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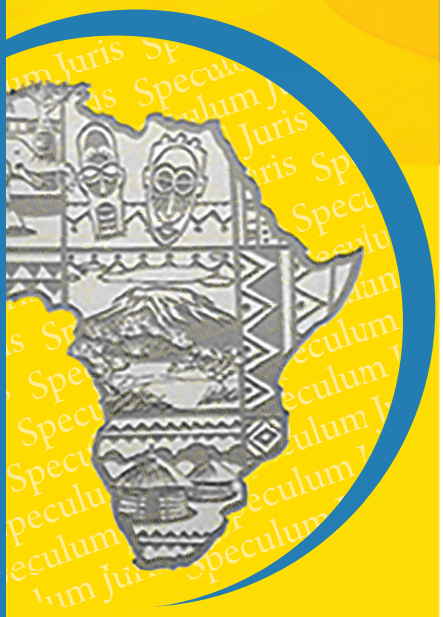

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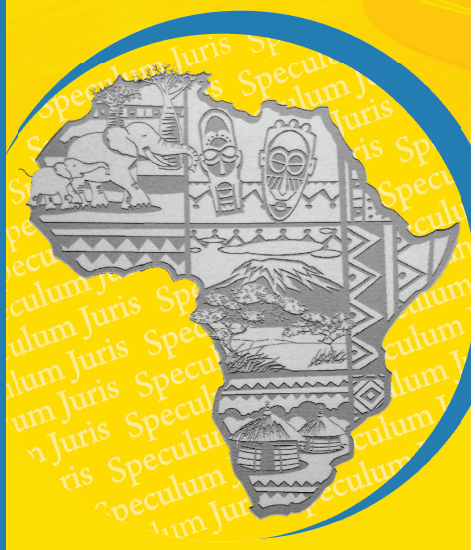

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Is the Open-ended Nature of the Common Law Duty to Disclose by an Applicant or Employee Fair and Just?

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Abstract

The common law duty to disclose past transgressions could lead to a miscarriage of justice in the form of double jeopardy for the affected individual, resulting in the employee or applicant being without employment for a lifetime. The focus of this paper is not on what was supposed to be disclosed; rather, it is to interrogate the application of the open-ended nature of this responsibility in the context of an employee or applicant seeking new employment. It is argued that the lack of development of this common law duty is not aligned with the constitutional mandate of reconciliation and rehabilitation for past transgressions, which is dominant in the criminal justice system and consumer law, among others. There is no justification for labour law to be an exception. The vacuum in labour law needs to be addressed in order to assist in realising this constitutional mandate and in ensuring that employees and applicants are not held perpetually responsible for past wrongs, with no avenue for reform and re-integration into the workplace. It could be argued that

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this is in violation of section 22, which stipulates the right to choose trade and profession as protected by the Constitution of South Africa, 1996. Furthermore, the open-ended nature of this duty is also a contributing factor to the high unemployment rate in South Africa and must be addressed urgently.

Keywords: Employee; applicant; duty to disclose; open-ended; the Constitution; rehabilitation; re-integration; workplace

1 INTRODUCTION

In order to avoid disrepute, prospective employees have a duty to disclose to the employer if they have been or are currently involved in practices that could jeopardise the company's or employer's reputation. However, this duty is open-ended as there is no fixed period during which the duty starts and ends on the one hand, while on the other, it can be said that it starts during the application and interview period and with no end date because the employer can evoke such a responsibility once it has obtained certain information, which in its view, the employee should have disclosed but failed to do so. This still creates challenges and an imbalance with regard to this responsibility on the part of the employee. The article aims to assess the open-ended nature of the duty to disclose by the applicant or employee without looking at the contents or merits of what was supposed to be disclosed at the particular time, while balancing it with the duty of the employer to do quality and background checks. This article aims to demonstrate that, as much as the duty to disclose rests with the employee, the open-ended nature of this duty is subject to abuse by the employer because it can be evoked at any time during the employment period without taking into account the duty of the employer to perform due diligence. There is a common law duty of good faith that obliges an applicant or employee to disclose information that may affect the decision of the employer to employ him/her. Non-disclosure of such information constitutes misconduct. [1] There is no dispute with regard to this duty on the part of the employee, but the open-ended nature of the duty warrants interrogation.

