



Goldman-Judin-Maisels-Inc
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PERSONNEL RECRUITMENT AGENCIES AND JOB REFERENCES

1 SOURCES OF EMPLOYEE REFERENCES

Sources of information available to employers about prospective employees are various and diverse, ranging from the employee themselves to credit rating agencies and more dubious private investigation services. The focus of this memorandum is on the provision of information by job recruitment agents ('the agency') on prospective employees ('the candidates') to the prospective employer, who is the agent's client ('the client'), and in particular, on job references. The major sources of information available to the client and the agency are the candidates themselves and their former employees. The scope and nature of representations made by candidates and former employers in the course of providing information to the agency, which are then conveyed to the client, require consideration, as the agency is not entitled to any more information from these sources than the client is. The legal issues arising from the provision of information by the candidate, former employer and the agency, respectively, are set out, in brief, below before dealing with the agency's liability vis-à-vis the client.

2 DUTIES OF EMPLOYEES TO DISCLOSE INFORMATION ABOUT THEMSELVES

2.1 What information ought an employee to provide?

2.1.1 It has never been suggested that a contract of employment is akin to a contract of insurance in the sense that it is entered into in the utmost good faith. Candidate employees are not required to disclose all prejudicial information about themselves.¹ Nevertheless, it has always been an essential implied term of the employment relationship that it is one of trust and that acts of gross dishonesty are destructive of that trust.² Hence, theft and

¹Hoffman & Moni's Winerlies Ltd 1948 (2) SA 163(C); Dilks v Postma's Diamond Prospect Ltd 1921 WLD 4

²EG : Standard Bank of South Africa Ltd v CCMA & Others [1998] t BLLR 622(LC) at [38] - [41], 630-1 and De Beers Consolidated Mines Ltd v CCMA & Others (2000) 21 ILJ 1051 (LAC) and Toyota SA Motors (Pty) Ltd v Radebe & Others (2000) ILJ 340 (LAC)

fraud are normally considered grounds for summary termination of employment. As the essential terms are axiomatically material ones, any information that has a bearing on a candidate's trustworthiness, for example, could be considered highly material to the candidate's suitability as an employee.³

- 2.1.2 Likewise, if the employer pertinently makes candidates aware of any other requirements it considers material, such as possession of minimum qualifications or relevant experience, details thereof should be provided. The information that would normally be considered material would be information directly relevant to the suitability of a candidate for the job in question. Thus, the previous dismissal of a former insurance consultant for fraud were highly pertinent to his appointment as a Pension Fund consultant and failure to disclose that was a material non-disclosure entitling the new employer to terminate the contract.⁴ On the other hand, the sequestration of a credit manager at a bank, when there was no indication he brought it himself, was not regarded as a justification for his dismissal. It ought to follow that a non-disclosure of the same would not be considered a material representation.⁵
- 2.1.3 A wilful failure to provide material information, in itself, would raise questions about trust and honesty. Consequently, material non-disclosure in circumstances in which a candidate ought to have been aware from the questions asked or the inherent nature of the job may, in turn, suggest dishonesty. It would be advisable for the materiality of information to be spelled out expressly and acknowledged in writing by the candidate when providing the information. Depending on the seriousness of the non-disclosure, the dishonesty entailed, may by itself, be sufficient to undermine the new employment relationship.
- 2.1.4 The question of a negligent failure to disclose information will be dealt with below.

³See Grogan, J, *Workplace Law* (2003), Juta 145

⁴*Auret v Eskom Pension & Provident Fund* (1996) 7 BLLR 838 (IC)

⁵*Spijkerman v ABSA Bank Ltd* (1997) 3 BLLR 287 (IC)

2.2 Questions of privacy

2.2.1 Some information a candidate ought not to be expected to provide as a precondition for employment, such as: personal details pertaining to medical records, family circumstances, lifestyle or sexuality, and the like. In this respect an applicant is protected, not only by the common law of privacy, but also by the right to privacy in section 14 of the Constitution. It is important to note that the constitutional right to privacy does not require the candidate to suffer any damage for an unconstitutional breach to occur. For example, the breach of an individual's right to control information about themselves might, in and of itself, be sufficient to make obtaining of personal information without their consent constitutionally unlawful, irrespective of the individual being able to prove an unlawful intention on the part of the responsible party.⁶ Thus, intrusive methods of gathering information would usually be considered a breach of Section 14.

