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MINOR DISSERTATION

DOES THE F I C A [*FINANCIAL INTELLIGENCE CENTRE ACT*] LEGISLATION COMPROMISE THE UNIQUE RELATIONSHIP BETWEEN ATTORNEY-CLIENT AND IS THERE A CONFLICT?

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws (Tax Law) dissertations including those relating to length and plagiarism as contained in the rules of this University, and that this dissertation confirms to those regulations

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INTRODUCTION

Despite being relatively quite far down the long road to democracy, South Africa did not have any money-law laundering legislation. International pressure from organisations such as the Financial Action Task Force [FATF], the Organisation for Co-operation of Development [OECD] and Asia Pacific Group on Money-Laundering [APG], World Bank, and Interpol has resulted in a new jurisprudence. Since its introduction in 2002, the Financial Intelligence Centre Act, Act 38/2001 (hereinafter referred to as FICA, or 'The Act') has also brought about many perplexing conundrums – one of which being whether amongst other time-consuming and cumbersome obligations imposed by 'The Act' – whether, in fact, the whole relationship between a legal advisor will be severely compromised.

In this paper, I shall propose to discuss whether the introduction of FICA legislation creates conflict in the relationship between an attorney and his/her client. The use of the word 'relationship' postulates and pre-supposes commitment of the attorney to his/her client.

To whom does the attorney now owe 'allegiance'?

Has the promulgation of the FICA legislation invaded the sanctity and solemnity of the unique relationship between attorney and client?

I shall now endeavour to set out what the attorney-client professional privilege is, as well as what the rationale is for the existence of the privilege, and also examine possible consequences that have resulted from the introduction of the FICA legislation as well as constitutional implications.

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CONCEPT: LEGAL PROFESSIONAL PRIVILEGE

CASE LAW

The attorney profession privilege is, simply put, in my humble opinion, an adoption of the old adage used by legal practitioners that 'my word is my bond'. It is one of the most important fundamental concepts that seeks to encourage ordinary people to be completely comfortable and at ease with whatever is mentioned to his legal practitioner. 'Men are unequal in wealth, power, intelligence and capacity to handle their problems, to remove this inequality and to permit disputes to be resolved ..... lawyers are necessary and privilege is required .....to ensure that all relevant facts will be put before them, not merely those the client thinks favour him.[1]

The unique existence of the privilege creates and facilitates 'the promotion of candour' [2] as well as 'unguarded, frank and confidential consultation' [3] and 'of perfect trust' [4] in 'the quest for the truth'[5]. This view is shared by Lewis – 'the confidence of the client is absolute and must be preserved by his attorney.[6]

Wigmore[7] holds the opinion that 'where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications

relating to that purpose made in confidence by the client are at this instance permanently protected from disclosure by himself or by the legal advisor, except the protection may be waived.[8]

The attorney-client relationship places fiduciary duties on the attorney. This can be summarized by Lord Brougham's words uttered as far back as 1820 as being:

> 'An advocate, by the sacred duty that he owes his client, knows in the discharge of that office but one person in the world – that client and no other.' [9]

The attorney is also said to have an '*ubberrimae fides*' – an utmost good faith relationship with his client in the discharge of his mandate. The allegiance owed by the attorney to his client is unwaivering and supreme.

In the English case of RE, a firm of solicitors (1985) ER 482 [10], the chancery division held that the contract of retainer between the companies and the attorneys created a close advociary relationship – 'which duty extended to every partner in the firm of solicitors.' [11]

One of the ways cited [12] that law firms utilized to avoid possible leaking of confidential information is by erecting what is known as a "Chinese wall"[13]. This is defined as being 'a system of organisational arrangement within a law firm, which prevents the free flow of information throughout various departments in the law arm'. [14]

The House of Lord's decision [15] in *Prince Jefri Borkiah v. KPMG 1995 ER 517* is a relatively recent judgement that re-affirms the duty of attorneys (and

other professionals) – in this case – the world-renowned firm of accountants KPMG – to respect the duty to preserve sensitive and confidential information.

