

# BREACH OF CONFIDENTIALITY

VS

# PRIVILEGED COMMUNICATION

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## THE CASE OF EMPLOYMENT AND CONTRACT LAW

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***Can an employee consult with an attorney on issues relating to their employment and the work place?***

***Can a party to a contract with a confidentiality clause consult an attorney as relates to their rights arising from that contract?***

The above questions are seemingly different however, they both speak to the same thing, to wit, whether consulting an attorney while bound by confidentiality, results in a breach of that confidentiality?

**ANSWER:** Consulting an attorney while bound by confidentiality (*in our write up, by employment or contract*) does not result in breach of that confidentiality only if the confidential information was shared with the attorney for purposes of obtaining legal advice.

**RATIONALE:** In law, there is a concept/principle referred to as privilege, attorney client privilege. In the case of *Moremi and Another v African Banking Corporation of*

*Botswana Ltd - 2009 (2) BLR 18 (HC)*, and many other alike, the High Court of the Republic of Botswana have cited with approval, South African case law such as the case of *Lane and Another NNO v Magistrate, Wynberg 1997 (2) SA 869 (C) at G page 879*, wherein the South African courts note as follows:

*"It is a well-established rule of both the South African and English law of evidence that professional communications by client to attorney are privileged if they are of a confidential character and for the purpose of obtaining legal advice": see S v Kearney 1964 (2) SA 495 (A) at 499-E, the English decisions cited by Ramsbottom J in R v Fouche 1953 (1) SA 440 H (W) at 445-6 (to which reference was made in the Kearney case, ubi supra)."*

The above simply means that there are consultations with attorneys (*confidential in character/nature, disclosed for purposes of legal advice*) which will escape certain consequences of the law, such as, for purposes of this write up, breach of confidentiality.

**More about Privilege:** Privilege has been seen by some lawyers, beyond the borders of Botswana as an indispensable function of 'lawyering' to the extent that it enables clients to be free enough to disclose everything, good or bad, without fear of legal consequences (*for purposes of this write up, let's consider privilege to be a general principle in law*). Again, in law, there is a recognised saying to the effect that 'for every general rule, there is an exception'. The point herein, in relation to privilege, being that privilege is not absolute, this means that there are exceptions to privilege, therefore privilege would, where such exceptions arise, not apply. So for example, a client consulting an attorney on how to commit a crime will be an exception to privilege and therefore, such communication with an attorney does not enjoy the benefits of being referred to as privileged communication.

**Effect of Privilege:** Once communication between an attorney and a client is viewed as privileged, that communication is excused from certain vigour(s) of the law. As an example, a Court will not look into privileged communication between a client and attorney unless such privilege has been waived. For purposes of this write up, it is our opinion that an employee, consulting a lawyer about an envisaged contract review at the workplace (*including any other workplace related issues, from a legal consequence /advice standpoint*) or, a party to a contract with a confidentiality clause, consulting an attorney about to such contract, will enjoy the protection of privilege. The result of this is that the said employee and the said party to a contract, will not be viewed, in the eyes of the law, to have committed a breach of confidentiality.

## **PARTING WORDS:**

To employees: an employer- employee relationship, is viewed by the law to be a 50/50 relationship (although, this may to some, be a subject of debate) and employees must be fully equipped and prepared to engage with their employers, be it for employment term reviews or envisaged disciplinary proceedings, even if it means engaging an attorney. It is necessary however, to caution and say that where an employer has explicit rules in relation to internal (*workplaces procedures*) for example, the employee hand book (*disciplinary procedures and guidelines*) providing that no legal representation is allowed at a disciplinary hearing, such rules must be respected. In this case an attorney may not represent the employee at a disciplinary hearing, but there is nothing precluding the employee for obtaining legal advice and guidance as to how to engage with the employer at such hearing.

**To employers:** refrain from accusing employees of breaching confidentiality in cases where they seek legal advice. You may insist on your internal procedures being respected; however, breach of confidentiality is not a finger to hide behind when an employee seeks to engage on an equal footing.

**Parties to contracts:** Your right to consult an attorney prior to, during and after a contract is not one that can ever diminish. Even in the face of non-disclosure agreements which often proceed contracts, you are entitled to have consultations, privileged consultations with attorneys.

Should you require further information on what you can and cannot consult on, feel free to contact the writer hereof **Quintan Maduwane** at [quintan@collinschilisa.co.bw](mailto:quintan@collinschilisa.co.bw)