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### **A job seeker's duty to reveal skeletons in the cupboard**

An employee's departure from an organisation is not always on good terms. A prospective employer who comes to know about this may have some reservations in employing the job applicant, irrespective of what led to the breakdown of the relationship with the previous employer. While the job seeker does not have to refer to this in the CV, the issue may very well come up in the job interview. Being evasive at this stage is likely to be more problematic. But how far does the duty to disclose go?

In some cases the outcome of a given situation is fairly straight forward. In the CCMA case of *Poonen vs JHI*, the prospective employee (applying for the position of accountant) had been dismissed by the previous employer and was facing criminal charges for fraud. In this case the prospective employee had not only failed to disclose the reason why he had left his previous employment, but had also stated in his CV that he had left his previous employer "for the purposes of growth and improved prospects". He was appointed to the new job, but dismissed when the true facts emerged. The commissioner had no hesitation finding that the dismissal had been justified.

In the Labour Court matter of *MEC for Education, Gauteng v Mgijima & others*, the employer did not have it that easy. Ms. Mgijima was employed by the Department of Arts and Culture (DAC). She then applied for a post with the Gauteng Department of Education (GDE). At the time of her pre-employment interview by GDE she had been suspended by the DAC in relation to disciplinary charges that they intended to bring against her. When asked during the interview whether she had "skeletons in the cupboard", she denied that she had any. Soon after the interview with GDE, the DAC gave Mgijima notice of the disciplinary charges against her. In the meantime she was informed that she had been successful in her application for the GDE post. Before the commencement of her employment with the GDE, she entered into a settlement agreement with the DAC in terms of which she resigned and the DAC withdrew the charges against her. When the GDE came to learn about the circumstances of Mgijima's termination of employment with the DAC, they brought charges against her for her failure to make disclosure of what the GDE considered to be material information.

The matter was dealt with by way of a "pre-dismissal arbitration". The arbitrator held the view that Mgijima did not have duty to disclose the information about her suspension to the interview panel on the basis of the principle in South African law that "a person remains innocent until proven guilty". In the arbitrator's view a further consideration favouring Mgijima was the agreement between her and the DAC that she would resign in exchange for a withdrawal of the charges. That, the arbitrator said, meant that Mgijima had a clean record and consequently had no duty to disclose anything to the interview panel. The GDE took the matter on review to the Labour Court.

Fortunately for the GDE, the Labour Court held that the arbitrator had been manifestly wrong in his reasoning when he relied on the presumption that "a person remains innocent until proven guilty". According to the Court, Mgijima was required, at the time of the interview, that she was on suspension pending a substantial number of charges of serious misconduct. This fact was of material significance to the GDE as her prospective employer. The Labour Court also found that withdrawal of the charges against her in exchange for her resignation, did not mean that the existence of the charges were of no material significance to her prospective employer. The post for which Mgijima applied was a senior post, one that clearly required unimpeachable honesty

and integrity on the part of the incumbent. Mgijima's failure to disclose material information in response to an express invitation to do so deprived the GDE of the opportunity to make an informed decision as to the effect, if any, of the suspension and pending charges on the contemplated employment relationship. The arbitrators' award was set aside.

The case underlines the importance of the relationship of trust that should exist in the employment context, particularly in positions of seniority. From an employer's perspective the case demonstrates how important it is to do proper screening, interviews and reference checking before making an appointment.

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