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## False or Fake Qualifications in an Employment Context: A South African Perspective

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### Abstract

The pressure for employment opportunities has led to many dishonest practices by employees and job seekers. The evil of employees misrepresenting their academic qualifications has become endemic, and the South African government has been compelled to act. Misrepresentation of academic qualifications mainly manifests itself through employees claiming to have non-existent higher education qualifications to secure a new job offer or be promoted to a higher post. This misrepresentation has consequences for the employer, who may pay the employee a salary they do not deserve. The employee must refund the employer and face prospects of imprisonment if found guilty in a criminal court. In South Africa, high-profile individuals working in the public service or occupying prominent political positions have falsely claimed to have qualifications that they did not have. They have been allowed to resign on their own accord or were dismissed after lengthy disciplinary hearings. This paper outlines some examples of this misrepresentation and unravels the legal implications from a South African perspective. We recommend that employers promptly discipline employees found guilty rather than allow them to resign, as was done correctly in the Mthikhulu case discussed here. Further, we urge employers in South Africa to foreground the skills of employees rather than paper qualifications and assess technical ability ahead of academic qualifications.

**Keywords:** Fake Qualifications; Labor Law; Employer; Discipline; Misrepresentation.

### Introduction

South Africa is an important economic and political player in the Southern African Development Community (SADC) and Africa. Because South Africa hosts many expatriates and economic migrants from Africa, it is regarded as the African employer of choice. The influx of job seekers from other African countries into South Africa has led to palpable tensions, leading some organizations to call for a

ban on migration and mass deportation of undocumented migrant workers. Some South African citizens and migrants have secured jobs using fake qualifications, and the trend seems to be increasing, thus warranting a scholarly investigation. Fellow African countries look up to South Africa for inspiration and guidance.

Fake qualifications refer to the falsification of academic and professional qualifications.<sup>1</sup> It is possible to obtain fake qualifications from both legitimate and illegitimate institutions. If a qualification is obtained from an illegitimate institution not registered or accredited, then such qualification has no institutional basis and is, therefore, fake; the institution is also labelled as fake.<sup>2</sup> The corollary is that a person can illegitimately acquire a qualification from a legitimate institution, in which case the qualification obtained is fake. In the capitalist world, the primary motivation to acquire a fake qualification is to seek and obtain suitable employment and, in related instances, get promoted at work. Job applicants may also fake qualifications and experience if there is perceived competition from superior rival job applicants.<sup>3</sup> The other related context of fake qualifications relates to situations where individuals claim to have acquired specific qualifications from named institutions when the reality is that the claimants never earned the qualifications. In such cases, one may characterize such qualifications as ‘fathom,’ ‘imaginary’ or ‘wishful.’ One writer refers to such qualifications as ‘degrees of doubt’.<sup>4</sup>

High-profile incidents in South Africa in the recent past have illustrated the endemic evil of employees misrepresenting academic qualifications and claiming to have qualifications they never obtained. It is a problem that will likely persist as

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<sup>1</sup> Ignasio Jimu, ‘Fake Qualifications and the Challenge of Regulating Higher Education in Southern Africa’ (2018) 6 *Modern Africa: Politics, History and Society*. [107].

<sup>2</sup> *ibid.*

<sup>3</sup> Jordan Ho and others, ‘The Influence of Competition on Motivation to Fake in Employment Interviews’ (2019) 18 *Journal of Personnel Psychology*. [95].

<sup>4</sup> George M Brown, ‘Degrees of Doubt: Legitimate, Real and Fake Qualifications in a Global Market’ (2006) 28 *Journal of Higher Education Policy and Management* [71] <<https://doi.org/10.1080/13600800500440789>>.

unemployment increases with stiff competition for the few jobs in the labor market.<sup>5</sup> This dishonest conduct is characterized by securing a qualification improperly by resorting to the unlawful copying of answers in an examination, having illicit notes or other material during an examination, plagiarism or simply falsely claiming a qualification that one does not have. For the purposes of this paper, we focus on situations in which individuals claimed to have specific academic qualifications which they did not have. We characterize such qualifications as fake or false. In this context, regard is had to the consequences for the employee concerned and implications for an employer who is a victim of the employee's dishonesty.

In the South African context, there are numerous reports of high-profile individuals working in the public service or occupying prominent political positions falsely claiming to have qualifications they did not have. The individuals implicated ranged from a well-known, highly regarded political member of the ruling party;<sup>6</sup> chairwoman of the board of the public broadcaster;<sup>7</sup> an ambassador;<sup>8</sup> acting chief

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<sup>5</sup> For Example, Ndwakhulu Stephen Tshishonga, Addressing the Unemployed Graduate Challenge Through Student Entrepreneurship and Innovation in South Africa's Higher Education (IGI Global 2022) Cases on Survival and Sustainability Strategies of Social Entrepreneurs (IGI Global 2022), who reports that the graduate unemployment rate of South Africa in 2022 is estimated at 33.5% for the youth (15–24) and 10.2% for those aged 25–34.

<sup>6</sup> Gareth Van Onselen, 'Pallo Jordan's Phantom Doctorate' Timeslive it was reported that an investigation by the paper had found no evidence that a named prominent ruling party elder and former cabinet minister, who used the title "Dr", had ever earned a PhD or even had an honorary doctorate bestowed on him by any university in the world. He later resigned from his position after "owning up for what he called deceit over a long time (New York, 4 August 2014) <<https://www.timeslive.co.za/politics/2014-08-04-pallo-jordans-phantom-doctorate/>>.