In this case, the "Chinese wall" was established [16], i.e. steps were taken to prevent possible breach of confidential privilege, yet the court held [17] that KPMG had not taken effective measures. The court also pointed out that it was impossible to 'prevent the unwitting disclosure of information'[18] in the circumstances. It went on to further state that partners and managers are accustomed to sharing information and expertise [19], that owing to the sheer magnitude of the forensic audit 'a "Chinese wall" based on physical segregation was not adequate in the circumstances.' [20]

It also held the important point that accountants who perform roles traditionally performed by attorneys, owed their clients the same duties flowing from this advociary relationship of confidentiality. [21] It would seem that the English courts have widened the scope of the privilege to include those of other professions who render litigation services. [22]

The so-called Big Five (5) law firms as well as some other law firms have - in their quest to strive to provide a full turnkey comprehensive service to existing and future clients – acquired entire tax department expert personnel from international accounting firms who had a dominant presence here.

Whilst this move is to be welcomed since admitted attorneys have the skills, in the event that litigation is unavoidable, it is my humble submission that clients who engage these tax experts are simply receiving the short-end of the stick, as the communications even in terms of the strict criteria laid down in the FICA/2001 legislation will definitely not be privileged and all potentially

harmful information will have to be reported to the information centre within the specified period.

The real danger is that the client would engage accountant specialists and experts at these law firms, thinking that whatever is discussed is privileged, but the client unwittingly finds himself in an unenviable, precarious and untenable legal position.

The Cape Law Society has issued a guideline to its members[23] which launches a scathing attack on the legislature stating that certain aspects of FICA may be impinging upon the traditional role of the attorney profession.[24]

It is clear that the Act seeks to bring attorneys trust accounts into their focus, since they have been identified as 'primary vehicles for money laundering'.[25]

5-27 under the heading urges a member of an accountable institution to 'report' on their own clients; it further states also a person 'who has been a client'. It is unclear whether this provision is retrospective in operation.

The guideline[26] goes on to state 'that it is inconceivable' that attorneys are required to act 'deceitfully' against their own clients given the time-honoured ethical and professional duties owed by attorneys to their clients.[27]

It advises clients to withdraw representation and 'to withdraw entirely from the transaction'.[28]

It also states that attorneys return monies held in trust on behalf of clients rather than risk being guilty of 'unprofessional conduct'[29] whilst still

acting in the transaction and ostensibly acting on behalf of and in the interests of the client in question.[30]

Other questions to ponder are:

What does an attorney in the course of winding up a deceased estate discover 'grey money' offshore?

What is the position of the clients who have set-up offshore trusts or who have off-shore investments comprising of 'grey-money' transferred twenty years ago? Does the attorney become a party to the transaction as soon as he receives payment as being proceeds of crime? According to the FICA provisions, the attorney would clearly not be able to receive fees in this instance.

What is the ethical position of those attorneys who have consulted with their clients during the exchange control amnesty period and whose clients have, after consultation, decided to maintain the status quo and not apply for amnesty.

These are the dilemmas that attorneys will continue to find themselves in.

Advocate Gilbert Marcus, SC, in his opinion titled *CONFIDENTIALITY AND PRIVILEGE*, [31] states that 'persons other than legal advisers are in no better position than any other witness required to give evidence at a criminal trial or before a statutory enquiry.' He also emphasises that it is theoretically possible that an auditor or tax advisor may be required to disclose information

about their clients. [32] The common law position is that the only relationship which will bar an order to breach privilege is marriage. [33]

The learned counsel also sets out the South African position by stating that [34] 'our courts have thus far refused to extend the privilege to other professional relationships.' He cites journalists – *S v. Pogrund 1961(3) SA 868(+)* as well as *S v. Cornellisen 1994(20) SACR 41(3)*; insurers *Howe v. Mabuyu 1961(2) SA 635(D)*; ministers of religion *Smit v. Van Niekerk No en n Ander 1976(4) SA 293(A)* and *S v. Bierman 2002(5) SA 243(cc)* as well as doctors *Botha v. Botha 1972(2) SA 559(N)* as authority for this proposition.