At this stage it is important to mention that there is no legislation in South Africa that regulates the duty of applicants or employees to disclose information. However, in terms of normal contractual principles of the common law, a prospective employee has a duty to disclose potentially relevant information to the prospective employer.[2] It is a well-established common law principle that employees are obliged to render services in good faith by furthering their employers' business interests.[3] The employee owes his or her employer a fiduciary duty and stands in a position of trust and confidence in relation to the employer. This implies a duty to protect the employer's interests, with the employee not being allowed to make a clandestine profit at the other's expense or place him or herself in a position where their interests are in conflict with this duty. The duty of good faith was clearly captured in the court case of *Dunlop Mixing and Technical Services (Pty) Ltd and Others v National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others*,[4] where the court held that an employee is bound by a duty of good faith towards their employer, and as such, an employee breaches that duty if they remain silent about the knowledge they possess regarding the business interests of their

1 *Atkins v Datacentrix (Pty) Ltd* (JS02/07) [2009] ZALC 164; [2010] 4 BLLR 351 (LC); (2010) 31 *ILJ* 1130 (LC) (2 December 2009).

2 Van Niekerk *et al Law@work* 2020 5 ed 89.

3 *Ibid.*

4 *Dunlop Mixing and Technical Services (Pty) Ltd v National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others* (D345/14) [2016] ZALCD 9; [2016] 37 *ILJ* 2065 (LC); [2016] 10 BLLR 1024 (LC) (11 May 2016).

employer being improperly undermined.[5]

It is generally accepted that these duties form part of each contract of employment, irrespective of whether the parties agree to include them expressly as a contractual term.[6] Furthermore, the only inference that can be drawn in the employment relationship is that the common law duty of good faith places an obligation on an employee to act honestly, free from deceit, and lawfully without any violation, intending to uphold the contract of employment and relationship with the employer.[7] This entails that the employee must approach the employment relationship with clean hands and always act in the best interests of the employer and the company. Due to the important role the duty of good faith plays in the employment context, it was reaffirmed by the Constitutional Court (CC) that there is a common law duty on employees to act in good faith. The Constitutional Court took this point further and stated that it is not only the duty that is vested in the employee but a reciprocal duty on the employer to deal fairly with its employees at all times.[8] In *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others*,[9] the court stated that the reciprocal duty of good faith should not, as a matter of law, be taken to imply the imposition of a unilateral fiduciary duty of disclosure on employees.[10] The court further stated that in determining whether, as a matter of fact, a unilateral fiduciary duty to disclose information on the misconduct of co-employees forms part of the contractual employment relationship, caution must be taken not to use this form of indirect and separate misconduct as a means to easier dismissal, rather than initially investigating the participation of individual employees in the primary misconduct.[11] This case confirmed that there must be a balance between the duty of the employee when it comes to good faith and the role of the employer not to abuse this responsibility but to ensure that due diligence is followed in the employment context in order to attain a fair and just decision for all parties concerned.

A breach of the duty of good faith is often used as a type of catch-all charge when employees are charged with misconduct. Should a breach of the employee's fiduciary duty be proven during disciplinary proceedings, it will generally be accepted as a sufficient and fair reason for dismissal.[12]

2 WHEN DOES THE DUTY TO DISCLOSE START AND END?

There is no specific timeline or set period as to when employees must disclose information that is material to their employment. However, from case law, one can deduce that the employee has to disclose information during the interview stages if the information may affect the decision of the employer in hiring him/her. In the case of *Intercape Ferreira Mainliner (Pty) Ltd v McWade and others*,[13]Intercape dismissed McWade for failing to disclose the circumstances surrounding his departure from his prior employment. McWade's previous employer had levelled a number of allegations of bribery, corruption, and the use of company assets without permission against McWade, who was suspended, with subsequent negotiations resulting in a settlement agreement

5 *Ibid* para 5.

6 Van Niekerk *et al* 2020 90.

7 *Ibid.*

8 *Ibid.*

9 *National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited and Others* (CCT202/18) [2019] ZACC 25; 2019 8 BCLR 966 (CC); (2019) 40 *ILJ* 1957 (CC); [2019] 9 BLLR 865 (CC); 2019 5 SA 354 (CC) (28 June 2019) para 6.

10 *Ibid* para 7.

11 *Ibid* para 8.

