

# Should legal professional privilege be limited to exclude in-house lawyers under South African criminal law?

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## 1. Background and rationale for the privilege

Many jurisdictions including the member states of the European Union, the United States of America, Canada, England and South Africa provide for legal professional privilege.

These jurisdictions share a common rationale with regard to the protection of communications between lawyer and client. The rationale recognises the nature of the legal profession and its contribution to the rule of law and applies to both criminal and civil law.

Heydon explains the rationale for the principle of legal professional privilege under English law as follows (JD Heydon & M Ockelton *Evidence: Cases & Materials* 4ed (1996) 417):

‘Men are unequal in wealth, power, intelligence and capacity to handle their problems. To remove this inequity and to permit disputes to be resolved in accordance with the strength of the parties’ case, lawyers are necessary, and privilege is required to encourage resort to them, and to ensure that all relevant facts will be put before them, not merely those the client thinks favour him. If lawyers are only told some of the facts, clients will be advised that their cases are better than they actually are, and will litigate instead of compromising and settling. Lawyer-client relations would be full of “reserve and dissimulation, uneasiness, and suspicion and fear” without the privilege; the confidant might at any time have to betray confidences.’ [Even though Heydon uses the example of litigants in civil law, the rationale is similar and easy to understand in the criminal context.]

In *S v Safatsa* 1988 (1) SA 868 (A) at 886A-E, the South African Appellate Division (as it then was) held that the conflict between revealing all relevant information and attorney-client privilege had been resolved in favour of confidentiality of the communications. The court explained that this served the public interest better because of the operation of the adversary system upon which we rely in pursuit of justice.

Under the adversarial system the parties to the dispute are essentially responsible for the preparation and presentation of their cases. The verdict in the trial comes from an adjudication of the presented issues. Consequently each party (in the criminal context, the accused) must have a proper chance to prepare and present their case. The

client must feel free to be candid with his legal advisor so that the advisor can give legal advice based on all the facts. This privilege is therefore necessary for proper functioning of the South African legal system (*Baker v Campbell* (1983) 153 CLR 52, 49 ALR 385, 57 ALJR 749; *Sasol III (Edms) Bpk v Minister van Wet en Orde* 1991 (3) SA 766 (T)).

Yet, the basis and justification of the privilege has not been without debate (see for example M Kriegler 'Legal professional privilege as a right: Whence, when, and whose?' (1991) 108 (4) *SALJ* 613). The court in *Sasol III* supra reiterated that the privilege was necessary for the proper functioning of the legal system but that public policy ultimately underpinned the privilege. Paizes found favour in the argument put forward by Fried who expressed his view as follows ('Towards a broader balancing of interests: Exploring the theoretical foundations of the legal professional privilege' (1989) 106 *SALJ* 120-121):

'It is only the client's lack of legal knowledge that compels him to make confidential communications to his lawyer. If we regard them as constituting one conceptual unit then, ex hypothesi, no "communication", as such, has been made. To compel either the lawyer or the client to disclose what has passed between them would be tantamount to involuntary self-incrimination...'

## **2. Legal professional privilege under South African criminal law**

In South African criminal law, the principle of legal professional privilege is reflected in section 201 of the Criminal Procedure Act 51 of 1977. Section 201 provides that no legal practitioner, who is qualified to practice in any court, shall be competent without the consent of the person concerned to give evidence at criminal proceedings, against any person by whom he is professionally employed or consulted, with regard to anything he would not have been competent on 30 May 1961. The section therefore removes the danger of compelled disclosure in a criminal court by a legal adviser against a client, of information that was privileged on 30 May 1961.

On 30 May 1961 the privilege could be claimed by the client if the communication was made in confidence to a legal adviser acting in his professional capacity for the purpose of pending litigation, or for the purpose of obtaining professional advice (PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 3ed (2009) 147). The privilege cannot be claimed if it facilitates the commission of an offence or fraud (*Botes v Daly* 1976 (2) SA 215 (N); *Harksen v Attorney-General of the Province of the Cape of Good Hope* 1998 (2) SACR 681 (C); *Waste Products Utilisation (Pty) Ltd v Wikes* 2003 (2) SA 515 (W) at 551-552).

Section 201 qualifies the privilege in that the lawyer is obliged to reveal any information he obtained before he was professionally engaged with regard to a defence.

However, the application of this privilege in the criminal context has, since the advent of the Constitutional era, shifted from a mere evidentiary rule to a fundamental right (*Mahomed v National Director of Public Prosecutions* 2006 (1) SACR 495 (W) at para [7]; *Bennet v Minister of Safety and Security* 2006 (1) SACR 523 (T) at para [55]; *S v Tandwa* 2008 (1) SACR 613 (SCA) at para [17]).

