

Legal professional privilege protection available to taxpayers too



Authors: Emil Brincker and Louise Kotze.

In a litigious context, the doctrine of legal professional privilege provides that communications between an attorney and a client are protected from disclosure in litigious proceedings. The protection afforded to a litigant in terms of this doctrine is aimed at encouraging and protecting the full and honest disclosure of information by clients to their legal advisors when seeking legal advice, which is necessary for the proper functioning of the South African adversarial system of litigation.

Legal professional privilege also applies to taxpayers who are engaged in litigious proceedings against the South African Revenue Service (SARS). As such, communication between a taxpayer and their attorney that is subject to legal professional privilege is protected from disclosure at the instance of SARS.

In the recently reported High Court case of *Astral Operations Ltd & Others v Minister for Local Government, Western Cape & Another* 2019 (3) SA 189 (WCC), the Court examined the scope of legal professional privilege and the circumstances in which such privilege will be waived.

Facts

In the course of review proceedings, the Applicants sought to compel the Respondents to comply with a notice, served in terms of Rule 35(12) of the Uniform Rules of Court, for the production of a memorandum drafted by one of the Respondents junior counsel.

Given the nature of the review proceedings and the identical grounds on which the review was opposed, each of the two Respondents attorneys engaged the same senior counsel to act on the Respondents behalf. Each of the attorneys also appointed their own junior counsel. The two Respondents therefore formed a single cohesive legal team to represent the Respondents aligned interests in the review.

During the preparation for trial stage, one of the Respondents junior counsel prepared a memorandum, at the instance of the senior counsel, regarding the allegations made by the Applicants in their pleadings. This memorandum was made available to each of the Respondents attorneys and was subsequently given to three experts (on a confidential basis) who were instructed by the Respondents to prepare reports for purposes of the review application. The Applicants were made aware of the existence of the memorandum by way of a reference to it in a document that formed part of the official court record and therefore insisted that the Respondents disclose it.

The Respondents refused to make the memorandum available on the basis that it was protected by legal professional privilege. The Applicants contended that the exchange of the memorandum between the Respondents attorneys and the subsequent disclosure thereof to the three experts resulted in a waiver of privilege by the Respondents, alternatively that a waiver of privilege can be imputed by virtue of the disclosure that had been made of the existence of the memorandum in the court documents.

Judgment

Legal professional privilege exists in respect of legal advice obtained from a legal practitioner and given in confidence to a litigant. However, it is necessary for the litigant to assert legal professional privilege before the communication will be afforded legally privileged status.

The Court in this case recognised that there are two manifestations of legal professional privilege:

1. Legal advice privilege, which protects communication between attorneys and their clients where legal advice is sought or given; and
2. Litigation privilege, which protects communications between a litigant or his attorney and a third party that comes into existence once litigation is in contemplation or has commenced.

The tension between the public interest that is served by full disclosure of all information as an aid to the vindication of the truth in litigious proceedings and the public policy considerations that inform the existence of legal professional privilege was highlighted by the Court, and it was reiterated that the right to assert legal professional privilege is not absolute.

In order to claim litigation privilege, it must be shown that the relevant document was obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice, and that litigation was pending or imminent at that time.

In coming to its finding, the Court was required to ascertain whether the memorandum was subject to legal professional privilege, and, if answered in the affirmative, whether or not the Respondents had waived that privilege.

The Court noted that legal professional privilege belongs to the litigant and can therefore only be waived by the litigant and not by the legal advisor or third parties. Furthermore,

once the confidentiality of the information that forms the subject of the communication has been breached, the basis for claiming legal professional privilege falls away.

It was concluded that the memorandum was covered by legal professional privilege as:

- The content of the memorandum was pertinent to a single topic, being counsels advice in respect of the steps to be taken to further the Respondents case in response to the allegations contained in the Applicants papers; and
- The Respondents conduct showed that they had formed a composite legal team to represent the aligned interests of both Respondents and as such, the distribution of the memorandum amongst the instructing attorneys did not exclude the document from being legally privileged.

While the Court did not consider it material whether the privilege ascribed to the memorandum was legal advice privilege or litigation privilege, it was noted that the use of the memorandum by the attorneys to instruct the three experts would subject it to litigation privilege.

In determining whether the Respondents had expressly or impliedly waived their privilege, or if a waiver of privilege was to be imputed, the Court found that the references to the memorandum in the documents contained in the official court record did not disclose the substance or content of the memorandum to the extent that an intention to abandon the confidentiality of the document may be inferred. It was also held that a mere reference to a document does not constitute a reliance on that document in the review proceedings.

In the result, the Court found that legal professional privilege had not been waived and dismissed the application.

Comment

Similar to the Uniform Rules of Court that find application in

the High Court, the Tax Court Rules, issued in terms of s103 of the Tax Administration Act, No 28 of 2011 (TAA), apply to litigation proceedings between SARS and taxpayers in the Tax Court.