<sup>7</sup> SAPA, 'SABC Chairwoman Zandile Tshabalala Lied about Her Qualifications' (Timeslive, 13 July 2014) that the then SABC Chairperson had lied to parliament that she was a Master of Commerce graduate from the University of South Africa (Unisa) (see "SABC chairwoman Zandile Tshabalala lied about her qualifications<<https://www.timeslive.co.za/politics/2014-07-13-sabc-chairwoman-zandile-tshabalala-lied-about-her-qualifications/>> accessed 16 June 2022

<sup>8</sup> 'South Africans Ambassador to Japan Mohau Pheko' (Timeslive, 16 June 2015) On 27 February 2015, the Times reported that South African ambassador to Japan, regretted misrepresenting herself on her CV, by stating that she had a PhD when she had not, in fact, completed the degree <<http://www.timeslive.co.za/politics/2015/02/27/south-africa-s-ambassador-to-japan-mohau-pheko-admits-lying-about-phd>> accessed 16 June 2022.

executive officer of the national airline;<sup>9</sup> chief operating officer of the national broadcaster;<sup>10</sup> a chief engineer and a top executive of South Africa's Passenger Rail Agency;<sup>11</sup> a prominent official working for a university<sup>12</sup> and a law professor.<sup>13</sup> While some implicated persons resigned from their posts either voluntarily or involuntarily after the conclusion of disciplinary hearings, others clung to their jobs after tendering feeble apologies or simply hoping the matter would go away. In some instances, despite employees having misrepresented their qualifications, they have been defended and supported by their employers. From the examples cited above, what emerges is that claimants to false qualifications are driven by two main motives – desperation for appointment or promotion to a particular job position and the desire for prestige and recognition emanating from being recognized as a holder of higher qualifications, specifically postgraduate qualifications.

Because incidents of high-ranking officials claiming to have qualifications they do not have seem to be on the increase, there is a need to describe some of the legal consequences that may flow from such dishonesty in the workplace

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<sup>9</sup> 'Flights SAA Defends CEO Accused of False Qualification' (Travel 24 News, 2015) In this case, the employer, South African Airways, said that it stood by its decision to appoint the employee in question as Acting Chief Executive Officer despite there being a cloud about his claims to having completed certain qualifications which he in actual fact had not completed (see "SAA defends CEO accused of false qualifications" <<http://traveller24.news24.com/News/Flights/SAA-defends-CEO-accused-of-false-qualifications-20141125>> accessed 16 June 2022

<sup>10</sup> Sthembiso Sithole, 'Matric-Less Motsoeneng Waxes Lyrical about Matric Certificates' Mail & Guardian (6 January 2015) On 6 January 2015 in a report entitled "Matric-less Motsoeneng waxes lyrical about matric certificates the Mail and Guardian Newspaper, citing from the Report of the Public Protector, reported that the Chief Operating Officer of the South African Broadcasting Corporation (SABC) had lied about his qualifications, specifically, that he had passed certain Matric subjects<<https://mg.co.za/article/2015-01-06-matric-less-motsoeneng-waxes-lyrical-about-matric-certificate/>>

<sup>11</sup> Mia Lindeque, 'Prasa Hit By Another Qualifications Probe' Eyewitness News (Johannesburg, 9 August 2015) South Africa's Passenger Rail Agency was hit with a double fake qualifications scandal involving its chief engineer and a top executive (see "PRASA hit by another qualifications probe <<https://ewn.co.za/2015/08/09/Prasa-hit-by-another-qualifications-scandal>>.

<sup>12</sup> 'University of Limpopo Manager Arrested for Fake Qualification' SABC (23 September 2015) the elite crime investigations unit, the Hawks, has arrested a University of Limpopo labour relations manager for alleged fraud involving the use of a fraudulent matric certificate to secure his appointment at the institution in 1996 <<http://www.sabc.co.za/news/a/a9bfd90049f456769ededfa53d9712f0/University-of-Limpopo-manager-arrested-for-fake-qualification-20152309>>.

<sup>13</sup> Sharika Regchand dan , 'UKZN Professor Quits amid Row' Independent Online and affiliated companies (25 November 2008).

environment. Essentially, three potential perils face the miscreant – disciplinary action, criminal liability, and civil liability, each of which is considered in this paper. It is hoped that once the legal consequences are laid bare, employers will be confident to deal with cases involving fake qualifications in the workplace. This paper interrogates the legal position from the perspective of an employer-employee relationship. This approach does not imply that false claims to qualifications cannot arise in other contexts.

### **South African Perspective I: Possible Disciplinary Action**

When an employer discovers that an employee has falsely represented his qualifications, disciplinary action is likely to follow.

Under common law, an employee impliedly warrants that he, or she, is qualified for the post.<sup>14</sup> Where dishonesty was involved in breach of this warranty, the employee faced the prospect of being summarily dismissed. While an employer can no longer dismiss an employee without a hearing, as envisaged in Section 188 of the Labor Relations Act 66 of 1995,<sup>15</sup> an employee found guilty of misrepresenting qualifications will invariably be dismissed pursuant to a fair hearing.