2.2.2 An employer may also not require an applicant to indirectly provide such information by, for example subjecting themselves to medical examination.⁷

2.2.3 Psychometric tests to assess candidates must also pass certain criteria before they can be used as a source of information about a candidate or employee.⁸

3 WHAT ARE THE DUTIES OF FORMER EMPLOYER'S TO PROVIDE INFORMATION ABOUT FORMER EMPLOYEES TO OTHER PROSPECTIVE EMPLOYER?

⁶De Waal, Currie & Erasmus, Human Rights Handbook (2000) Juta 250

⁷Medical testing of employees or applicants is prohibited under section 7 of the Employment Equity Act 55 of 1998 unless legislation permits or requires the testing; or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job

⁸Section 8, Employment Equity Act

- 3.1 Firstly, there is no statutory duty to provide information to a prospective employer. Section 42 of the Basic Conditions of Employment Act only requires an employer to provide the former employee with a 'certificate of service' containing the barest details. Even in this document, the employer is only obliged to provide the reason for termination if the employee requests.
- 3.2 Does a former employer have a duty to reveal information about a former employee to a prospective one? Withholding information such as an employee's acts of violent conduct, fraud, etc., which a prospective employer would reasonably consider material, could result in a person being employed despite their unsuitability.
- 3.3 Aside from any damage to the new employer's own business that could result from e.g, a loss due to fraud, that employer could conceivably suffer a damages claim from others as a result of that employee's conduct, such as a co-employee assaulted at work. Does the former employer attract any liability for not disclosing the employee's material flaws, when he ought to have known that such damage was likely to occur?
- 3.4 Whether the causal chain between the material non-disclosure and the resultant damage suffered will be strong enough, will be a matter of fact to be decided on the circumstances of the case. But if the causal connection and foreseeability of potential harm is established, it does not necessarily make that failure to disclose actionable in delict.
- 3.5 It has been held that non-disclosure, even in the context of a contractual relationship between parties, does not require that one contracting party tell the other all they knew about anything material: a party is only expected to speak when the information they had to impart fell within their exclusive knowledge and was such that the other party's right to have it communicated ' would be mutually recognised by honest men in the circumstances.⁹ In the non-contractual context, which applies between a former and prospective employer, the issue arises whether or not a special relationship between them exists, that gives rise to a duty on the former employer to disclose material information about a candidate and

⁹Absa Bank Ltd v Fouche 2003 (1) SA 176 (SCA) 801/J - 181 B/C

to take reasonable care in doing so.¹⁰

- 3.6 This must be distinguished from the situation where a former employer chooses to speak, notwithstanding the absence of an obligation to do so, and materially misrepresents information about the former employee.

4 **IF A FORMER EMPLOYER DOES PROVIDE INFORMATION ABOUT A FORMER EMPLOYEE.**

- 4.1 In the first place, a former employer would probably be well advised to ask for the employee's permission to disclose information such as the employee's disciplinary record, before doing so. In the context of an agency such permission could be obtained by the agency from the candidate.
- 4.2 Secondly, if the information is provided without the candidate's consent, then the former employer must be alert to possible infringements of the candidate's right to privacy. Since a candidate is not obliged to disclose all prejudicial information to a prospective employer, then a former employer who elects to disclose such information will probably breach the candidate's right to privacy in disclosing prejudicial information unless that information is directly relevant to the central issue of that candidate's suitability for employment.
- 4.3 In any event, if a former employer does provide information, whether or not the candidate has given their permission, the information provided should be strictly factual and any statement that could be seen as defamatory of the candidate could well give rise to an action in defamation on the part of the employee. If the candidate is also refused employment as a result of a false or obviously biased representation the former employer may well be liable for delictual damages to the employee for the loss of employment.
- 4.4 A statement about a former employee will, on the face of it, be defamatory if the former employer provides information to a third party, being the agency and/or the prospective employer, which directly or by implication would lower the candidate in the view of ordinary persons. Clearly, the negative connotation of a bad disciplinary record might satisfy the requirement of defamatory subject matter, even though it might be

¹⁰Mukheiber v Raath & Another 1999 (3) SA 1065 (SCA) 1076D-J

true.

- 4.5 However, given that the prospective employer has a legitimate interest in receiving the information and the former employer a legitimate interest in providing a testimonial, it is arguable that providing an honest, if prejudicial reference, at the request of a prospective employer constitutes a privileged occasion, which would provide a defence for the former employer to an action for defamation.¹¹. Rather than seeking to rely on this defence, a safer route would be to seek the candidate's consent for the disclosure, and the prospective employer would be entitled to draw its own conclusions from a candidate's failure to permit a former employer to verify the candidate's claims about their employment record.