Rule 36 of the Tax Court Rules makes provision for either SARS or a taxpayer to request the disclosure of pertinent documentation during litigation proceedings and to provide such documentation if necessary. However, Rule 36(4) allows either party to object to the exchange of such documents if the documents are, for example, covered by legal professional privilege.

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 a requirement that legal professional privilege be claimed by the taxpayer in respect of the communication. Where the legal advice is sought for criminal or fraudulent purposes, such as tax evasion, legal professional privilege will not apply.

While the matter has yet to be decisively determined by the South African Tax Court, international tax case law has made it clear that tax advice solicited from accountants or tax practitioners who do not qualify as legal advisors will not be subject to legal professional privilege and will have to be disclosed should SARS require such disclosure.

Given the likelihood that SARS will request a multitude of documents from a taxpayer before and during litigation proceedings, it is imperative that taxpayers are aware of the types of documents that are protected by legal professional privilege and that these documents are not provided to SARS at any time. This includes not only the final document that constitutes the legal communication between the attorney and

the taxpayer, but all of those documents called into existence for purposes of inclusion in the final document. The disclosure of these documents, even before the commencement of legal proceedings in the case of documents subject to legal advice privilege, will destroy the confidentiality of the document on which the legal professional privilege is based and the taxpayer will lose the protection afforded to it in terms of the doctrine of legal professional privilege.

It is important for taxpayers to safeguard the confidentiality of their communication with their legal advisors. Confidentiality is a broader concept than legal professional privilege, however, its existence is vital to the assertion of privilege. There are various ways in which the information contained in a document can lose its confidentiality and thereby its status as a legally privileged document. As a general rule, information that enters the public domain will no longer be confidential. However, the mere circulation of information that constitutes communication with a legal advisor will not necessarily negate the confidentiality thereof. It is only when the communication is circulated too widely to persons who are not integral to the matter at hand that the confidentiality of the communication may be lost.

Therefore, if a privileged document is to be circulated, it is essential that it is not circulated to more persons than necessary, that the confidential nature of the document is emphasized and that the limited purpose for which the advice is being disclosed is duly specified.

As has been stated above, legal professional privilege is the right of the taxpayer and can be waived either expressly or by implication only by the taxpayer and not by its legal advisor or a third party. In the Tax Court case of *A Company and Others v Commissioner for South African Revenue Service* 76 SATC 321, the Tax Court noted the following in respect of the waiver of legal professional privilege:

1. If a document is covered by legal professional privilege, disclosure of a part of the document may constitute implied or imputed waiver of the privilege attached to the whole document;
2. The mere reference to advice sought or given in a separate document that has been disclosed does not constitute a waiver of privilege as long as the content of the advice is not disclosed or cannot be inferred from that reference; and
3. Where a document is not privileged, but refers to legal advice sought or given and also discloses the content or scope thereof, legal professional privilege will not be lost if that reference is redacted.

While legal professional privilege is aimed at protecting the confidential communication between a taxpayer and its legal advisor, there is an anomaly provided for in the TAA in terms of which a taxpayer would seek tax advice for purposes of its disclosure to SARS in order to safeguard itself against the imposition of understatement penalties that may be imposed by SARS in terms of s223 of the TAA.

Section 223(3) provides that SARS must remit an understatement penalty imposed on a taxpayer in respect of a substantial understatement if SARS is satisfied that:

(a) Full disclosure of the arrangement has been made by the taxpayer by no later than the date that the relevant return was due; and

(b) The taxpayer was in possession of an opinion by an independent registered tax practitioner that:

(i) was issued by no later than the date that the relevant return was due;

(ii) was based on full disclosure of the facts and circumstances of the arrangement; and

(iii) confirmed that the taxpayers position is more likely than not to be upheld if the matter proceeds to court.

This section makes reference to an opinion received from a tax practitioner, which includes the advice sought and received from a legal advisor that specialises in tax law. Whether or not an opinion of this nature is covered by legal professional privilege is dependant on the intention with which the taxpayer sought the opinion.

If a taxpayer seeks an opinion in terms of s223(3) purely for purposes of safeguarding itself against any understatement penalty that may be imposed by SARS in the future, it is unlikely that legal professional privilege will apply to the document as the taxpayer at all times intended to disclose the document to SARS and never intended for it to be privileged.

However, if a taxpayer seeks an opinion in order to ensure that its tax affairs are structured in accordance with the law and that opinion subsequently enables the taxpayer to qualify for the remittance of an understatement penalty in terms of s223(3), it is likely that the opinion will be covered by legal professional privilege. In such a case, there may be a financial advantage (being the remittance of an understatement penalty) in the voluntary waiver by the taxpayer of the legal professional privilege that covers the opinion.

[download PDF](#)