12 Van Niekerk *et al* 2020 90.

13 *Intercape Ferreira Mainliner (Pty) Ltd v McWade* [2020] 2 BLLR 199 (LC).

with him. During his interview for employment with Intercape, McWade had been asked, on more than one occasion (in the initial interview meeting, by the CEO of Intercape and the board), about his departure from his previous employer,[14] but failed to disclose the circumstances surrounding his departure. He gave reasons such as "difference of opinion" on ethical matters and "new owners, Zim Economy".[15] When the board questioned him further, he once again did not mention the circumstances surrounding his departure.[16] The court held that the arbitrator did not seem to "recognise that outside the category of deliberate, false representations of fact, a prospective employee may nonetheless be required to disclose information not specifically requested, if that information is material to the decision to employ; or where (as in the present instance) a question is asked, that a less than honest and complete answer might form the basis for a dismissal when the truth is ultimately discovered".[17]

The court found that this was an issue of ethics rather than a contractual one. In other words, the "lawfulness of the non-contractual non-disclosure [is] premised on what would be mutually recognised by honest men in the circumstances."[18] This speaks to the objective test applied, and it will come out more clearly during the discussion below, on what constitutes a material fact.

The court considered the seniority of McWade's position and held that despite the settlement agreement reached between him and his previous employer and despite the fact that he resigned and was never found guilty of misconduct, there was still a duty to disclose the circumstances that led to his departure from his previous employment.[19] The non-disclosure in the circumstances was material, and any reasonable employer would have wanted to investigate the facts before concluding the recruitment process. The court set aside the arbitrator's award and found that McWade's dismissal was substantively and procedurally fair.[20] Furthermore, in *Galesitoe v CCMA and Others,* the court defined the nature and extent of the obligation to disclose facts during the recruitment process. The failure to disclose must pertain to material information, "at least in the sense that the prospective employer would have conducted its own enquiry into the relevant facts and determined eligibility or sustainability for employment as a consequence".[21] This point was further emphasised in the court case of *Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v Commission for Conciliation, Mediation & Arbitration & Others,*[22] in which it was held that failure to disclose material activities to the employer amounts to a violation of the employee's duty to act in good faith.[23] In this case, the employee was engaged in business that was in competition with the employer but failed to disclose this fact, which put more focus on her business. Upon finding out about this, the employer dismissed the employee for dishonesty on the grounds of failure to disclose a material fact.[24] The CCMA ruled in favor of the employer on the basis that the employee's non-disclosure was dishonest and the employee had a duty to inform the employer about her business interests and allow the employer to decide if it was in conflict with its business rather than continuing with her side business.[25] Furthermore the case

14 *Ibid* para 4.

15 *Ibid* para 5.

16 *Ibid* para 6.

17 *Ibid* para 7.

18 *Ibid.*

19 *Ibid* para 8.

20 *Ibid* para 9.

21 *Galesitoe v CCMA [*2017] 7 BLLR 690 (LC).

22 *Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v Commission for Conciliation, Mediation & Arbitration* (2022)43 *ILJ* 1272 (LAC).

23 *Ibid.*

24 *Ibid* para 10.

25 *Ibid* para 11.

of *Schwartz v Sasol Polymers and Others*,[26] illustrates that the dishonest non-disclosure of a material fact justified a dismissal, and a calculated silence in the face of a duty to inform her employer of a material fact amounted to fraudulent non-disclosure.[27]

It is very clear from the above court cases that an employee's failure to disclose material facts to the employer warrants dismissal because it breaches the duty of good faith. There is no clear and precise definition as to what really constitutes a material fact, but it can be said that the facts of each case and the nature of business interests will guide each case. However, material facts can mean conduct or information which can put the company into disrepute or damage its reputation by appointing the employee or having the employee as a staff member in the organisation. Material facts must be of a serious nature to such an extent that they pose risks to the reputation and business interests of the employer. It is safe to say that an objective test or analysis of how a reasonable man in the same circumstances could have acted to avert the situation is applied as per the court cases above. This view is confirmed by the court case of *Sylvester/ Neil Muller Constructions*,[28] which states that:

> There are varying opinions regarding the subject of non-disclosure, however, the dominant view is that there is no general duty to disclose. Nonetheless, there are exceptions to this rule.[29] A formulation, according to Willes Principles of SA Law, which has attracted support is the following:
>
> The duty to speak arises when there is an involuntary reliance of the one party on the frank disclosure of the certain facts necessarily lying within the exclusive knowledge of the other such that, in fair dealing, the former's right to have such knowledge communicated to him would be recognised by honest men in the circumstances. Conversely, a party may remain innocently silent where matters are open to common observation, or ascertainable by ordinary diligence, or accessible to both parties alike so that each party could reasonably be expected to exercise his own judgment in the matter.[30]

The court held that in terms of this formulation and if the employer felt so strongly about this information, prospective employees should have been subject to a proper recruitment and selection process, so as to reduce the risk and obtain the necessary information for decision-making. The failure of the employer to screen better and ask questions pertaining to the prospective employee's state of health, cannot give rise to a duty to disclose by the employee. It was the employer's duty to protect its interests and should not have taken the risk that this vital information, according to him\her, may not be conveyed to him\her by the employee.[31]

