Global Privilege and Professional Secrecy Guide - South Africa

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# 01 - Discovery

## What disclosure/discovery is required in litigation?

In South Africa's adversarial legal system, the discovery process stands as a major exception to the general principle that parties are not entitled to pretrial disclosure of an opponent's evidence. This procedure ensures that all parties can adequately prepare for trial by entitling them to be informed of all documentary evidence, including electronic records, relevant to the matter.

After the close of pleadings, any party may request discovery from the other parties. The party required to make discovery must, within 20 court days, deliver a sworn discovery affidavit. This affidavit must list all documents in the party's possession that relate to the matter in question, separating them into documents it intends to produce and those it contends are subject to a valid objection to production, such as privileged documents. The opposing party is then entitled to inspect and make copies of all non-privileged documents.

The test for relevance in discovery is broad. A document must be discovered if it "can directly or indirectly advance the case of the party requiring discovery or damage the case of the party making discovery" (*Swissborough Diamond Mines v. Government of the Republic of South Africa*). This obliges a party to discover documents that may be detrimental to its own case or beneficial to its opponent.

While documents protected by legal privilege are exempt from inspection, they must still be listed in the discovery affidavit. These protected documents include witness statements prepared for the proceedings, communications between attorney and client, and communications between attorney and advocate. These materials are protected by litigation privilege, as confirmed in *Mason v. Mason NO*, which held that such materials are exempt from disclosure if prepared in anticipation of litigation. A significant recent issue is the need for e-discovery modernization. The Rules Board for Courts of Law issued a request for comment on 27 May 2024, highlighting that the current rules are deficient for handling electronically stored information, leading to the loss of valuable metadata and increased costs.

# 02 - Type of privilege

## Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Yes, South African law robustly recognizes legal professional privilege as a fundamental, substantive right essential for the proper functioning of the justice system. The privilege belongs to the client, not the lawyer, and fosters full and frank communication by protecting confidential disclosures made for legal advice or litigation from being compelled.

South African law recognizes two primary forms of privilege. The first, legal advice privilege, protects confidential communications between a client and their legal adviser. For this privilege to apply, several strict requirements must be met: The communication must be with a legal adviser acting in a professional capacity; it must be made in confidence; its purpose must be for seeking or providing legal advice, which includes advice on what should prudently be done in the relevant legal context; and the client or their representative must claim the privilege.

The second form, litigation privilege, has a broader scope, protecting communications that come into existence for the dominant purpose of pending or contemplated litigation. It covers communications with third parties, such as expert witnesses, and protects items like instructions and interim reports (*Mason v. Mason NO*). The Supreme Court of Appeal definitively adopted the dominant purpose test in *Ibex RSA Holdco Ltd v. Tiso Blackstar Group (Pty) Ltd*.

Additionally, the law protects communications made in a genuine attempt to settle a dispute under "without prejudice" privilege. Such communications cannot be disclosed in court without both parties' consent, thereby encouraging open settlement negotiations (*AD v. MEC for Health and Social Development, Western Cape*).

# 03 - Scope of privilege

## Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

A copy held by the client is also fully protected. The privilege attaches to the communication itself and belongs to the client, not the lawyer, so its protected status is not dependent on its location.

## Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Yes, in-house lawyers are treated the same as external lawyers, and the privilege extends to their internal communications. The legal foundation for this rests on principles established in cases like *Mohamed v. President of South Africa and Others*, which confirmed that legal professional privilege applies to salaried in-house legal advisers. However, this protection is subject to strict requirements. The in-house lawyer must be acting in their professional capacity as a legal adviser, not in a commercial or executive role. Furthermore, the communication must be made in confidence for the dominant purpose of seeking or providing legal advice to the employer, which is the client. When these conditions are met, confidential communications between two or more in-house lawyers collaborating on legal advice for their employer are protected.

## Does privilege extend to internal communications between in-house lawyers?

Legal professional privilege extends to interpreters, articled clerks, secretaries and other employees of a law firm (as established in *S v. Mushimba and Others*). Legal privilege also applies to internal communications, whether with internal stakeholders or external legal counsel, provided such communications are made for the purpose of obtaining or providing legal advice or in anticipation of litigation, and are legal rather than commercial in nature.

## Are foreign lawyers recognized for the purposes of privilege?

Yes. While there is no direct case law, South African law, consistent with its common law focus, recognizes privilege for communications with foreign lawyers. This is provided the communication meets the standard requirements of being made in a professional capacity, in confidence and for the purpose of legal advice or litigation.

## Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

No. Legal professional privilege in South Africa is strictly confined to the relationship between a client and a professional legal adviser (*Trust Sentrum (Kaapstad) (Edms) Bpk v. Zevenburg*). It has been explicitly held that privilege does not extend to accountants, even when advising on tax law (*Jeeva v. Receiver of Revenue, Port Elizabeth*).

# 04 - Sharing documents with third parties

## In what circumstances (if any) can a document be given to a third party without losing protection?

The general rule is that disclosing a privileged document to a third party waives the privilege, because confidentiality is its cornerstone (*Bank of Lisbon and South Africa Ltd v. Tandrien Beleggings (Pty) Ltd and Others*). The test for waiver is objective and depends on whether the conduct is inconsistent with maintaining confidentiality. Inadvertent disclosure may not constitute a waiver if reasonable steps were taken to maintain confidentiality, but the decision in *Ibex RSA Holdco Ltd v. Tiso Blackstar Group (Pty) Ltd* established that deliberately publishing summaries of privileged documents waives privilege over the entire document.