5 DUTIES OF RECRUITMENT AGENCIES

- 5.1 The rights and duties of recruitment agencies are, in part, premised on, the duties imposed on former employers, candidates and the client. A recruitment agency as the agent of its principal the client, is entitled to request and receive the same information about a candidate that the client may, within the scope of its mandate from the client. For the rest, the duties imposed on an agency are those contained in its contract with the client.
- 5.2 In general, an agency cannot be expected to obtain more information than would otherwise be legally obtained from the candidate or the former employer. The extent of its search for material information beyond these sources is a matter to be inferred from the terms of its contract with the client.
- 5.3 The duties, or lack thereof, of the former employer towards the agent would be the same as the former employer's duties are towards the client.
- 5.4 However, unlike the former employer, the agency has a contractual responsibility towards the client which would usually include identifying a short list of suitable candidates for employment based on the information it has obtained from the candidates and from their former employers, or other sources.
- 5.5 Because of the contractual relationship, the agency is also under a

¹¹De Waal v Ziervogel 1938 AD 112 at 121-3. See also Burchell J, *Personality Rights and Freedom of Expression*, Juta 1998



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clearer obligation not only to provide information it obtains to the client, but also to make sure, as far reasonable diligence would reveal, that the information is correct. In this regard, there is probably greater scope for a client holding an agency liable for negligent misrepresentation of information than of holding an 'unconnected' former employer liable for not providing material information, or for not taking the same degree of care in ensuring the correctness of the information.¹²

- 5.6 Likewise, the agent would be obliged to provide the material information it obtained to the client by virtue of its contract with the client, and not out of some social duty or moral obligation similar to that of the former employer.
- 5.7 In seeking to obtain this information reasonable diligence would be expected of the agency. The nature and extent of information the agency is required to obtain, may of course be regulated by contract. For the sake of certainty, it would be preferable for the contract between the agency and the client to spell out precisely what information the agency will endeavour to obtain, and may rely on, in drawing up a short list of candidates. This would then make clear the risk the client is assuming in relation to information that the agency is not required to obtain.
- 5.8 In gathering such information, the agency ought to be made aware by the client of any specific employment criteria the client considers material, apart from those that are ordinarily considered material by virtue of the essential features of an employment relationship. A failure to obtain such information, if it is available and not protected by considerations of privacy and the like, could conceivably expose the agency to liability for either contractual or delictual damages suffered by the client in consequence of employing an unsuitable candidate whose material flaws would have been apparent had the information been obtained, and who would not have been employed in that instance.
- 5.9 In either a contractual or delictual claim, the damage suffered would have to be a foreseeable (not unlikely) consequence that would tend to follow on the breach of the agent's duty.¹³ In this regard, it should be mentioned

¹²Aucamp and Others v University of Stellenbosch, 2002 (4) SA 544 (C), 568J-569E

¹³Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA) at 579D-580B, 580G-H/I and 581 g-I/J

again that the chain of causation between the agency's omission or misrepresentation and the loss suffered by the client might be too weak to attribute the loss to the agency's actions.

- 5.10 As an independent party conveying information to the client, albeit in the context of a contract, the agency is still publishing information when it passes the information on to the client, and to the extent that a candidate complains that such publication is defamatory it is vulnerable to such a claim. Nonetheless, if the defence of a qualified privilege is available to a former employer, then there is all the more reason to suppose that it is available to an agent of the prospective employer on the same basis.

6 SUMMARY

- 6.1 A candidate is only obliged to disclose information that goes to the heart of their suitability for the job applied for.
- 6.2 In determining this, essential features of the contract of employment such as trustworthiness are assumed to be material. Other terms ought to be made explicit by the prospective employer.
- 6.3 A prospective employer is not entitled to information about a candidate in breach of the candidate's right to privacy.
- 6.4 A former employer is probably not obliged to provide information about an employee beyond what is statutorily required, unless the employee consents thereto.
- 6.5 If a former employer does provide such information then the employer must only provide factual information and should take care to avoid defamatory comment.
- 6.6 In general, defamatory statements made by a former employer might still be protected by qualified privilege.
- 6.7 In the absence of express contractual provisions dealing with the issue in the contract of agency, the contractual relationship between an agency and client probably impose a greater duty of care on the agency in seeking to ensure that it provides the client with correct information, than would be imposed by a former employer volunteering information.
- 6.8 The extent of the agency's obligations to provide correct information or of



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its liability in the event of providing incorrect information can be regulated by the terms of its contract with the client.

- 6.9 An agency has no greater entitlement to information than its client has in law.
- 6.10 An agency would probably be able to rely on the same defence of qualified privilege in relation to any defamatory material it provides to the client.