According to Grogan:<sup>16</sup>

Many employees have been validly dismissed for obtaining their employment on the basis of false CVs or fraudulent qualifications, or even for not disclosing information during pre-employment interviews which they should have reasonably disclosed.

The reason why such conduct attracts the ultimate penalty in labor law is not hard to find. In the words of the Labor Appeal Court:<sup>17</sup>

This trust which the employer places in his employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes

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<sup>14</sup> ‘Wallace v Rand Daily Mail Ltd 1917 AD 479’.

<sup>15</sup> ‘As Read with Item 4 (1) of the South African Code of Good Practice: Dismissal’.

<sup>16</sup> ‘Workplace Law 11th ed 246-247. Hoch v Mustek Electronics (Pty) Ltd (2000) 21 ILJ 365 (LC)’ where an employee had misrepresented her education qualifications upon application for a job, her dismissal was confirmed despite the fact that her dishonesty was only discovered several years later. See also Evans v Protech [2002] 7 BALR 704 (CCMA).

<sup>17</sup> ‘Central News Agency (Pty) Ltd V CCAWUSA & Another (1991) 12 ILJ 340 (LAC) at 344 Which Dealt with a Case of Theft against the Employee’.

to the root of the contract of employment and the relationship between the employer and employee.

The timing of the misrepresentation does not subtract from the above dictum. For example, if made before the start of employment by an applicant for work, dismissal is still justified, even where the employer discovers the misconduct at a later stage, even though the employee has rendered impeccable service subsequent to his or her return or her appointment.<sup>18</sup>

It also does not matter whether the misconduct perpetrated by the employee caused actual loss to the employer. Potential prejudice is enough to justify dismissal. The submission of a false qualification amounts to fraud, as more fully explained later. In this context, an employee may even be dismissed for ‘fraudulent non-disclosure’ where, as an applicant for a post, he or she failed to disclose information of a material nature, which, if disclosed, the employer would probably not have employed the employee.<sup>19</sup> We believe it is also irrelevant whether the falsified qualification is a prerequisite for the job. We believe that the act of dishonesty per se is sufficiently serious to breach the fiduciary relationship between employer and employee.<sup>20</sup>

Ultimately dismissal may be justified where the court finds that the relationship of trust cannot continue, has irreparably broken down, or has otherwise been rendered intolerable. Gross dishonesty is an obvious ingredient for such justification. In this regard, the purpose served by the sanction of dismissal should not be confused with the role sentence plays in criminal proceedings. Dismissal is not imposed as a punishment. It is based on the employer’s operational requirements, unlike a criminal penalty designed to punish, reflecting society’s moral outrage.<sup>21</sup>

Where dishonesty is an element of misconduct, little room is left for mitigation. Basically, the only factor relevant to mitigation in this context is a display of remorse. The Labor Court considered this aspect where a senior municipal employee had fraudulently obtained a driver’s license, which was discovered nine years after the

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<sup>18</sup> John Grogan, *Dismissal, Discrimination, and Unfair Labour Practices* (2nd edn, Juta 2007).

<sup>19</sup> ‘Auret v Eskom Pension Provident Fund (1995) 16 ILJ 462 (IC)’.

<sup>20</sup> ‘Cf De Beers Consolidated Mines Ltd v CCMA and Others (2000) 21 ILJ 1051 (LAC)’.

<sup>21</sup> ‘City of Cape Town v SALGBC and Others [2011] 5 BLLR 504 (LC)’.

event. The fact that the employer had sustained no loss was considered irrelevant. The employee did not show any remorse. The court concluded that when an employee commits an act of dishonesty and falsely denies having done so, thereby showing no remorse, dismissal in these circumstances may be appropriate.

However, there are limits to the duty of disclosure by an employee who has previously been dismissed for misconduct. The Labor Appeal Court<sup>22</sup> commented on this boundary where an employee previously dismissed by Eskom applied two years later for a position with the same employer. She disclosed that she had been previously employed by Eskom but did not reveal that she had been dismissed on a charge of absence from duty without leave. When Eskom discovered the actual position, it withdrew its offer to employ her. The court concluded that it was ‘unreasonable, ludicrous, and disingenuous’ for Eskom to plead ignorance of her previous dismissal. In any event, Eskom could not rely on this lack of knowledge in circumstances where the selection committee ‘through ... ignorance, incompetence, or negligence’ failed to question the employee on the reasons for her previous departure from Eskom.

Contrast this approach to the Labor Court’s approach, where an employee had crafted her CV to create the false impression that she had completed a degree, whereas the degree was incomplete.<sup>23</sup> She was dismissed. In arbitration proceedings, the arbitrator ruled that since the employer could have readily ascertained the true position through reference to the employee’s file and that, in any event, the qualification concerned was irrelevant to the position sought; the employee had to be reinstated. The award was set aside on review, with the Labor Court finding that dismissal was fair. On the facts, the employee was found to have acted dishonestly. In this regard, Judge Cele held:

It is not a defence to an allegation of fraud that the person to whom the representation was made could have by the exercise of reasonable care, discovered the truth of the misrepresentation and ought never to have been duped by it.

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<sup>22</sup> ‘Eskom Holdings Ltd v Fipaza and Others [2013] 4 BLLR 327 (LAC)’.