I shall now attempt to show how our courts have interpreted the law in this area. In determining whether a communication between a professional legal adviser and his client is privileged, the question whether the legal adviser was acting in his capacity as such is in each case a question of fact – *Danzfull v. Additional Magistrate, Bloemfontein* [35]. The court also held that it was a matter of fact whether the communication was made in confidence.

Our law has developed a long way since the decision in *Mandela v. Ministry of Prisons 1981 (938)* and where the question was posed as to whether the attorney-client privilege conferred a general immunity against seizures of documents covered by such powers in terms of general powers [36].

In the case of *Adresen v. Ministry of Justice 1954(2) SA 473(W)* it was held that privileged documents were subject to seizure. This unhappy state of affairs came to an end, due to the erudite reasoning and judgement of JA Botha in *S v. SAFATSA 1988(1) SA 868(A).*

The learned judge of appeal cites at p885 with overwhelming approval the views of his colleague, J Friedman (as he then was) in *Euroshipping Corporation of Monrovia v. Ministry of Agricultural Economics and Marketing and Others 1979(1) SA 637(C)* that it was a fundamental right of the client that inroads should not be made into the right of the client to consult freely with his legal adviser, without fear that his communication to the latter will not be kept secret. [37]

He also quotes with approval the celebrated case of Baker v. Campbell in which the plaintiff had consulted his solicitors for advice about a scheme to minimise liability for Sales Tax. The defendant, i.e. the Australian Federal Police, had lawfully obtained a search warrant authorising him to seize documents held by the solicitors at their offices. The documents were all brought for the express purpose of obtaining and being given legal advice. The documents also included opinions by Counsel.

In the Euroshipping Corporation of Monrovia case cited previously, Mr Justice Friedman (as he then was) also at p644 utters more pearls of wisdom when he said 'to impose qualifications upon the rule of "once privileged, always privileged" would create an unwarranted inroad upon this fundamental right of a client.'

SAFATSA's case heralds a new perspective on the legal professional privilege, which will allow courts more scope and flexibility to unleash the spirit of the privilege rather than its form. [38]

SAFATSA's case was followed by *SASOL III (Edms) BPK v. Min Van Wet en Orde 1991(3) SA 766(W)*, which held that subsequent to a fire at the

petrochemical plant were twelve (12) people died, the prosecutor from the Occupational Safety Department of the Attorney General's Office was not allowed access to reports which were held to be privileged documents not capable of seizure. It also held the legal privilege is a substantive rule of law and not merely a rule of evidence.

JEEVA & BAGOSHI

In *Jeeva and Others v. Receiver of Revenue, Port Elizabeth and Others* [39], the applicants were subpoenaed to attend a Liquidation Enquiry: they instituted urgent proceedings for all information held by the Receiver relating to the liquidation of the Companies. One of the grounds on which this application was opposed was that the applicants were not entitled to the information since it was covered by legal professional privileges. The court held that the legal professional privilege was a reasonable and justifiable limitation on the applicants' constitutional right of access to information.[40]

Judge Jones [41] held 'that legal professional privilege has its true basis in a fundamental right to give and take legal advice with complete confidence, without which our adversarial system of justice cannot operate properly.'

Our law attaches an extremely high premium to legal professional privilege. A seizure of client's files – the subject of a motor vehicle accident fund investigation by the Office of Serious Economic Offences Unit in the case of *Bogoshi v. Director, Office for Serious Economic Offences*, [42] was challenged – the court held that [43] 'their claim to privilege was not a *bone fide* one and

should be disregarded. Another point that flows from this judgement is that the privilege belonged to the *client* and that it has to be claimed. There was no evidence that any of the clients had claimed the privilege or had, in fact, wished to do so. It was, nevertheless, in their interests to have the matter properly investigated.

MOHAMED V. PRESIDENT OF RSA.