The duty to disclose can be invoked at any particular time by the employer in the employment relationship with the employee, especially in instances where the employer becomes aware of the non-disclosure, he/she may enforce a disciplinary action against the employee or dismiss the employee for the non-disclosure. For example, the case of *Intercape Ferreira Mainliner (Pty) Ltd v McWades;* as indicated above can serve as a point of reference.[32] Furthermore, in the case of *Department of Home Affairs and Another v Ndlovu,*[33] the employee was dismissed during the employment contract, for non-disclosure of material facts at the time of the interview, and had the employer been aware of it, he/she would not have employed the employee. The court found that the employee had acted dishonestly whereas the employer had acted lawfully in

26 *Schwartz v Sasol Polymers* [2017] 38 *ILJ* 915 (LAC).

27 *Ibid.*

28 *Sylvester/ Neil Muller Constructions* [2002] 1 BALR 113 (CCMA).

29 *Ibid.*

30 Please refer to *Sylvester/ Neil Muller Constructions* para 8 and *Willes Principles of SA Law* 8 ed (2007) 445.

31 *Sylvester/ Neil Muller Constructions* para 9.

32 *Intercape Ferreira Mainliner (Pty) Ltd v McWade* para 8.

33 *Department of Home Affairs and Another v Ndlovu (*DA11/2012) [2014] ZALAC 11 (27 March 2014).

dismissing the employee.[34] Similarly, in the case of *Bhembe/Independent Development Trust* (IDT), [35] the CCMA had to grapple with the question of whether the dismissal of the applicant by the employer on the grounds of her failure to disclose that she had criminal charges to answer in Swaziland and that her previous employer had dismissed her for fraud, was fair.[36] It held that her failure to disclose constituted material misrepresentation on her part, and there is no obligation on an employee to disclose anything in his\her past which might prejudice him\her. However, it was held that in certain circumstances, there may well be a duty on the applicant to disclose previous misconduct, especially when it is of such a nature that it disqualifies him\her from his\her new appointment.[37] There must be a link between the disclosure and the job in order for fairness to be achieved, because that is what this duty calls upon.

This was the case *in Hoffman v Monis Wineries Ltd*,[38] where the court did not find a link between the disclosure and the job. In this case, a salesman of a liquor wholesaler neglected to disclose that twelve years prior to his job as a salesman he had been convicted for contravening various provisions of the Insolvency Act.[39] The court held that there was no obligation to disclose this fact to the employer. This case affirms the earlier argument raised above that each case must be judged on its own merit and basis in order to arrive at a fair and just decision. Furthermore, a lesson that can be drawn from the cases of *Bhembe and Hoffman* above is that employers must act and not assume in order to make a fair decision for all parties concerned.

In *Grobler / Anglo Platinum Frank Shaft,*[40] the applicant applied for employment, his application was successful, and he was appointed. The applicant had been previously employed by Impala Platinum Rustenburg. While in that employment, he was charged with gross negligence in the performance of his duties, resulting in his dismissal from Impala Platinum. After his dismissal, he started and managed his own business for approximately 12 months.[41] The applicant later approached an employee of Anglo Platinum regarding the possibilities of any employment opportunities there. The employee who was approached asked the applicant for a copy of his *curriculum vitae* in order to give it to the mine overseer. The applicant did mention to the employee to whom he had spoken that he had been previously dismissed from Impala Platinum.[42] The employee apparently passed this information to the mine overseer. Following an interview, the applicant was informed that his interview and subsequent application for employment were successful. After signing an offer of employment for the position of shift supervisor, the applicant continued to attend the induction course, and after successfully completing that course, he returned to his specific shaft.[43]

During this time and whilst attending to administration requirements specifically in relation to the applicant's employment, it was discovered that the applicant had been previously dismissed from Impala Platinum.[44] The applicant was informed that his employment would not be processed and that he must report to the human resources department. The applicant was informed that his appointment was withdrawn owing to the fact that he had failed to disclose important information in respect of his disciplinary record, with the Impala mine. The applicant

34 *Ibid.*

35 *Bhembe/Independent Development Trust* (IDT) (2015) 24 CCMA.

36 *Ibid.*

37 *Ibid* para 9.

38 *Hoffman v Monis Wineries Ltd* 1948 2 SA 163 (C).

39 *Ibid.*

40 *Grobler / Anglo Platinum Frank Shaft* [2008] 2 BALR 147 (CCMA).