The constitutional era has brought about a broader balancing of competing rights and principles and has in particular brought the right to a fair trial into the balancing process. The contemporary era has therefore widened the perception of the privilege bringing about an extension of the limits of the personal scope of protection of confidentiality of communications between lawyer and client (E Du Toit *et al Commentary on the Criminal Procedure Act* (loose-leaf) updated to 31 July 2010 at 23-36A & G).

Yet, in European Union competition law and in some European Member States the privilege is qualified in that the communications must emanate with regard to independent lawyers, and more specifically lawyers who are not bound by a relationship of employment.

I will now discuss a prominent decision of late under European Union competition law, where this principle was reiterated.

### **3. Akzo Nobel Chemicals Ltd and Others v European Commission (Grand Chamber of the Court of Justice of the European Union C-550/07P, judgment delivered on 14 September 2010)**

The background to this case is an enquiry conducted by the European Commission in its capacity as the competition authority. The Commission assisted by the United Kingdom Office of Fair Trading carried out the investigation at the premises of Akzo and Ackros as well as their subsidiaries (the applicants) in Manchester England, in order to attach evidence of possible anti-competitive practices (*Akzo Nobel Chemicals Ltd and Others v European Commission* (Grand Chamber of the Court of Justice of the European Union C-550/07P, Judgment delivered on 14 September 2010. Judgment item II at para [3.2], available at <http://curia.europa.eu/juris/p/cgibin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docdecision=docdecision&docop=docop&docp poag=docppoag&docav=docav&docsom=docsom&docinf=docinf&alldo cnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C550%2F07+P&ddatefs=&m datefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domain e=&mots=&resmax=100&Submit=Submit>, accessed 4 May 2011 ('Judg-

ment') and Opinion of Advocate General Kokott item III at para A[7] delivered 29 April 2010, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docdecision=docdecision&docop=docop&docppoag=docppoag&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C550%2F07+P&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submit>, accessed on 4 May 2011 ('Opinion').

It came on appeal before the Grand Chamber of the Court of Justice of the European Union. Three member state's governments, Ireland, the United Kingdom, the Netherlands and a number of lawyers' organisations, were given leave to intervene in support of the appeal by the applicants. Several other associations were refused leave to intervene in support of the applicants on the basis that they had not established a legitimate interest in the outcome of the case (Opinion *ibid* item III at para B[26]-[28]).

In their appeal the applicants in essence averred that the court *quo erred* in not applying legal professional privilege to two e-mails between the general manager of Ackros and Akzo's coordinator for competition law. The latter was an advocate of the Netherlands bar and a permanent employee in the legal department of the Akzo group. The Commission decided that these documents were not privileged and placed them on file (Opinion *ibid* at para A[13]-[14]).

The appellants relied on three pleas in law. The first plea being the primary ground, and the second and third, alternative grounds (Judgment *supra* item V at para C[27]). Because the second and third alternative grounds refer to grounds peculiar to the European legal landscape, I discuss only the primary ground.

The applicants and a number of interveners argued that the criterion in European Union law, that the lawyer must be independent, cannot be interpreted to exclude in-house lawyers. They argued that an in-house lawyer who is a member of a bar or law society is, because of his obligations of professional conduct and discipline, just as independent as an external lawyer. They submitted that the position of a member of the Netherlands bar is particularly significant, in that the code of professional ethics and discipline in the Netherlands made the employment relationship fully compatible with the notion of an independent lawyer.

The applicants also pointed out that the contract between Akzo and its coordinator for competition law provided that the company had to respect the lawyer's independence and had to refrain from any

action that might impede his independence. The contract furthermore sanctioned Akzo's coordinator to comply with his professional obligations as a member of the Netherlands bar, and regulations were in place aiming to resolve, in an independent manner, any dispute between the company and its in-house lawyer (Judgment supra at para C[35]-[37]).

The applicants in a second argument averred that the criteria set down by the bar and law society is no different for in-house lawyers and external lawyers. They therefore contend that the court erred in not finding that refusing to apply legal professional privilege to in-house lawyers violated the principle of equal treatment (Judgment supra at para C[52]).

The court relied on the judgment in *AM&S Europe Ltd v Commission of the European Communities* [1983] QB 878 ECJ at para [24] which held that the requirement that the lawyer should be independent is based upon the notion of the lawyers' role in assisting in the administration of justice. In that case, the lawyer provides the client the assistance he needs in full independence (Judgment supra at para C[42]).

The court held that legal professional privilege only extends to an independent lawyer, 'that is to say one who is not bound to his client by a relationship of employment'. It does not cover exchanges within a company or group with in-house lawyers. An in-house lawyer does not enjoy the same amount of independence as an outside lawyer. Therefore an in-house lawyer is less able to deal with clashes between his professional obligations and his client's interests. The lawyer's economic dependence and the close ties with the employer affect his ability to exercise professional independence (Judgment supra at paras C[43]-[49]).