Does legal professional privilege attach to advice given by a qualified lawyer who is not in private practice? This was the issue in *Mohamed v. President of RSA* [44]. More specifically, it concerned whether privilege applied to advice given by a state employee to the State. The court, per AJ Hoffman, held 'legal professional privilege can lawfully be claimed in respect of confidential communications between Government and its salaried legal advisers when they amount to the equivalent of an independent adviser's confidential advice'.[45] The learned judge once again re-iterated and re-emphasised the view that 'legal professional privilege exists to aid the end of litigation ..... to seek advice in confidence secure in the knowledge that the contents of such advice remains private.' [46]

In the case of *Blue Chip Consultants (Pty) Ltd v. Shamrock* [47] it was also stressed that 'there are sound reasons for respecting attorney-client privilege.'[48]

THREE RIVERS CASE

The South African jurisprudence in this area of law is 'said to be more generous than the test applied in England', which now requires communication be made for the *dominant purpose* of obtaining advice', [49] as held in the recent decision of the *Three Rivers District Council v. Governor of Bank of England (2003) EWCA Civ 474.*

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FICA

INTRODUCTION

The Financial Intelligence Centre Act 38/2001 as mentioned was introduced after enactment of the *Prevention of Organised Crime Act* to ostensibly thwart the nefarious activities of criminals, terrorists and money-launderers, and other like-minded people.

The basic thrust of the legislation, it is humbly submitted, is to 'conscript' owners of businesses, financial institutions, insurance companies and more importantly, professionals to 'monitor', i.e. to become their 'eyes and ears', whilst going about their daily duties.

Severe penalties, i.e. imprisonment not exceeding fifteen years or a fine up to ten million rands provide a deterrent to would-be transgressors. [50]

The legislation empowers the establishment of the Financial Intelligence Centre whose objective i.e. S3 'is to assist in the identification of proceeds of unlawful activities as well as the 'combating of money-laundering activities'.

Its 'other objectives' are to make information available to other investigating authorities such as 'the intelligence services' as well as 'SARS', as well as to exchange information with their overseas counterparts 'regarding money laundering activities and similar offences'.

Chapter 2 of the Act envisages the establishment of a money laundering advisory council composed of [51] various heads of bodies such as SAPS, NDPP, NIA, SA Secret Service, Governor of Reserve Bank, Commissioner of SARS who would advise the Minister effectively.

S21 states that an accountable institution may not establish a business relationship with a client unless the identity of the client has not been verified. In addition to which, a record in terms of S22 is to be kept of business relationships and transactions.

Part three refers to reporting duties and access to information provides for most of the controversial discourse3 on the Act.

S28 refers to the fact that an accountable and a reporting institution has to report certain 'above-prescribed limit' cash transactions but does not mention the amount.

Uncertainty is one definite consequence of trying to interpret S29 which imposes a duty to report any 'suspicious and unusual transactions' to the Centre within fifteen days after he acquired the knowledge or formed the suspicion. [52] The term 'suspicious' is not defined.

In *Hussein v. Chong Fook Kam (1969) 3 A11 ER 1626*, it was held that the term 'suspicion' is a state of conjecture or surmise where proof is lacking'. [53]

In the case of *Columbus Joint Venture v. ABSA Bank 2002 (1) SCA90*, JA Cameron ventures into suggesting behaviour which causes a 'reasonable and prudent person to have a doubt as to the *bona fides* of the person and the transaction'. [54]

Mr Justice Thring, in the case of *MV AIS Mamas Sentrans v. Owners*, MV AIS Mamas [55] refers to something as being unusual when it is 'uncommon, rare or different', or *in n' hoe mate ongewoon* – i.e. irregular.

I agree with the view [56] espoused that 'suspicion is a subjective state of mind, could be frivolous and the pivotal point that 'one person's sensibilities may very well not be to another'. [57]

Ss 30 and 31 make the conveyance of cash and the electronic transfer of large amounts – i.e. 'excess of the prescribed amount' reportable to the Centre.

The FICA legislation also make provision for what are termed 'monitoring orders' in terms of S35 of the Act, upon written application to a judge, who must satisfy himself in terms of 35(3) (a) that reasonable grounds exist for grounds on the suspicion as well as (b) that 'the interests of justice are best served by monitoring the person, account or facility.'

The provision seems fair and reasonable; what is indeed disturbing is that the order must be issued 'without notice to' or 'hearing the person' involved in suspected money laundering activities.