41 *Ibid.*

42 *Ibid* para 4.

43 *Ibid* para 9.

44 *Ibid* para 10.

then referred a dispute of unfair dismissal to the CCMA.[45] A witness for the respondent testified that at the interview, the applicant was questioned about the reason why he had left his previous employment, upon which he replied that he was looking for better opportunities.[46] Under cross-examination, witnesses for the respondent confirmed that the applicant had the opportunity to disclose the fact that he had been dismissed from Impala, but failed to do so.[47] For various reasons, it was held that there were procedural defects regarding the procedure followed by the employer prior to dismissing the applicant. In other words, the arbitrator ruled that the dismissal was procedurally unfair but substantively fair. The substantive reason for the dismissal was fair because the applicant had failed to disclose vitally important information regarding the termination of employment by his previous employer.[48]

Despite the fact that the arbitrator found that the dismissal was procedurally unfair, he did not award any compensation to the applicant for procedural unfairness.[49] This was because the procedural defects brought about by the employer, when seen against the fact that "the applicant himself acted unjustly and incorrectly by failing to disclose important and relevant information that would, in all probability, have impacted negatively on the decision of the respondent to appoint the applicant," was sufficient to render any procedural defect to be not unfair *per se*.[50] In other words, according to arbitrator, against this background the applicant is the architect of his own fate, and therefore is not entitled to any compensation.[51]

This duty to disclose is open-ended and does not prescribe because it is clear that it starts at the recruitment stage up until the employee leaves the employment either upon death or retirement, but it will still continue should the employee join another company or employer. It is an ongoing and perpetual duty to which the employee must always act with the necessary integrity and care in the interests of the employer. Non-disclosure has dire consequences, as already alluded to above, because the duty to disclose material facts either in the interests of the company or the public lasts for the employment lifetime of the employee. Whether this is fair and justified is a question of fact and does not speak to the reconciliatory nature of the South African legal system, which is dominating exclusively in criminal matters where rehabilitation and re-integration into society, including in labour, lies at the core of its operations.[52] We argue that the continuous and perpetual responsibility of the employee with regard to disclosure of past transgressions to a prospective employer could lead to double jeopardy. At some point, it may render the employee with no employment prospects as this is a common law duty which does not offer an opportunity for the affected employee to be rehabilitated and re-integrated into the job market. We hold this view on the basis that there is no case law or example in which an employee, after having disclosed why he\she has left their previous employment, is offered an opportunity to be employed. This is because of the stigma in some instances, and not necessarily the interests of the company or the public. Rehabilitation for past transgressions in the labour market is lacking and denies affected employees without employment a lifetime of opportunities, and yet this is not the case in criminal law or consumer law, especially when one is blacklisted. Such employees can be rehabilitated and re-participate in the economy and be re-integrated into society. It can be argued that the open-ended nature of the duty to disclose and its perpetuity in the employment record of the employee violate the right to choose one's

45 *Ibid.*

46 *Ibid* para 11.

47 *Ibid* para 12.

48 *Ibid* para 13.

49 *Ibid.*

50 *Ibid* para 14.

51 *Ibid.*

52 Forsberg and Douglas "What is Criminal Rehabilitation?" 2020 *Criminal Law and Philosophy* 103–126.

career or profession in terms of section 22 of the Constitution of the Republic of South Africa.[53] Most importantly, it can be said that it violates the supremacy and reconciliatory nature of the Constitution, and this means that the common law duty of disclosure needs to be developed in order to address this vacuum.

Labour law needs to address this vacuum in order to ensure fair labour practices for employees who have, in the past, committed offences and in most instances, have been punished already. They may still be punished in the new employment context, and hence they are afraid to disclose in order to secure employment because there is no relief at their disposal. Despite the vacuum as highlighted above, there are exceptions to this common law duty on the part of the employee. This means there is information which the employee is not required or expected to disclose because it may be of a personal nature and is irrelevant to the employer or its reputation. The exception arises from the right to privacy of the employee as protected in terms of section 14 of the Constitution.[54] For example, an employee is not bound to disclose information with regard to his\her sexuality or medical condition, for instance being HIV\AIDS positive. This position was confirmed in the case of *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre*,[55] in which the court held that where an employee is under a legal obligation to disclose information such as his/her HIV status, they cannot be dismissed for dishonesty since such a disclosure would constitute a violation of the employee's right to privacy and dignity.[56] Furthermore, in *Atkins v Datacentrix*,[57] the court held that:

> It is unreasonable for the employer to contend that the employee was dishonest when no legal duty rested on the employee to inform the employer about his intention to go for gender reassignment. It would have been different if this question was asked during the interview and the employee lied about it. There was simply no legal duty for the applicant to have disclosed what his intentions were. It was simply none of the respondent's business that he wanted to undergo the process. The issue of the applicant's reassignment process did not arise at the interview.[58]

The exception also applies to pregnant employees, although the Basic Conditions of Employment Act (BCEA),[59] places this responsibility on the employee for purposes of planning by the employer. In terms of the BCEA, it states that an employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to: (a) commence maternity leave; and (b) return to work after maternity leave.[60] Furthermore, the BCEA provides that notification in terms of subsection (5) must be given: (a) at least four weeks before the employee intends to take maternity leave; and (b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.[61] This provision is purely for planning and contingency purposes to ensure that an employee is replaced or that some of her responsibilities are re-distributed for the duration of her leave period. There is, however, no statutory obligation on the employee to disclose her pregnancy in advance of the stipulated four-week period.[62] A company thus cannot act against an employee for not disclosing her pregnancy, because doing so would constitute an unfair labour practice or unfair dismissal, and

53 Section 22 of the Constitution of the Republic of South Africa 1996.

54 Section 14 of the Constitution.

55 *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (2011) 32 *ILJ* 1637 (LC).

56 *Ibid.*

57 *Ibid* para 16.

58 *Ibid* para 17.

59 Section 25 of the Basic Conditions of Employment Act 75 of 1997.

60 *Ibid* section 25(5).

61 *Ibid* s 25(6).

62 *Ibid s* 25(6)(b).

it will be in contravention of the Labour Relations Act (LRA) and the BCEA, as already alluded to above. It can be deduced then that there is no obligation on the employee to disclose personal or intimate personal information about herself unless the information would directly affect the business or its inherent requirements. This amounts to the individual's constitutional right to privacy. As mentioned above, taking action against the employee for non-disclosure would thus be construed as being related directly to the employee's pregnancy as opposed to reasons of misconduct, capacity, or operational requirements of the job. We argue that employers need to find a compromise between the pregnancy of the employee and the inherent requirements of the job in order to succeed with their arguments, especially in the case of new employees who have just joined a company and have to go on maternity leave soon thereafter.

The exceptions are, at some point, somewhat of a safeguard to protect employees from being abused by employers due to the open-ended nature of the duty to disclose. However, the exception which relates to personal information does not take away the vacuum which has been identified above in terms of the non-rehabilitative nature of labour law especially for offences committed previously by the employee. This means that the employee is charged for being dishonest for non-disclosure and still held accountable for past transgressions, owing to the non-rehabilitative nature of the system. This will constitute a bad record of the employee, with little possibility of being expunged.

3 WHAT CONSTITUTES A MATERIAL FACT?

During a discussion of non-disclosure on the part of the employee as per the common law duty, there must be a debate of what needs to be disclosed, and this question leads to what constitutes a material fact. Reference above is made of what might constitute a material fact, but due to the different views and perspectives, it is prudent that to examine this point further in order to come up with a solution to the vacuum already identified. According to Hutchison and Pretorius,[63] the meaning of materiality is elusive, and this concept can have different meanings. The most common interpretation of materiality is that the misrepresentation should be of such a nature that it would naturally and likely induce a reasonable person to enter into the contract.[64] This takes us back to the earlier argument that there must be a link between the disclosure and the job description. In other words, reliance on the representation should be reasonable; however, it is difficult to reconcile with certain other established rules. For example, in a claim based on misrepresentation, one cannot rely on the defence that the representee might, with reasonable diligence, have discovered that the representation was false or that the representee should not have been gullible.[65]

Failure to disclose a material fact when under a legal duty to do so, constitutes a misrepresentation by silence, and the representee is entitled to the same remedies as the victim of any other misrepresentation.[66] However, it could be difficult to establish that the failure to speak was unlawful (wrongful) in the circumstances. Notably, as in other fields of law, there is a reluctance to impose liability for a mere omission, as opposed to a positive act of commission.[67] This is reflected in the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful; this was the position in the case of *BOE Bank Ltd v Ries*.[68] Furthermore,

63 Hutchison and Pretorius *The Law of Contract in South Africa* (2012) 23.

64 *Ibid.*

65 *Ibid* 25.

66 *Ibid.*

67 *Ibid* 27.

