
The Limitations of Legal Professional Privilege in Mine Health and Safety Inquiries

Legal Professional Privilege - Instructions of Presiding Officer - Public Interest

Section 11(5) of the Mine Health and Safety Act (MHSA) obliges every employer in the mining industry to investigate all reportable accidents and identify the underlying causes of the accident. Often, the employer engages third-party experts to conduct the investigations through the employer's legal representatives in order to claim legal privilege over these reports. This raises the question whether a presiding officer can compel the employer to disclose a report during a mine health and safety inquiry.

Under normal circumstances, a party may be compelled to disclose all relevant documents during an inquiry. However, employers often refuse to disclose investigation reports in MHSA accident investigations, notwithstanding their obvious relevance to the subject of the inquiry. There is legal recourse available to compel disclosure though.

Sections 70 and 71 of the MHSA strike a careful balance between a presiding officer's power to compel evidence and legal privilege.

Legal professional privilege is a common law right that may be claimed either by the right holder or their legal representative. The right, however, is not absolute and may be limited where competing considerations arise. South African law recognises different types of legal professional privilege, including litigation privilege. Litigation privilege pertains to, and protects, all communications between a legal practitioner and the client, or between either of them and a third party, with respect to actual or contemplated litigation, where a case is in the process of investigation or preparation for trial.

An inquiry initiated under section 65 of the MHSA is convened to investigate the cause(s) of an accident which caused a death at the mine. An inquiry therefore is not a court of law; it is an investigative forum with limited powers – to record evidence, compile a report, and make recommendations to the Chief Inspector of Mines. Accordingly, a section 65 inquiry is not regarded as litigation and thus, consequently, an employer cannot rely on litigation privilege to refuse the disclosure of investigation reports or similar documents if so compelled by the presiding officer.

Further, an employer may also be compelled to disclose an investigation report under the Promotion of Access to Information Act (PAIA). Section 70 of PAIA requires a private body to disclose information which reveals a substantial contravention of, or failure to comply with, the law; or an imminent and serious risk to public safety or the environment, provided the public interest in disclosure clearly outweighs any potential harm. This provision promotes transparency by enabling the exposure of wrongdoing and serious risks that might otherwise remain hidden, even if prejudicial. It incorporates a balancing test, through which compelling public interest overrides confidentiality concerns.

Section 80 of PAIA further permits a court to confidentially examine withheld records, in camera, to decide if disclosure is required. This 'judicial peek' is a tool of last resort which balances transparency and confidentiality. However, only the courts are permitted a judicial peek, and so section 65 inquiry presiding officers may not invoke section 80 of PAIA to confidentially examine an investigation report which an employer refuses to disclose.

Legal professional privilege protects confidential client-lawyer communications, including documents prepared for litigation, but it is not absolute. Under sections 70 and 71 of the MHSA, a presiding officer may compel the production of documents, performance of acts, and examination of witnesses under oath relevant to the inquiry, and privilege may be waived expressly, impliedly, or by conduct inconsistent with confidentiality. Section 70 of PAIA further allows disclosure where public interest in transparency and accountability, particularly for safety or legal compliance, outweighs the need for confidentiality.

Phillip Sobi Masilo, Director
Email: phillip@cth.co.za

Kutlwano Cinclaire Legwale, Candidate Attorney
Email: kutlwano@cth.co.za

www.cth.co.za