In terms of S35(4), one of the terms of the court order a commentator [58] has suggested 'might well be an order prohibiting the attorney from disclosing

the fact and the terms of the monitoring order to his client', 'the client' would certainly never receive notice.

An important consequence is that the attorney must continue to represent the client although he (the attorney) may be compelled to make secret periodic reports about the client. [59] S38(1) indemnifies persons, organisations from prosecution, i.e. criminal or civil 'during their 'whistle-blowing' activities.

S35 [60] does not 'compel the continued representation of the client'.

Is there a difference between confidentiality and privilege? There is definitely 'an overlap between the two concepts, since confidentiality is a necessary condition for claiming legal professional privilege'. [61]

'The mere fact that a communication was made in confidence will not necessarily mean that the communication is privileged'. [62] The communication will only be protected by privilege if it was made for purposes of obtaining legal advice – *S v. Kearney.* [63]

Confidentiality and privilege are distinguished in S37 which deals with reporting duties and obligations.

S37(1) deals with confidentiality and S37(2) with privilege. S37(1) supercedes any duty of secrecy or confidentiality that one may owe whilst S37(2) heralds the statutory restatement of the 'common law right to legal professional privilege. It applies to 'communications made in confidence between an attorney and client for purposes of legal advice for litigation which is pending, contemplated or which has commenced, or a third party and an

attorney for purposes of litigation which is pending, contemplated or has commenced. The attorney is thus not required to divulge information that is privileged

Any important difference is that where communications are confidential but are un-related to giving of legal advice, the effect of S37(1) is that the attorney will not be able to rely on the confidential nature of such communication to resist attack under S37(1)

'S37(1) is said to expressly override any duty of confidentiality that does not comply with definition and circumstances set out that constitute legal professional privilege.' [64]

Thus people such as accountants, bankers and doctors are not immune from the reporting obligations imposed by the Act.

The Act does, however - 1 to S37(1) - require attorneys to 'report non-privileged confidential information.' [65] This is said to present 'a significant burden to the attorney.' [66]

DOES THE FICA LEGISLATION VIOLATE THE BILL OF RIGHTS?

S14 of the Constitution of South Africa refers to the violation of private communications.

In *Hyundai Motor Distributors (Pty) Ltd v. Smit No 2000(10) cc1079*, Langa said:

> 'When people are alone in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied.'[67]

Blausten [68] insists that there is a single interest at the heart of the right to privacy, namely human dignity.

The Constitutional Court has stated that the right to privacy relates to the most personal aspects of a person's existence in *Bernstein's case*.[69]

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CONCLUSION

I feel that the right to privacy is infringed when confidences are breached.

Advocates Wim Trengrove, SC and Alfred Cockrell [70] are of the firm opinion that 'given the purpose of the Act as a whole, that the State probably has a legitimate interest in requirement the disclosure of confidential information that does not satisfy the requirements of privilege.' [71]

They conclude that the provisions of the Act do not violate the client's right to a fair trial in terms of S35 of the Constitution, nor S34 which relates to fairness in civil proceedings nor to S12(1) which refers to freedom and integrity. [72]

Do FICA provisions threaten the existence of the independent attorney's profession? I respectfully agree with the view that S37(1) is inconsistent and conflicts with the notions of attorney-client confidentiality. I am also of the view that a case can be made for the fact that S35(4) which refers to monitoring without the opportunity of being heard is a gross violation of the natural rule of justice and fairness – that of the *audi alteram partem* rule – i.e. the opportunity to be heard.

Whilst the ideals of the FICA legislation are commendable, it still remains a thorn in the flesh of most banking insurance institutions as well as attorneys

who are now forced to be 'whistle blowers' as well as policemen. Administrative compliance with this legislation has resulted in millions of human hours being lost, whilst 'the big fish get away'.

Whilst the provisions of Financial Intelligence Centre Act 2001 legislation restates to cement, entrench and re-affirm the common law relating to Attorney/Client Privilege, it is with due respect my view that the Act seriously violates, whittles away, compromises, undermines and bedevils the special relationship they – attorneys and their clients hitherto enjoyed. The candour and confidentiality being one of the defining and pivotal characteristic constituent of this special relation has been abrogated by conscripting attorneys to be clandestine 'peeping-Toms' who are compelled to report on their own fee-paying clients and breach their loyalty, special trust and confidence.