<sup>23</sup> ‘Rainbow Farms (Pty) Ltd v Dorasamy and Others (Unreported Case No D 303-11, 25-2-2014)’.

It seems that the distinguishing feature turns on the finding of dishonesty in the latter case, whereas no such finding was made in the former.

The context in which the dishonesty occurred may be decisive. For example, in a Labor Appeal Court case where a valid Code 8 driver's license was prescribed as a minimum qualification for work requiring the investigator of staff misconduct to travel out of the office to conduct investigations, the employee had misrepresented in her CV that she did have the requisite license, whereas she only possessed a learner's license.<sup>24</sup> Apart from the fact she had been appointed at the expense of properly qualified applicants, Deputy Judge President Waglay expressed himself thus:

To place an employee who was guilty of dishonesty back in her position where honesty and integrity are paramount to the execution of duties is to my mind, grossly unreasonable, but more importantly, it cannot be right and proper to reinstate or re-employ a person in a position that was secured by the making of false statements. The third respondent secured for herself the post by falsely claiming that she had the minimum requirements for the position, in the circumstances, ordering her re-employment amounts to condoning her misconduct. This would mean that a candidate for employment can secure an advantage, to the prejudice of other applicants, by falsely claiming to have minimum qualifications for the posts.<sup>25</sup>

### **South African Perspective II: Third-Party Intervention**

Of interest is the position where an employer is content to employ a person knowing full well that the employee's qualifications are false, or he is otherwise unsuitable for the job. A third party may intervene in exceptional circumstances to ensure this scenario does not prevail. The Constitutional Court in *Democratic Alliance v President of the RSA*<sup>26</sup> considered this aspect where the presidential appointment of the National Director of Public Prosecutions was challenged because the incumbent failed to meet the appointment criteria of being 'a fit and proper person, with due regard to their experience, conscientiousness and integrity

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<sup>24</sup> 'South African Post Office Ltd v CCMA and Others (2011) 32 ILJ 2442 (LAC)'.

<sup>25</sup> See also the unreported judgments in the 'Labour Court Ntseliseng Khumalo v University of Johannesburg Case No JS 533/16 of 8 February 2018,' 'LTE Consulting (Pty) Ltd v CCMA and Others Case No JR1289/14 of 8 August 2017'.

<sup>26</sup> '2012 (12) BCLR 1297 (CC)'.



to be entrusted with the responsibilities of the office concerned'.<sup>27</sup> Before his appointment, the person concerned had given evidence at a commission of inquiry where his credibility was called into question to the extent that it was recommended that disciplinary proceedings be taken against him. Remarkably, not only was this recommendation not followed at the material time but acting on the advice of the then Minister of Justice and Constitutional Affairs, the President ignored the commission's comments when making the appointment.

The court had little difficulty in finding that:<sup>28</sup>

Dishonesty is inconsistent with the hallmarks of conscientiousness and integrity that are essential prerequisites to the proper execution of the responsibilities of a National Director.

In setting the appointment aside, the court relied on the principle that the appointment was an executive decision of the President, which had to be rational, a requirement derived from the constitutional imperative of legality. The remarks of the commission 'represented brightly flashing lights,'<sup>29</sup> which ought to have warned the President when considering the appointment. They were highly relevant to the appointee's honesty and integrity. This led the court to conclude that the President's decision to ignore the said remarks 'was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational'.

It is not suggested that there may be third-party intervention in disputed appointments in an employment context generally. Indeed, in administrative law, such intervention may occur where the decision to appoint constitutes 'administrative action.' The reason for this is that such action must be, among other things, reasonable.<sup>30</sup> One of the requirements of reasonableness is rationality.<sup>31</sup> As an aside, the court in the Democratic Alliance case did not find that the President's decision amounted to administrative action. It was common cause that it was an

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<sup>27</sup> 'Section 9(1)(b) of the National Prosecution Authority Act 32 of 1998'.

<sup>28</sup> At '1319B'.

<sup>29</sup> At '1319H'.

<sup>30</sup> 'Section 33(1) of the Constitution'.

<sup>31</sup> 'Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC)'; 'Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)'.

executive act that, in any event, had to comply with the principle of legality, which, in turn, demanded rationality. However, it remains to emphasize that this scenario was played out in the field of public law. Similar interventions are unlikely to succeed in private law in the absence of special considerations.

### **South African Perspective III: The Criminal Law Position**

Section 66(2) of the Higher Education Act 101 of 1997, under the heading ‘Offences,’ provides:

Any person who pretends that a qualification has been awarded to him or her by a higher educational institution, whereas in fact no such qualification has been so awarded, is guilty of an offence and is liable on conviction to a sentence which may be imposed for fraud.

The ambit of this statutory criminal provision is confined to qualifications purporting to have been awarded by a higher education institution as defined in Section 1, which refers to any institution providing higher education established or registered in terms of the Higher Education Act.<sup>32</sup>

This provision imposes a form of strict liability on those ‘pretending’ to have a qualification. It is primarily shorn of the common law requirements of fraud. Having regard to the definition of ‘higher education institution,’ which is linked to the institution being established, or registered under the Higher Education Act, it seems that Section 66 (2) is only directed at the pretense of qualifications emanating from local institutions so incorporated, as opposed to overseas institutions, for example. This has the unfortunate result of criminalizing those who misrepresent local qualifications, while their foreign counterparts avoid sanction under this legislation because the disputed qualifications purport to be awarded by an institution outside South Africa.