68 *BOE Bank Ltd v Ries* (247/2000) [2001] ZASCA 132; [2002] 2 All SA 247 (A) (27 November 2001).

in *Absa Bank Ltd v Fousche*,[69] the court held that it is not the norm that one contracting party needs to tell the other all he knows about anything that may be material.[70] In other words, the general rule is that a contracting party is under no legal duty to disclose information known to him/herself, but not to the other party, even if he/she is aware that the disclosure would influence the other's decision whether, or on what terms, to enter into the contract. However, this rule is subject to a number of exceptions which have been synthesised into a general test for liability by the courts. The exceptional cases where the law imposes a duty to disclose include the following:

- Where the contract is one of insurance, agency, engagement, or partnership.
- Where there is a fiduciary relationship between the parties, such as between attorney and client or guardian and ward, please refer to *Orban and Federal Insurance Co Ltd v Oudtshoorn Municipality*;[71]
- Where a statute imposes a duty of disclosure.
- Where a seller has knowledge of a latent defect in the thing he/she is selling; and
- Where an applicant for credit is an unrehabilitated insolvent.

According to Reinecke,[72] even a non-disclosure, by way of an omission, may result in a pre-contractual misrepresentation.[73] In the case of *SPF and Another v LBCCT/A LB and Another,*[74] it defined a material fact as:

> On the other hand, material fact is a fact that is important, significant, or essential to a reasonable person in deciding whether to engage or not to engage in a particular transaction, issue, or matter at hand. "Material" means that the subject matter of the statement or concealment relates to a fact or circumstance which would be significant to the decision to be made as distinguished from an insignificant, trivial, or unimportant detail.[75]

Furthermore, in the case of *Intercape Ferreira Mainliner (Pty) Ltd v McWade & Others*,[76] which has been discussed extensively above also the court grappled with defining what constitutes a material fact and held that:

> However, when the employee has failed to disclose certain information during recruitment [this] cannot be viewed as submitting false information and therefore there is no misrepresentation of facts or any element of dishonesty as there is no legal duty to disclose.[77]

The duty to disclose is not a legal but an ethical one, as seen above from case law and views of academics. The dominant view from both case law and academia is that there is no general duty to disclose. From case law, it is evident that the courts consider the duty to disclose crucial if a specific question was asked to an employee during the pre-contractual stages, such as an interview, and the employee responded falsely or omitted certain information.

69 *Absa Bank Ltd v Fousche* (344/2001) [2002] ZASCA 111; [2002] 4 All SA 245 (SCA) (19 September 2002).

70 *Ibid.*

71 *Orban and Federal Insurance Co Ltd v Oudtshoorn Municipality* (240/82) [1984] ZASCA 129; [1985] 1 All SA 324 (A) (16 November 1984).

72 Reinecke *South African Insurance Law* (2013) 80.

73 *Ibid.*

74 *SPF and Another v LBCCT/A LB and Another* (26492/13) [2016] ZAGPPHC 378 (20 April 2016).

75 *Ibid.*

76 *Intercape Ferreira Mainliner (Pty) Ltd v McWade* para 8.

77 *Ibid.*

4 THE RECIPROCAL DUTY OF THE EMPLOYER ON THE DUTY TO DISCLOSE BY THE EMPLOYEE

In as much as there is a common law duty on the part of the employee to disclose material facts that could put the employer into disrepute if not disclosed, it is argued that there is an imbalance in this duty. To address the imbalance, it is important to look at the role of the employer in the process of ensuring that there is due diligence in this regard. The employer is expected to ensure that it does the necessary background checks on prospective employees, and this will corroborate the responsibility of the employee in ensuring that disclosure is made. From the case law above, it is quite clear that the sole reliance on the employee with regard to this duty creates a challenge in the courts and makes employees come up with a variety of reasons with regard to what needs to be disclosed and why they did not consider it relevant at the particular time. Bearing in mind the open-ended nature of this obligation, it needs to be complemented and supplemented in order to avoid unnecessary or, in some instances, unintended consequences, especially in cases where the employee is already in the service of the employer. The argument is that the sole reliance on the employee is at times burdensome, especially with an open-ended responsibility which relies on the material facts which can put the employer or company into disrepute, and this stems from case law already outlined above. In as much as the authors have attempted to define what constitutes material facts in line with case law and views of academics in this area of labour law, it is still not clear what an employee needs to disclose. Furthermore, it is unclear from which proceedings the information that must be disclosed must be gleaned, whether through disciplinary processes or alternative dispute resolution.