The FICA legislation is bet summarised by what Meyerowitz calls 'F' for futile[73], as it greatly diminishes the role of attorneys to that of being corroborations of the State information machinery by unleashing severe penalties, i.e. the Big Stick approach to those accountable 'reporting authorities' – attorneys being used as number one – on those accountable categories who do not play ball. The State has, at great financial cost to financial and other institutions, inflicted great inconvenience to ordinary law-abiding citizens in order that their dealings be verified or having to face the daunting real prospect of their hard-earned rands being 'frozen'.

Whilst the ideals of combating money-laundering, drug-trafficking and financing of terrorist activities are laudable, it is earnestly felt that the price

paid by ordinary law-abiding citizens and professions such as attorneys is far too high.

FOOTNOTES

1 Heyden – Ocklxxx, *Principles of Evidence* - 4th Ed (1996). Evidence: Case and Materials, as quoted at p1031.

2 Hoffman – Zeffert, *South African Law of Evidence*, p562.

3 *op cit,* p562.

4 *op cit,* p562.

5 *op cit,* p562.

6 Lewis, *Legal Ethics*, p291.

7 Wigmore, *Evidence in Trials at Common Law*, p554A.

8 *De Rebus*, p2, July 2002.

9 *De Rebus*, p3, July 2002.

10 Insurance Seminar – September 2000 – *Chinese Walls – How Thick Are They?* P2.

11 *op cit,* p2 by Deneys Reitz Inc – Author Craig Wooley.

12 *op cit,* p1.

13 *op cit,* p1.

14 *op cit,* p1.

15 *op cit,* p1.

16 *op cit,* p5.

17 *op cit,* p5.

18 *op cit,* p5.

19 *op cit,* p6.

20 *op cit,* p5.

21 *op cit,* p5.

22 *op cit,* p5.

23 Guidelines FICA

24 *op cit,* p3.

25 *op cit,* p2.

26 *op cit,* p9.

27 *op cit,* p9.

28 *op cit,* p9.

29 *op cit,* p9.

30 *op cit,* p9.

31 GJ Marcus, SC, *Law Society of Northern Province – Opinion*, p14.

32 *op cit,* p15.

[33] *op cit,* p15.

[34] *op cit,* p26.

[35] *1981(1) SA 115(0).*

[36] Xxx p939 of the Judgement.

[37] Xxx p885 G-H.

[38] *SA Law of Evidence*, Sefferdit et al, p572.

[39] 1995(2) SA453(SE)

[40] Jones, J @453C-457 B4 S33(1) of *Interim Constitution.*

[41] *op cit* 453 C to D.

[42] 1996(1) SA 785(A).

[43] p795 G to H.

[44] 2001(2) SA 1145©.

[45] At p1156 I to J.

[46] At p 1154 E to F.

[47] 2002(3) SA 231 (W).

[48] At p235 H to I.

[49] *De Rebus*, June 2004 p24.

[50] FICA Act /38/2001 S68.

[51] S19 ACA Act 38/2001.

[52] S29.1 (C)

[53] *De Rebus*, May 2004, p37.

[54] As quoted by Nadasen & Voosen '*Suspicious and Unusual Transactions*', p10.

[55] *op cit,* p10.

[56] *op cit,* p11.

[57] *op cit,* p11.

[58] Bert Bester, *De Rebus*, June 2002, p25.

[59] *op cit,* p25.

[60] *op cit,* p25.

[61] Opinion, *The Financial Centre Act* – Wim Trengove, SC and Cockrell.

[62] *op cit,* p16.

[63] *op cit,* p16.

[64] *op cit,* p19.

[65] *op cit*, p20.

[66] *op cit*, p23.

[67] p9-16.

[68] SA Constitution Law, p186, *Cheadle, Davis et al*.

[69] 1996(2) SA 751(CC), *op cit*, p24.

[70] *op cit*, p29.

[71] *op cit*, p30.

[72] *op cit*, p33.

[73] Tax Payer, 2005

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