Where the misrepresentation of a qualification amounts to the Common-Law crime of fraud, a prosecution under the criminal law is a possibility. Fraud arises when a person unlawfully and intentionally misrepresents another, thereby

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<sup>32</sup> ‘The Higher Education Act under Section 66 (1)’ also criminalises conduct by a person other than a higher education institution who, inter alia, offers a higher education programme or confers a higher education programme without the requisite authority.

causing such other person to be prejudiced or otherwise.<sup>33</sup> Generally, the intentional misrepresentation of a qualification which does not exist will fall within the common law definition of fraud. The misrepresentation amounts to a distortion of the truth. In the absence of factors such as coercion, such conduct is unlawful. The element of intent to defraud will invariably be present. The prejudice may be actual or potential. In this regard, whether the employer acted on the false qualification or whether the employee succeeded in his or her deception is irrelevant. Further, it is irrelevant if the employer was aware that the misrepresentation was false when it was made. Nor is it necessary for potential prejudice to be proprietary in nature. For example, writing an examination in another student's name to mislead the examiners as to the true identity of the author of the answer script amounts to fraud.<sup>34</sup>

#### **South African Perspective IV: The Scope for Civil Liability**

Two possibilities arise where an employee's conduct amounts to fraud when misrepresenting his qualifications to the employer.

First, we consider the position under the law of contract. As discussed above, the contract cancellation issue has now been largely subsumed by the law relating to dismissal in an employment context. This aspect requires no further consideration.

In addition to dismissal, there is no reason why an employer may not sue an employee for damages for loss occasioned to the employer because of the employee's breach.<sup>35</sup> This was confirmed in the Mthimkhulu case discussed below.

Second, the recovery of delictual damages is a possibility.

A fundamental difficulty facing an employer when contemplating civil action against a former employee is that he may be a 'man of straw.' By the time judgment is obtained, there may be no, or insufficient assets to satisfy the judgment. In this event, any litigation to recover losses may be an expensive waste of time.

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<sup>33</sup> Gerhard Kemp, *Criminal Law in South Africa* (3rd edn, Oxford University Press 2019) [404].

<sup>34</sup> 'S v Swarts En 'n Ander 1961 (4) SA 589 (GW)'.

<sup>35</sup> 'Rand Water v Stoop & Another (2013) 34 ILJ 576 (LC)'.

The ability of the employer to recover amounts due to him is bolstered in two respects. Firstly, the employee has a limited opportunity to make deductions from any outstanding salary due to the employee, subject to certain conditions, including the securing of the employee's consent,<sup>36</sup> in circumstances where, among other things, the loss or damage occurred in the course of employment and was due to the fault of the employee.

Secondly, more importantly, Section 37D (1) (b) of the Pensions Fund Act<sup>37</sup> gives the pension fund of the employee a discretion to withhold, or deduct, payment of any benefits due to the employee in respect of damage caused to the employer arising from his 'theft, dishonesty, fraud or misconduct,' provided that the employee has admitted liability in writing or the employer has obtained a judgment in respect of the compensation of the damage caused.<sup>38</sup> The amount so withheld or deducted is then paid to the employer, which places him in a more secure position when measured against the risks of suing a person who may have no funds or security to satisfy a judgment against him.

*Excursus: Where a Qualification is Improperly Obtained*

An interesting situation may arise where a university confers a degree that the student subsequently relies upon in an application for employment where the qualification is a condition for appointment. On the strength of the said qualification, the student is appointed. Upon discovering that the student's plagiarism materially taints the degree, the University revokes the degree. While it falls outside the scope of this paper to consider the powers and procedures governing the process of revocation of a degree, it is established that a university may, in the absence of an express statutory provision providing for revocation, revoke a degree under common law. There are two scenarios. First, in the event of a material error, where,

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<sup>36</sup> 'Section 34(2) of the Basic Conditions of Employment Act 75 of 1977'.

<sup>37</sup> Act 24 of 1956.

<sup>38</sup> 'The Judgment May Be Civil in Form or a Compensatory Order Made in Terms of Section 300 of the Criminal Procedure Act 51 of 1977'.

for example, a student who has failed is mistakenly placed on the graduation list. Second, in instances of fraud or dishonesty, as in the case under discussion, where plagiarism has taken place. Not only is such revocation possible in law, but the university may be obliged to take corrective action on the basis that the conferment of a degree amounts to 'a certification to the world at large of the recipient's educational achievement and fulfilment of the institution's standards'.<sup>39</sup>

The issue is whether an employer is entitled to dismiss the employee in these circumstances. Apart from the employee's dishonest dealings with the university regarding his degree, such deceit permeates through to the employment relationship where the employee takes up employment in circumstances where he knows that he is unable to meet the qualifications for the job as he was aware that his degree was tainted by plagiarism. It is in this context that his misrepresentation is material, apart from his record of dishonest conduct as a student. In this regard, an analogy may be drawn where an employee fails to disclose to the employer that the employee's driving license was obtained by relying on a false foreign license.<sup>40</sup>

In any event, dishonesty prior to commencing employment may be sufficient to justify dismissal even in circumstances where the dishonesty is discovered after a period during which the employee rendered impeccable service.<sup>41</sup>

### **Illustrative Example from South African case Law**

In the box below, we summarise what we consider a leading and illustrative South African case on the issues discussed in this paper. The facts and the decision in Passenger Rail Agency of South Africa (PRASA) v Mshushisi Daniel Mthimkhulu Case number 42056/2015, decided on 26 November, 2019, are outlined in the box immediately below.