With regard to the argument concerning equal treatment the court held that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified. Despite the fact that an in-house lawyer may be a member of a bar or law society and subject to its rules, an in-house lawyer does not enjoy the same amount of independence. The respective circumstances are therefore not comparable and there is accordingly no breach of the principle of equal treatment (Judgment supra at paras C[54]-[60]).

For the sake of completeness it may be noted that the rule does not apply where an in-house lawyer is merely relaying the privileged advice received from an external lawyer. The judgment does furthermore not distinguish between private and public employees. Public employees may therefore also be covered by the same principles.

#### **4. The South African approach to in-house lawyers**

Under South African law, the approach taken by the English courts in *Alfred Crompton Amusement Machines Ltd v Customs & Excise Communications (No 2)* [1972] 2 QB 102 at 129 has been followed. Lord Denning limited legal professional privilege to in-house lawyers where they acted in the capacity of legal advisor. No distinction is to be drawn between an in-house legal advisor and someone who is an advocate or attorney in private practice for the purpose of privilege (*Van der Heever v Die Meester* 1997 (3) SA 93 (T), *South African Rugby Football Union v President of the Republic of South Africa* 1998 (4) SA 296 (T) at 302). However, Kruger (in *Hiemstra Suid-Afrikaanse Straffproes* 7ed (2010) 535) submits that this is wrong as far as criminal law is concerned. He argues that section 201 applies to the relationship between a lay-client and a legal representative that acts as an independent court official. He argues that this is substantially different from the status of a legally trained employee and also of the latter's relationship with the employer.

In *Mobamed v President of the RSA* 2001 (2) SA 1145 (C) at 1151B-C, the court explained that there was no justification in law to make this distinction. The court held that such a distinction would dislocate established practice and force entities with legal advisors to reorganise at great expense, so that all legal advice be received from outside lawyers. The court found that such steps were not warranted but reminded that only communications of in-house lawyers in their capacity as legal advisors were privileged.

#### **5. Discussion**

It is fair to say that crime is endemic in South Africa and that the relevant authorities and the criminal courts are not up to the task of effective law enforcement. South Africa has furthermore had considerably more than its share of corporate scandals frequently arising out of corruption, graft and fraud (see also T Wixley & G Everingham *Corporate Governance* 2ed (2005) vii & 5). On 16 March 2011 Siphon Pityana, the chairman of the Council for the Advancement of the South African Constitution held: 'It is now beyond doubt that corruption and patronage are so pervasive, rampant and crippling in our society that we are on the verge of being deemed a dysfunctional state.' (SAPA *The Citizen Newspaper* of 17 March 2011, available at <http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=180095&sn=Detail&pid=800&SA-on-verge-ofbeing--dysfunctional->, accessed on 6 May 2011). Many corporations are furthermore of such size that it pervades society. All of this results in serious personal and collective loss.

Significantly, even though many in-house lawyers are members of a law society in practice, there are no statutory or other legal requirements to become a legal advisor in a corporation under South African law. Unrealistic employment policies, due to political objectives, further worsen the problem in that the most suitable candidates are not always appointed as in-house lawyers.

It must further be agreed with the Court of Justice of the European Union in the *Akzo* case, that an in-house lawyer, despite being enrolled as a member of the bar or law society, does not enjoy the same independence from his employer as an external lawyer in relation to his client. The in-house lawyer is expected to follow work-related instructions and is part and parcel of the structure of the entity. An in-house lawyer may choose to give advice that is acceptable to his employer and is economically, for the most part, dependant on one client.

An in-house lawyer is therefore less able to deal with conflicts between his professional obligations and the aims of his client.

These points are based on the conception of the lawyers' role as assisting in the administration of justice by the courts. The lawyer must in full independence supply the client with legal assistance. As a lawyer in private practice will be a member of a law society, the lawyer will be suitably qualified, and the administration of justice will be supported by the rules of professional ethics and discipline enforced by the relevant professional body.

Would it therefore not be in the general interest of South African society that legal professional privilege between client and lawyer be limited to practicing lawyers who are not in the employ of their client? One may be able to argue that it is in the general interest that the privilege be limited to communications with regard to external lawyers. The individual right to legal counsel would then have to yield to societal interests if the benefit of the limitation to society outweighs the detriment to society (JA Rawls *A theory of justice* (1971) 29).

Yet, the Governments of the United Kingdom and Ireland argued before the Court of Justice that the starting point must be that of fundamental rights (the right to legal representation) and that the issue should not primarily be viewed through the prism of the Commissions' power to enforce competition law (general interest).

