Hogan Lovells' Makwakwa headache: 'Why we could not break SARS's privilege'

27 May 2018
Fin24

As much as we wanted to, we could not break SARS's privilege, unless they permitted us to do so, writes partner at Hogan Lovells (South Africa) Wessel Badenhorst for Fin24 about an investigation into controversial former SARS chief executive for business and individual tax Jonas Makwakwa.

Confidentiality is not a right. Privilege is.

While sitting in Parliament last week listening to the debate on confidentiality and its place in the governance of our state institutions it struck me how the concept of legal privilege is much misunderstood and confused with confidentiality.

Much has been made by politicians and campaigners of professional firms, both legal and audit, "hiding" behind confidentiality as an excuse to not disclose the terms and details of their work with private and state organisations. But confidentiality and attorney-client privilege are very different beasts, and should be treated differently.

For the past seven months, Hogan Lovells has been under attack, facing accusations that we could not effectively refute due to our attorney-client privilege in relation to our work for SARS.

I want to make it abundantly clear that when lawyers, consultants, and accountants are contracted by state organisations they are servants of those organisations. Public funds are deployed to pay for the services. Financial, judicial and parliamentary oversight of such work and the terms on which it was done, is not only permissible, but it is essential to hold those government bodies to account for the proper use of public funds.

When consulting or audit firms are employed by government organisations, they often enter into service level agreements that contain confidentiality clauses obliging the consultant and the government to keep the terms and the work that was done, confidential. As a principle there is nothing wrong with this and it actually makes commercial sense.

But what if the contract or the work being done uncovers corruption, whether within the State Client or on the part of the consultant? Should the contractual confidentiality clause trump the consultant's obligation under our corruption laws to report the corruption to the authorities?

The answer is not crystal clear in law as the consultant contractual obligation to remain silent competes directly with its statutory duty to report the uncovered corruption. From a policy

perspective, the statutory duty should probably be paramount as the fight against corruption is hampered if it does not.

So if there is an expectation in society that auditors and consultants have a duty to report corruption, even in breach of a contractual confidentiality clause, why does the same principle not apply to lawyers?

Lawyers are not consultants. Lawyers are not auditors. Lawyers have a unique professional obligation. We must advise on and represent our clients in litigation – both civil and criminal. Inherent in that duty is our obligation to keep our client's instructions and the information they provide a secret. This is attorney-client privilege. And although it may not always be popular it is a fundamental cornerstone of our constitutional democracy and the upholding of the rule of law in our country.

Put it this way. Everyone is entitled to be advised of their legal position. If a client wants to know whether what they have done is a crime, that client talks to a lawyer for advice. If the lawyer is obliged to report a potential crime to the authorities, then the client's ability to obtain legal advice is not only undermined but it fails to serve the broader interests of the fair admission of justice.

This is the position in law, regardless of who the client is or what the crime is on which advice is sought. It doesn't matter whether the client is someone accused of murder or theft or a traffic violation. It also applies to the government and bodies such as SARS and the Hawks. The attorney-client privilege cannot be carved up to create categories of exclusion to cover certain crimes or certain organisations. To do so would undermine the proper functioning of our judicial system and rule of law. Imagine applying it to your own circumstances. Imagine not knowing whether you could trust the lawyer who you turn to when you are at your most desperate and need to know what your rights are and where you stand.

Hogan Lovells has been accused of hiding behind attorney-client privilege and it has been demanded that we should "come clean" post the investigations into Mr Jonas Makwakwa and that we should do so in wanton disregard of the attorney-client privilege.

The attorney-client privilege is not ours' to release or surrender. It never has been. In the Makwakwa case it belongs to the client, SARS. It would have made our lives much easier if we had been able to. But that's not how this works. As much as we wanted to, we could not break SARS's privilege, unless SARS permitted us to do so. It would be unethical, unprofessional and unlawful.

What is in the public interest is a complex concept. In the heat of our demands for justice and retribution it is easy to demand full transparency and disclosure as being in the public interest. But that is the easy path to take. The harder path and the right path to take is one where the rights of all of us are equally protected under the law. That is what many of us fought for when our constitution was established. You might not like it in all circumstances. But one day you might have to count on it.

Read the full report on Jonas Makwakwa and Kelly-Ann Elskie, which was made public to MPs in Parliament:

https://www.fin24.com/Opinion/hogan-lovells-makwakwa-headache-why-we-could-not-break-sarss-privilege-20180527-2

Contacts

Wessel Badenhorst

Office Managing Partner

> Read the full article online