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<sup>39</sup> See the unreported case of 'Potwane v University of KwaZulu-Natal Case No 5347/2012 KwaZulu-Natal High Court' Durban at 1. This matter is now on appeal to a full bench of the Natal Provincial Division.

<sup>40</sup> 'City of Cape Town v SALGBC & Others (2) (2011) 32 ILJ 1333 (LC)'.

<sup>41</sup> Grogan (n 18).

***PRASA v Mshushisi Daniel Mthimkhulu 2019, High Court of South Africa, Gauteng Local Division, Johannesburg***

**The Facts:**

Mshushisi Daniel Mthimkhulu (Mthimkhulu), who was an employee of PRASA, misrepresented to his employer in 2010 that he had a national diploma and a bachelor's degree from the Vaal University of Technology in South Africa. As a direct consequence of the misrepresentation, his employer appointed him to the post of Executive Manager: Engineering Services. A few months later after the new appointment, Mthimkhulu misrepresented to his employer that he had been awarded a doctorate by the Technische Universitat Munchen in Germany, and on the strength of the 'doctorate,' had been offered a job as an engineering services specialist, with a salary of 2,8 million South African Rand per annum. PRASA made a counteroffer of 2,8 million Rand and Mthimkhulu stayed and did not take the other offer in Germany. After media reports that Mthimkhulu possessed fake qualifications, PRASA investigated and established that indeed Mthimkhulu did not have the qualifications he claimed to have. He was hauled before a disciplinary hearing and subsequently dismissed.

**Parties Contentions:**

PRASA argued that it had suffered patrimonial loss because of paying Mthimkhulu a hefty salary, which he did not deserve because he has lied about his qualifications. Mthimkhulu insisted that he did not make any of the alleged misrepresentations.

**Findings:**

Judge Windell described the case as a delictual (tort) action based on fraudulent misrepresentations. The court found that Mthimkhulu had falsely represented to his employer that he had a diploma, a bachelor's degree, a doctoral degree, and an offer of employment from a Germany company. The misrepresentations led his employer to employ him in the positions he was appointed to. PRASA was awarded damages amounting to R5 771 854.39.

***Notes from the Mthimkhulu case***

It is worth restating that had Mthimkhulu not misrepresented his qualifications, he would have been employed based on a high school leaving certificate since he did not have any university degree. His misrepresentation was quite daring (he claimed to have a diploma, a first degree, a master's degree, and a doctoral degree), enabling him to move fast through the employment ranks and occupy strategic positions. It is mindboggling that a high school certificate holder led PRASA's strategic engineering operations. Such misrepresentation is costly because through

Mthimkhulu's leadership, PRASA ordered locomotives from Sweden costing 2.6 billion Rands, but the locomotives were unsuitable for South African local rail conditions.<sup>42</sup> This clearly illustrates that the falsification of qualifications has severe economic and other implications for the employer. In this case, PRASA sustained a 2.6 billion Rands loss. It is heartening that the Mthimkhulu case later took a criminal law turn. He was convicted on three counts of fraud by a magistrate court three years after the High Court found him guilty of fraudulent misrepresentation.

### Conclusion

The falsification of qualifications is a blight on society. It generally constitutes conduct that requires a degree of premeditation. The employee has ample time to reflect on his conduct before executing it. It can place him at an unfair advantage against other suitably qualified applicants competing for the same position. In the Mthimkhulu case, the employee attended the Vaal University of Technology but never completed the qualifications he claimed to have completed. He further claimed to have obtained a doctorate from Germany and insisted on being referred to as 'Dr Mthimkhulu.' He drafted and submitted a CV to his employer and listed all the qualifications he claimed to have, including a doctoral qualification. He misrepresented every aspect of his qualifications. Not only may such dishonesty constitute fraud on the employer, but depending on the nature of the employment, the dishonesty could be prejudicial to those whom the employee serves during employment. The observation is particularly true in professions such as law, medicine, or engineering, where proper qualifications are crucial to render a reliable service. In some instances, like the *Mthimkhulu* case, the misrepresentation poses a serious technical risk to the employer and potential reputational risk in the corporate context.