Under South African law it can be argued that a denial of the privilege to communications with in-house lawyers is an unjustifiable infringement of the right to paid legal representation of choice, and also the right of effective assistance by counsel (for a discussion of the right to choose a legal practitioner see my case discussion, 'Depriving a criminal defendant of his choice of paid counsel: *United States v Gonzalez-Lopez* 548 US 2006 No 05-352' (2007) 1 *THRHR* 153 and for

a my discussion on the right to effective assistance by counsel, see my note on, 'Ineffective assistance of counsel during plea negotiations: An agreement lost' (2006) 3 *THRHR* 484).

The Bill of Rights (chapter 2 of the Constitution of the Republic of South Africa, 1996) and the Criminal Procedure Act 51 of 1977 provide for the right to legal assistance with regard to criminal litigation. The Bill of Rights furthermore provides that, '[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person' (section 8(4) of the Constitution of the Republic of South Africa, 1996).

However, in terms of section 36 of the Bill of Rights, the right to legal representation in the Constitution may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom, taking into account specified factors.

Section 39(1)(b) of the Bill of Rights furthermore provides that when interpreting the Bill of Rights, international law, for example the *Akzo* case, must be considered.

It is furthermore accepted that the right to paid counsel of choice is subject to reasonable criteria. Not all lawyers are for example allowed to appear before all courts of the land. With regard to in-house lawyers, it is accepted that they are not allowed to represent their employer in court. This restricts the choice available to a client when deciding on the most suitable lawyer. Is it therefore not objectively reasonable to limit the privilege to lawyers who are substantially independent (not in the employ of the client)? After all, the degree of protection afforded by a fundamental right may vary according to the circumstances. I think not.

The lack of protection afforded to communications with in-house lawyers will without a doubt deter entities to seek legal advice from those lawyers. It will diminish the role of the lawyer as an organ of the administration of justice and as an intermediary between the courts and entities, and be detrimental to the interests of society.

The limitation of legal professional privilege, between client and lawyer, to communications to lawyers who are not in the employ of their client, might even bring about undesirable practical results in the context of criminal litigation.

When a corporate body is charged, a director or 'servant' of that body must be cited as representative of that body and as the accused (section 332(2) of the Criminal Procedure Act 51 of 1977). Very often the representative is also charged in his personal capacity (see for example *S v Pelser* 1966 (3) SA 626 (N)). Just as often, the director or employee consulted the legal advisor in his representative and personal capacities (typically the corporation represented by the director or



employee appears as accused number 1, and the director or employee appears in his personal capacity as accused number 2). Because the legal advisor is in the employ of the corporate body, communications with the legal advisor, with regard to the corporation, would in terms of the limitation not be privileged. Because the director or servant is not the employer of the legal advisor, communications with the legal advisor in his personal capacity would be privileged.

Generally it is desirable that accused, charged with the same offence, be tried together (*S v Libaya* 1965 (4) SA 249 (O); *S v Levy* 1967 (1) SA 347 (W)). Where the communications are admissible against the corporation but not against the director or employee in his personal capacity, the director or employee will probably have grounds for a separation of trials due to prejudice (*R v Koblinfile Qwabe* 1939 AD 255; *R v Ndblanguisa* 1946 AD 1101). I submit that prejudice will be likely (See also *R v Dekker & Others* 1931 TPD 462 and *R v Kritzinger* 1952 (4) SA 651 (W)).

A separation of trials results in a duplication of proceedings and may well in some instances hinder the State in effectively presenting or prosecuting the case. This brings about an acquittal of guilty persons which is detrimental to the interests of society.

## 6. Final remarks

I agree with all the parties, bar the Commission, in the *Akzo* proceedings that legal professional privilege should be accorded to in-house lawyers.

It is in the interests of South African society that an entity has access to legal counsel. The benefit, in my opinion, outweighs the detriment to society that may occur if the legal professional privilege is not limited to exclude communications with in-house lawyers.

In practice, in-house lawyers play a crucial role in society. The chief executive of the United Kingdom Law Society, Desmond Hobson, stressed this point in his response to the *Akzo* judgment soon thereafter. He explained that in-house lawyers were the 'frontline guarantor of compliance' and that it was sad that the court had rejected this key tool in achieving the high aims of the European Union. He pointed out that broader social benefits are served when companies behaved ethically, properly and within the limits of the law. This can best be ensured when legal advisors can give frank legal advice. He indicated that more and more companies have legal advisors that ensure business is informed and that they meet their legal obligations (R Rothwell 'Akzo ruling against in-house privilege in competition matters' in the United Kingdom 'Law Society Gazette', available at *matters*, accessed on 6th May 2011).

The sheer complexity and sometimes size of businesses furthermore make it increasingly difficult for directors and employees of corporations to understand the relevant regulatory principles.

I am therefore of the view that legal professional privilege should not be limited to exclude communications with in-house lawyers under South African criminal law.