This duty on the employee resembles a one-size-fits-all approach, which cannot be regarded as correct because the consequences of a disciplinary proceeding and alternative dispute resolution mechanisms have different desires and outcomes and cannot be treated in the same manner. For example, a disciplinary hearing is a punitive process involving a winner and a loser, while an alternative dispute resolution process like mediation aims to restore relations in order to ensure continuity and stability in the system. Why then is non-disclosure of the two processes treated equally and regarded as dishonesty on the part of the employee by the new employer? Surely, an employee who has left a former employer after an alternative dispute resolution process must be treated differently from one who has left because of a disciplinary inquiry that had found him\her guilty. However, this is not the case because a one-size-fits-all approach is applied in this regard. The common law needs to be developed in order to address this vacuum, especially in a country like South Africa with very high unemployment rates.[78]

We argue that it is important, that in as much as the employee has a duty to act in good faith and in the interests of the company, the same responsibility needs to apply to the employer. Both employer and employee have a duty to act in the interests of the company, and currently, there is an imbalance, especially when it comes to the duty of disclosure. The courts also, in the cases mentioned, open up the vacuum more widely, which is a concern. South African courts must develop the common law in the interests of both employers and employees aligned with the interests of the company. All this cannot be vested on an employee at the exclusion of other role players, like the employer. This is because, at times, dismissal due to non-disclosure on the part of the employee is not a moral judgment but rather a risk management factor in line with the interests of the company. A balance must be struck, and hence rehabilitation is proposed as a solution to addressing the gap, in ensuring that employees or applicants of employment are not held to account in perpetuity for past transgressions or wrongdoing.

Failure to do checks and balances by the employer is very costly to the company because it creates a situation where there will be unfair labour practices in terms of section 186 of

78 Stats SA https://www.statssa.gov.za/?p=16113 (accessed 20-03-2023).

the LRA.[79] It results in a situation where one party is to benefit more at the expense of other candidates and takes away the role as well as the responsibility of the selection and appointment body in making a fair analysis. This confirms the view that this duty is a dual role in such a way that it needs both employer and employee to be proactive in this exercise and corroborate each other rather than rely solely on the view of the employee concerned. A case in point to highlight the costly nature of the failure to do quality checks and balances is *SAPS v Safety and Security Bargaining Council & Others*,[80] which illustrates that the failure of the employer to do background checks such as analysing the disciplinary record of the employee constitutes an unfair labour practice.[81] "The court found that where a candidate misleads a selection panel, they prevent the panel from performing their task, that he\ she defeats the purpose of having a selection panel and illegitimately advantages him\ herself. This, therefore, also disadvantages all other candidates. The court therefore found that SAPS, in failing to check the disciplinary record of the appointee and then appointing him, constituted an unfair labour practice, and found that the aggrieved applicant should be compensated for the procedural unfairness."[82]

It appears that this case sought to balance the duty to disclose with the employer's duty to conduct relevant checks, in that as much as it confirms the employee's duty to disclose, it also places a duty on the employer to conduct due diligence.

5 CONCLUSION

This article highlighted and identified the vacuum that currently exists due to the open-ended nature of the common law duty to disclose. There is a need to develop the common law duty of disclosure. Labour law must be developed to include provisions that deal with the duty of disclosure while explicitly defining and/or providing direction as to what constitutes a material fact concerning the information that must be disclosed. This is because we are currently relying on case law, which varies depending on the circumstances of each case, and the contents of the duty remain unclear. The provision determining what constitutes a material fact can take the form of either a subjective or objective test. Such provisions must also include the duty of the employer to do quality background checks and due diligence before hiring employees. This will restore the balance that is currently lacking in the obligation to disclose on the part of the employee and the obligation to perform due diligence on the part of the employer. Striking this balance is critical to avoid a catch-all charge when dismissing employees, as already alluded to above. Furthermore, it will reinforce that the duty to disclose is a dual duty and does not fall on the employee alone but also on the employer.

Rehabilitation and re-integration of employees who committed past transgressions need to be considered to align with the constitutional mandate of reconciliation. Labour law is no exception to the reconciliatory mandate set by the Constitution and must come to the party through the development of this common law duty of disclosure and it cannot be left open-ended with no parameters. This means that the common law duty must be developed to align with the Constitution, as outlined above to ensure that employees found guilty of failure to disclose do not remain out of employment for eternity. The jurisprudence must be developed to help them be rehabilitated back to the workplace due to the restorative nature of the South African legal system.

79 Section 186 of the Labour Relations Act 66 of 1995.

80 *SAPS v Safety and Security Bargaining Council* (C1222.18) [2021] ZALCCT 61 (27 August 2021).

81 *Ibid.*

82 *Ibid* para 18.