

Confidentiality clauses - whistles can't be blown if employer consent is required



By [Johan Botes](#)

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When employers settle employment disputes with staff, the standard practice includes adding a confidentiality undertaking to the settlement agreement. Employers are often reluctant for employees to trumpet the settlement reached to other prospective litigants, and generally would not mind if the employee is precluded from telling others where the proverbial bodies are buried. But, what happens when an employee discloses confidential information during legal proceedings or where the information pertains to wrongdoing by the employer? The Labour Appeal Court recently considered the binding nature of confidentiality agreements in *J v. KZN Treasury*.



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The employer dismissed the employee for misconduct after it concluded that the employee had breached a prior confidentiality agreement. The employee's undertaking to maintain confidentiality related to their role on a selection panel. All panelists signed a contract wherein they undertook not to disclose any confidential information relating to the selection process.

Following a dispute by a candidate, the employee signed an affidavit to confirm that the selection outcomes were amended after the process, to the detriment of the candidate. The employer contested this claim and held that the employee had breached a confidentiality undertaking.

The employment tribunal agreed and held that the employee was dishonest. The arbitrator found that the employee cannot escape liability for disclosure merely because the employee's affidavit was used for legal proceedings (the arbitration in respect of the candidate's unsuccessful application for the role). The arbitrator concluded that the employee had to seek permission from the employer to be released from the confidentiality obligations arising from the agreement.

The aggrieved employee applied to the Labour Court to review and set aside the arbitrator's award. The court concluded that an employer "...may not use confidential agreements to conceal wrongdoings in the workplace and an employee does not require the permission of his or her employer to reveal the truth to a legal process, such as a court or arbitration proceedings." However, the court found against the employee, as the employee did not place the entire record of proceedings before it to allow the court to consider the evidence presented to the arbitrator.



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The Labour Appeal Court disagreed with the employer, arbitrator, and lower court on appeal. It held that a proper analysis of the common cause facts confirmed that the minutes of the selection panel were indeed changed. The employee was not dishonest when making that statement in the affidavit. The LAC stated as follows in respect of gag clauses:

“ It is, also, my view that an employer may not invoke a confidentiality agreement to conceal wrongdoings in the workplace, and an employee who has signed a confidentiality agreement does not require the permission of his or her employer to reveal wrongdoings in the workplace if required to do so in legal proceedings. If permission is to be obtained first, any dishonest conduct will never see the light of day. ”

Employees have a general duty to refrain from disclosing the confidential information of their current or past employers. This duty arises from the common law and the employee's obligation to further the employer's business interests and to not work against the employer (see *Cyberscene Ltd & others v. i-Kiosk Internet & Information (Pty) Ltd [2000]*). This duty is often confirmed or bolstered in an employment contract or subsequent written agreement. Preventing employees from blowing the whistle on wrongdoing is not in the public interest. Our courts are unlikely to support employers (or other parties) seeking to gag employees or third parties from disclosing wrongdoing.

Employees should not interpret the judgment to mean that confidentiality agreements or undertakings are invalid – that is clearly not the case. The courts will consider each case on its merit but will critically consider the scope and reach of the agreement, and the substance of the disclosure that breaches this undertaking. Agreements inducing employee amnesia about malpractices are unlikely to offer any meaningful protection.

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