disclosed - see CPR 31.20 for civil proceedings and section 78 of the Police and Criminal Evidence Act 1984 for criminal proceedings.[16]

6.5.10 We submit that it is trite that it is the client who must waive the privilege, and it is therefore the client's right to legal privilege which must be protected from disclosure in subsequent proceedings. Accordingly, where there is no real suggestion of the client having waived privilege (as in the present case) he or she must not be punished because a document is, for example, stolen from a law firm and published on the internet.

6.5.11 As the English Court of Appeal has noted "*[c]onfidentiality is not dependent upon locks and keys or their electronic equivalents*".[17]

Limited waiver

6.6 We note, as an aside, that a waiver of legal professional privilege granted in relation to a particular purpose does not amount to a general waiver of legal privilege - because the law recognises the concept of limited waiver.

6.7 According to this principle the fact that privileged documents have been made available in earlier proceedings or investigations does not preclude a claim to privilege in later proceedings or investigations.

6.8 For instance, in ***British Coal Corp v Dennis Rye Ltd (No 2)***[18] documents which had been created for the purpose of civil proceedings were disclosed

---

[16] ***In re: McE (Appellant) (Northern Ireland) In re: M (Appellant) (Northern Ireland) In re: C (AP) and another (AP) (Appellants) (Northern Ireland)*** [2009] UKHL 15.

[17] ***Tchenguiz v Imerman; Imerman v Imerman*** [2010] EWCA Civ 908.

[18] [1988] 3 ALL ER 816.

to the police for the purposes of criminal investigation. The question arose whether the waiver of privilege in favour of the police amounted to a waiver in favour of the defendant for the purposes of the civil proceedings. The Court held that:

> The documents had been disclosed for the limited purpose of a criminal investigation and a criminal trial, in accordance with the plaintiff's duty to assist with criminal proceedings, and objectively that could not be constructed as either an express or implied waiver of privilege in relation to the civil action.

6.9 This principle was also neatly explained by the Court of Appeal in ***Bourns Incv Raychem Corp***[19] as follows:

> It is possible to waive privilege for a specific purpose and in a specific context without waiving it for any other purpose or in any other context. Documents disclosed on taxation in the manner contemplated in Goldman's case are disclosed for the purposes of that taxation and, perhaps absent special circumstances, the privilege is only waived for the purpose for which the documents are disclosed.

7. Conclusion on legal privilege

7.1 In summary, the Chairperson's written Ruling on 8 October (that the Debevoise Report cannot be admitted as evidence): is sound as a matter of law; has been revisited twice already in these proceedings; and need not be revisited again.

---

19 [1999] 3 All ER at 161 to 162.

8. **Conclusion**

8.1 As specified above, Ferrostaal has sought to provide what information it is are able to in order to assist the Commission, however, it is limited in the co-operation it may provide through the practical considerations set out above.

8.2 We submit that both reports are and remain privileged and inadmissible on the basis set out above.

WEBBER WENTZEL

25 March 2015