While one would expect that the legal consequences outlined above should constitute a sufficient deterrent to those who contemplate acting dishonestly,

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<sup>42</sup> Khaya Koko, 'Bogus Prasa Engineer Daniel Mthimkhulu Guilty of Fraud' (*Mail & Guardian*, 2022) <<https://mg.co.za/news/2022-01-31-bogus-prasa-engineer-daniel-mthimkhulu-guilty-of-fraud/>> accessed 21 June 2022.

employers may be tempted not to follow through with the remedies at their disposal from a practical perspective. Where an employee suspected of dishonesty resigns prior to disciplinary proceedings, the employer may think that little purpose will be served in pursuing the matter. Further, the employer may be keen to secure the employee's resignation as part of a settlement to avoid the costs, delays, and reputational fallout attendant on disciplinary proceedings. For example, where an employee is suspended from duty pending disciplinary action, the employer must continue paying the unproductive employee's salary pending the proceedings' finalization.<sup>43</sup>

Even when employers attempt to avoid legal intervention and the consequent over-judicialization of disciplinary proceedings by confining the accused employee to representation at such proceedings to, for example, a trade union representative or a fellow employee,<sup>44</sup> the constitutionality of such a limitation is now in issue. In an administrative law context, even when the rules governing an administrative process expressly exclude lawyers from representing a person at a hearing, the presiding officer is nevertheless obliged to entertain an application for legal representation. He is required to exercise a discretion which may result in granting such representation in serious and complex cases despite any procedural rule barring lawyers from the proceedings. To act otherwise by simply dismissing the application on the basis that the rules exclude lawyers would amount to a procedural irregularity.<sup>45</sup>

To the extent that disciplinary proceedings involving employees may be considered administrative in nature, this approach has influenced labor law. While an employee has no absolute right to legal representation, the presiding officer should at least exercise his discretion when faced with an application of this nature, even in circumstances where the disciplinary code expressly proscribes such

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<sup>43</sup> *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085'.

<sup>44</sup> As provided for in item '4(1) of the Code of Good Practice: Dismissal'.

<sup>45</sup> *Hamata & Another v Chairperson, Peninsula Technikon Disciplinary Committee & Others* (2002) ILJ 1531 (SCA)' See also section '3(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")' which, in promoting procedural fairness in administrative action, gives the administrator a discretion to allow a person.



representation.<sup>46</sup> The upshot is that despite a disciplinary rule to the contrary, the employee may obtain legal representation in the appropriate case. This, in turn, may have a domino effect in that the employer may feel obliged to level the playing fields by securing the services of a lawyer to prosecute at the disciplinary inquiry. This may further entail appointing a person with legal training to preside over the proceedings where both parties are legally represented. While the employee will obviously be responsible for the costs of his lawyer, the balance of legal costs will be for the employer's account. There is a grim prospect that the intervention of lawyers is likely to result in protracted proceedings, coupled with the fact that the employee may be on suspension with full pay, and the employer will have to manage his business without the services of the suspended employee.

The ever-attendant risk is that the employer may fail to discharge the onus on a balance of probabilities that the employee is guilty of the alleged misconduct, no matter how strongly he suspects the employee is culpable. Securing cogent evidence is not easy where fellow employees are relied upon to implicate a colleague. The costs and delays mount where, upon dismissal, the matter is referred to an internal appeal process, if one is in place, or the dispute is taken to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation, and if that fails, arbitration. The possibility of a review of the CCMA proceedings in the Labor Court cannot be ruled out. There may be a further appeal to the Labor Appeal Court. It is against the above background that an employer may be tempted to settle the matter, even in circumstances where the settlement is prejudicial to the employer and unduly beneficial to an employee who is guilty of misconduct. With his employment record intact and settlement in place, the terms of which are invariably embargoed as 'confidential,' the employee is at liberty to resume his career elsewhere with a 'clean' record. From the employee's perspective, his endeavors were worthwhile. However, the labor market, in particular, and society, in general, are left the poorer where like-minded individuals may be tempted to test the waters of dishonesty in circumstances where deterrence is weak.

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<sup>46</sup> 'Grogan 281 Supra Who Refers to MEC: Department of Finance, Northern Province v Mahumani (2004) 25 ILJ 2311 (SCA)'.

These issues may be circumvented having regard to authority for the view that the withdrawal of an offer of employment will not amount to dismissal if the appointment is made subject to a condition precedent on the employee having to comply with specific requirements,<sup>47</sup> such as producing proof of qualifications. This approach has been reinforced recently by the Labor Appeal Court.<sup>48</sup> Some protection may be afforded to an employer by incorporating a resolutive condition in a contract of employment whereby the contract will end if the employee fails to produce proof of a specific qualification. This governs the contractual relationship between the parties, entitling the employer to terminate the employment relationship by enforcing the resolutive condition should the employee fail to comply. A condition of this nature avoids the necessity of a disciplinary hearing. Once the condition is triggered, the defaulter no longer has any employment status as the employment contract no longer exists; this deprives the various labor tribunals and the labor courts of jurisdiction.

The courts generally scrutinize so-called automatic termination clauses in employment contracts purporting to deprive an employee of access to the protection of labor legislation. This tactic may undermine the protection afforded to an employee under labor legislation by making provision for ending an employment relationship without having to comply with the onerous legislative procedural and substantive requirements associated with an employee's dismissal.

The Labor Appeal Court confirmed this approach when considering a condition in an employment contract making the appointment 'subject to [a] vetting and screening process.' It further provided that 'should the revealed outcomes become negative, your contract will be automatically terminated'. Negative information having come to the employer's attention, the employment contract was terminated with immediate effect. The court concluded that it was not dealing with an allegation of misconduct which would bring into play fairness requirements, both at a substantive and procedural level, as there is no breach of a contractual term. A

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<sup>47</sup> Grogan (n 18) [167].

