Global Attorney-Client Privilege Guide - South Africa

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| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# 01 - Discovery

## What disclosure/discovery is required in litigation?

Most of the principles in the South African law of evidence stem from the English system of adversarial (accusatorial) trials; an important aspect of which is that parties are not entitled to be informed, prior to trial, of the evidence which the opposing party intends to present at trial. One of the major exceptions to this principle is that parties to litigation are entitled to be informed of all documentary evidence (including tape recordings) that the opposing party intends on using at the trial. The purpose of this discovery procedure is to enable all parties to adequately prepare for trial.

After the close of pleadings, a party may, on notice, request the opposing parties to make discovery. The party required to make discovery must, within 20 days of receipt of the notice, deliver a discovery affidavit listing:

All documents in a party’s possession that relate to a matter in question in the litigation and that the party intends to produce

All documents that the party has a valid objection to producing (i.e., privileged documents)

The other party is entitled to inspect and make copies of the discovered documents.

South African courts have held that a party is only obliged to discover documents which either directly or indirectly damage its own case or which advance the case of the opposing party — documents which tend only to advance the case of the party making the discovery or which tend to damage the case of the opposing party need not be discovered (*Carpede v. Choene*). This rule is subject to certain exceptions. Documents that do not need to be discovered include statements of witnesses taken for the purposes of the proceedings; communications between the attorney and client and attorney and advocate; and pleadings, affidavits and notices in the action. In a sense, privileged documents do need to be discovered, insofar as they must be listed in the discovery affidavit, although they need not be handed over to the opposing party.

# 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?

The general rule in South African law is that communications between a lawyer and their client, as well as documents prepared by lawyers for their clients, may not be disclosed without the client’s consent. Legal professional privilege (or, simply, “privilege”) may be invoked if the communication or document in question was (i) made to a legal adviser (ii) acting in a professional capacity, (iii) in confidence, (iv) for the purpose of pending litigation or for the purpose of obtaining professional advice. The privilege relates to communications of both an oral and a written nature.

A litigant is not obliged, either before or during a trial, to disclose any document brought into existence for the purpose of the litigation. This includes communication between a party's legal adviser and expert witness, instructions given to the expert witness and interim reports compiled by the expert witness in forming their opinion (*Mason* v. *Mason NO*). Such privilege can extend to parts or portions of documents, which may be redacted (*A Company* v. *Commissioner, South Africa Revenue Services*).

A statement made by a party involved in a dispute which is genuinely aimed at achieving a compromise is protected from disclosure. These statements are usually marked “without prejudice” and can only be accepted into evidence with the consent of both parties. Recently, the court held that, depending on the surrounding circumstances, such an offer can be taken into consideration in determining whether punitive costs should be awarded (*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?

Privilege belongs to the client, and must be claimed by the client in order to be effective. Although the legal adviser may claim privilege on their client’s behalf, they act as the client's agent in so doing. Accordingly, a copy of privileged documentation held by the client, as the notional principal in the attorney-client relationship, would be afforded full protection in terms of legal professional privilege.

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

Yes, but only where an in-house lawyer acts in a professional capacity; a question of fact to be determined in each case.

Recent judgments have drawn on English authorities supporting the view that legal professional privilege also attaches to communications between an employer and its salaried in-house lawyers in circumstances where the communication would otherwise meet the test for claiming privilege, there being no justifiable basis in law to limit the scope of privilege to clients and lawyers in private practice.

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

Privilege extends to interpreters, articled clerks, secretaries and other employees of the law firm (*S v. Mushimba*). Privilege would also extend to internal communications between in-house lawyers.

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

To the extent that a foreign lawyer is acting in a professional capacity, and the communication was made by the client in confidence for the purposes of pending litigation or obtaining professional advice, the communication will be privileged, and the same principles in relation to privilege will apply as in relation to domestic legal professionals and in-house lawyers.

## 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?

As it stands, professional privilege in South Africa pertains only to the lawyer-client relationship and does not extend to any other professional relationships for any purpose whatsoever (*Trust Sentrum (Kaapstad) (Edms) Bpk v. Zevenburg*). It has been held, in particular, that privilege does not extend to accountants (*Jeeva v. Receiver of Revenue, Port Elizabeth*), although submissions have been made to the South African Revenue Service that legal professional privilege should be extended to chartered accountants.

In terms of section 42A of the Tax Administration Laws Amendment Act 2015, a taxpayer claiming legal professional privilege will have to prove the validity of such privilege by providing a list of extensive information which includes – but is not limited to – a description of each and every document not provided and full details of the legal practitioner.