However, a document can be shared with a third party without losing protection in specific circumstances. Litigation privilege is designed to cover communications with third parties, such as expert witnesses, where the dominant purpose is for use in pending or contemplated litigation (*General Accident, Fire and Life Assurance Corporation Ltd v. Goldberg*). Common interest privilege preserves the protection when a document is shared with a third party that has a sufficient common legal interest in the matter, such as codefendants or companies in the same group (*Anglo American South Africa Limited v. Kabwe and 12 Others*). A document may also be disclosed for a limited and specific purpose under strict terms of confidentiality (e.g., to an auditor) without a general waiver, though, if confidentiality is ultimately breached, privilege cannot be used to suppress publication (*South African Airways Soc v. BDFM Publishers (Pty) Ltd and Others*).

Finally, disclosure to a necessary agent of the lawyer or client, such as an interpreter, will generally not waive privilege.

# 05 - Investigations

## Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

The fundamental legal principles governing legal professional privilege remain the same across civil, criminal, regulatory and investigatory contexts. The requirements for legal advice and litigation privilege apply equally in all situations.

## Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Yes, provided they meet the necessary requirements. For such documents to be privileged, their creation must satisfy the dominant purpose test — that is, they must have been created for the company (the client) to obtain legal advice or to prepare for contemplated litigation (*Ibex RSA Holdco Ltd and Another v. Tiso Blackstar Group (Pty) Ltd and Others*). Notes from employee interviews conducted by lawyers to gather facts for legal advice are privileged, so long as the interview is not a general fact-finding exercise for business purposes. Documents produced by lawyers during the investigation, such as chronologies and draft reports, are generally protected as they reflect the lawyer's strategy.

Following the *Ibex* decision, internal investigations must be carefully structured to ensure that the dominant purpose is legal advice or litigation preparation, not business compliance. It is best practice for lawyers conducting employee interviews to clarify that they represent the company, the interview is for providing legal advice to the company, the communication is privileged, and the privilege belongs to the company.

# 06 - Regulatory investigations

## Can governmental regulators require a privileged document to be provided to them?

As a fundamental substantive right, legal privilege generally protects documents from compulsory production to governmental regulators. However, this protection is not absolute and can be limited by statute or common law exceptions.

Several statutes provide for such limitations. The Promotion of Access to Information Act contains a "public interest override" in section 46 that can compel disclosure of a privileged record held by a public body if it would reveal evidence of a substantial contravention of the law or a serious public safety risk, and the public interest in the disclosure clearly outweighs the harm of the breach. The Tax Administration Act provides a procedural mechanism in section 42A where an independent legal practitioner adjudicates disputes over privilege claims made in response to a request from the South African Revenue Service. Similarly, while the Competition Act grants the Competition Commission broad investigative powers, including "dawn raids," these are subject to valid claims of legal privilege.

The primary common law exception is the crime-fraud exception, which holds that privilege does not apply to communications made to further a criminal or fraudulent scheme. Recent developments, such as the "failure to prevent corruption" offense under the Prevention and Combating of Corrupt Activities Act and a new National Prosecuting Authority policy on resolving corruption matters, may also impact privilege considerations during regulatory interactions.

# 07 - Artificial intelligence

## Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Under South African law, legal professional privilege is unlikely to protect confidential client information that a lawyer inputs into a publicly available generative AI tool. The foundation of privilege is confidentiality, which is destroyed by disclosing information to a third party. Inputting data into a public AI system constitutes a disclosure to the AI provider, whose terms of service often permit them to use the data for model training, thereby destroying any reasonable expectation of confidentiality.

The output generated by an AI tool is also not automatically privileged. It cannot be protected by legal advice privilege because an AI system is not a qualified legal adviser. The argument for protection under litigation privilege (as work product) is weak, as the legal status of AI-generated works is uncertain, particularly since South African copyright law requires a human author. Privilege would likely only attach once a lawyer has applied their professional skill and judgment to verify and adopt the text, transforming it into their own work product.

The analysis is different for secure, private enterprise-grade AI tools that contractually guarantee data confidentiality. In this scenario, one could argue that privilege is not waived, but this position remains untested in South African courts. Practitioners are, in all circumstances, bound by their duties of confidentiality under the Legal Practice Act and data protection obligations under the Protection of Personal Information Act. Furthermore, South African courts have shown zero tolerance for AI-generated fictitious citations, establishing that practitioners are fully responsible for the accuracy of their work product and cannot blame technology for errors (*Mavundla v. MEC: Department of Co-Operative Government and Traditional Affairs; Northbound Processing (Pty) Ltd v. South African Diamond and Precious Metals Regulator*).

# 08 - Recent issues

## What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

Recent issues have revolved around courts clarifying foundational principles in response to modern commercial and technological challenges. The most significant development came from the Supreme Court of Appeal (SCA) in *Ibex RSA Holdco Ltd and Another v. Tiso Blackstar Group (Pty) Ltd and Others*, colloquially known as the Steinhoff case. This case concerned a forensic report by PwC into accounting irregularities at Steinhoff. The SCA formally adopted the "dominant purpose" test for litigation privilege, holding that a document is only privileged if its primary purpose was for legal advice or litigation. The court found that the PwC report was not privileged because its dominant purpose was to finalize financial statements. The case also highlighted implied waiver, as the SCA held that Steinhoff's publication of an 11-page overview of the report waived privilege over the entire document.

Other pressing issues include the urgent need for e-discovery modernization, as highlighted by a Request for Comment from the Rules Board for Courts of Law on 27 May 2024. Cybersecurity breaches also pose new challenges, with 2024 statistics indicating that 42% of large law firms experienced data breaches, creating risks that forensic reports may lose privilege if shared for business rather than legal purposes. Finally, enhanced regulatory enforcement, such as the Financial Sector Conduct Authority's 2024 Regulation Plan and the strengthening of the Competition Commission's powers (*Sasol Gas v. Competition Commission*), continues to test the boundaries of privilege in investigatory contexts.

# 09 - Authors

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