# 04 - Sharing documents with third parties

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

**Inadvertent disclosure**

The principle underpinning privilege in South African law is confidence, and “when confidence ceases, privilege ceases” (*Bank of Lisbon and South Africa Ltd v. Tandrien Beleggings (Pty) Ltd and Others (2)*). Thus, where a third party acquires knowledge of a privileged communication, or possession of a privileged document, there is no rule at common law to prevent them from disclosing its contents, and privilege may therefore be defeated. It is only if such knowledge or possession came about as a result of an unlawful act (e.g., theft), that a court may refuse admission of such evidence by use of its inherent discretion to exclude unfairly obtained evidence.

In a recent case, the court emphasized the distinction between legal advice privilege and litigation privilege (*South African Airways Soc v. BDFM Publishers (Pty) Ltd and Others*). The court stated that while the right to legal professional privilege was a necessary means of protecting South Africa’s adversarial justice system, it was not an absolute right. The client invoking the privilege would be invoking a “negative right”, making legal advice provided to them by a legal practitioner inadmissible as evidence. The court was of the opinion that this right could not be interpreted as a positive right, which would otherwise entitle a client to suppress publication once confidentiality has already been breached.

**Litigation privilege**

Since it is in the public interest to facilitate the obtaining and preparation of evidence, where communications are made between the legal adviser or client and a third party, privilege (commonly known as “litigation privilege”) will extend to such communications if: (i) the communication was made for the purpose of being submitted to a legal adviser; and (ii) the communication was made after litigation was contemplated (*General Accident, Fire and Life Assurance Corporation Ltd v. Goldberg*). It is only in these circumstances that a privileged document may be furnished to a third party without losing protection.

# 05 - Investigations

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

There is no distinction drawn between legal professional privilege in the context of civil, criminal, regulatory or investigatory situations.

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

Any communication that satisfies the requirements of legal professional privilege is protected. As such, where interviews are conducted with employees of a client for the purposes of carrying out an investigation, then such information will be privileged as such information is given for the purposes of giving legal advice. It is worth noting here that, prior to the start of each interview, the attorney should make it clear to the employee that they represent the employer and that the interviews are conducted in furtherance of the giving of legal advice to that same employer and as such the information arising from the interview is privileged.

Documents produced by attorneys during the investigation process, for the same reasons as stated above, will also be privileged.

# 06 - Regulatory investigations

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

Legal privilege in South Africa is a fundamental substantive right rather than a mere evidentiary rule, and “any claim to a relaxation of the privilege…must be approached with the greatest circumspection” (*Euroshipping Corporation of Monrovia v. Minister of Agricultural Economics and Marketing*). As such, unless expressly empowered by statute, a governmental regulator is prohibited from encroaching on this right. Communications between a lawyer and client for the purpose of obtaining advice to enable the client to commit an offense are, however, not protected by the privilege (*Thint (Pty) Ltd v. National Director of Public Prosecutions*; *Zuma v. National Director of Public Prosecutions*).

# 07 - Recent issues

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

A recent decision dealing with legal professional privilege is that of *Thint (Pty) Ltd v. National Director of Public Prosecutions and Others*; *Zuma v. National Director of Public Prosecutions and Others*. The Constitutional Court held that where a search pursuant to a search warrant is conducted at an attorney’s office, there is a much greater risk of invasion of legal professional privilege than when the search is conducted elsewhere. In this case, however, the scope of the search was fairly narrow and, as a result, the ordinary concerns relating to the seizure of privileged materials in searches of attorneys’ offices did not arise. The court found that no actual prejudice to the applicants had been established, and that their claim was based on the hypothetical ground that there was a possibility that privileged documents may have been seized.

The recent enactment of the Protection of Personal Information Act has resulted in the codification of some common law principles and new obligations on parties processing personal information. Under the new statute, communication between a legal adviser and their client is considered to be exempt from a warrant issued by the information regulator, subject to the legal advice being in respect of the client’s obligations, liabilities or rights. In addition, communication between a legal adviser and their client and any other person, made in contemplation of legal proceedings, is considered exempt. It further prohibits the information regulator from requesting privileged information from a responsible person, such as a legal adviser.

Finally and most recently, in the context of a widely reported case of alleged corporate fraud (*Tiso Blackstar Group and Others v. Steinhoff International Holdings N.V.),* two media houses successfully applied to court for access to certain accounting reports and records of Steinhoff. When allegations of accounting irregularities arose, Steinhoff appointed an independent accounting firm in South Africa to investigate. The media houses approached the accounting firm directly to request access to its report under the Promotion of Access to Information Act. The firm refused, relying on legal privilege, along with other grounds. The court granted access on a number of grounds, including a rejection of the claim of privilege in the absence of evidence that the report was commissioned in anticipation of contemplated litigation. The judgment will be the subject of an appeal but remains important in considering the balance between the media’s right to information in the public interest and the necessary facts that a party will be required to prove in order to successfully claim privilege.

# 08 - Authors

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