<sup>48</sup> 'Nogcantsi v Mnquma Local Municipality and Others [2017] 4 BLLR 358 (LAC)'.

condition is something external to the contract. It makes no difference whether the condition is suspensive or resolutive with the court finding that:

What does matter is whether the condition prevents the employee from exercising any right conferred by the LRA, which is what Section 5(2)(b), read with Section 5(4) of the LRA, is set against. The enquiry should be whether the agreement entered into prevents the employee from exercising any of such rights, and not whether the condition is suspensive or resolutive.<sup>49</sup>

While the facts of this case turned on the employer discovering prior alleged criminal conduct of the employee, the court found that its ruling would be equally applicable to the employment contract of a chauffeur containing a suspensive condition that a valid driver's license must be produced, or in the case of a pilot, the production of a valid pilot's license. The court confirmed that, as the services of the employee had automatically terminated through operation of law, he had not been dismissed, thereby depriving the court of jurisdiction to entertain the merits of the matter.

Whatever the approach adopted by the employer may be, perhaps the issue of ensuring proper deterrence is in place is by introducing some form of compulsory reporting to the appropriate state authority where the employee's misconduct is criminal in nature.

There has been some progress in the form of the National Qualifications Framework Amendment Act, 2019 ('the Act'). Employers and educational institutions must refer unregistered qualifications to the South African Qualifications Authority (SAQA) for verification which is then obliged to verify their validity.<sup>50</sup> Maintaining two separate registers of misrepresented and fraudulent qualifications is required.<sup>51</sup> Having complied with the provisions of the Promotion of Administrative Justice Act 3 of 2000, if SAQA finds that a qualification is misrepresented or is declared by a court of law to be fraudulent, SAQA must inform the relevant professional body and record certain prescribed information in the appropriate

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<sup>49</sup> '3(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")' (n 45).[38].

<sup>50</sup> 'Section 4(a), Read with Section 7, of the National Qualifications Framework Act 12 of 2019'.

<sup>51</sup> 'Section 4(c) of the Act'.

register.<sup>52</sup> Any person who falsely claims to have a qualification is guilty of an offence, attracting a sentence which may be imposed for the offence of fraud.<sup>53</sup> This explains why Mthimkhulu was later convicted of fraud.

Several features are salient. The Act's provisions are not only confined to fraudulent or criminal activity. They are wide enough to include a 'misrepresented qualification' which purports to be authentic but was erroneously issued to the holder and presented in good faith to another person believing it to be genuine.<sup>54</sup> The process is qualified by compelling compliance with just administrative action, but in the case of fraud, a conviction must be obtained in a court of law. These safeguards are essential to obviate prejudice which may arise from an erroneous entry in a register. Of interest is that the Act extends to monitoring foreign qualifications, which fills the lacuna left in the Higher Education Act, as discussed earlier. Ultimately it may be concluded that the Act will promote the ability of employers to assess the authenticity of qualifications with the additional benefit of a 'naming and shaming' process in the case of fraud. Naming and shaming may deter those contemplating defrauding an employer by submitting false qualifications when applying for employment. It may also address the mischief of employees being able to seamlessly secure alternative employment without attracting any real sanction after the detection of their deceit.

Finally, we call upon all employers to be practical and vigilant, foregrounding practical skills and the technical ability to do a job or perform a task rather than emphasizing paper qualifications. Prospective employees who claim to have the required qualifications must be subjected to practical competency tests during interviews. Practical questions and tests during interviews will, in all likelihood, expose fakes, pretenders and dishonest opportunists.

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<sup>52</sup> *ibid* (e).

<sup>53</sup> 'Section 7 of the Act'.

<sup>54</sup> 'Section 1(e) of the Act'.

**Bibliography**

‘1319B’.

‘1319H’.

‘2012 (12) BCLR 1297 (CC)’.

‘3(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”)’.

‘4(1) of the Code of Good Practice: Dismissal’.

‘As Read with Item 4 (1) of the South African Code of Good Practice: Dismissal’.

‘Auret v Eskom Pension Provident Fund (1995) 16 ILJ 462 (IC)’.

‘Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)’.

Brown GM, ‘Degrees of Doubt: Legitimate, Real and Fake Qualifications in a Global Market’ (2006) 28 *Journal of Higher Education Policy and Management* 71 <<https://doi.org/10.1080/13600800500440789>>.

‘Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC)’.

‘Central News Agency (Pty) Ltd V CCAWUSA & Another (1991) 12 ILJ 340 (LAC) at 344 Which Dealt with a Case of Theft against the Employee’.

‘Cf De Beers Consolidated Mines Ltd v CCMA and Others (2000) 21 ILJ 1051 (LAC)’.

‘City of Cape Town v SALGBC & Others (2) (2011) 32 ILJ 1333 (LC)’.

‘City of Cape Town v SALGBC and Others [2011] 5 BLLR 504 (LC)’.

‘Eskom Holdings Ltd v Fipaza and Others [2013] 4 BLLR 327 (LAC)’.

‘Flights SAA Defends CEO Accused of False Qualification’ (*Travel 24 News*, 2015) <<http://traveller24.news24.com/News/Flights/SAA-defends-CEO-accused-of-false-qualifications-20141125>> accessed 16 June 2022.

Gareth Van Onselen, ‘Pallo Jordan’s Phantom Doctorate’ *Timeslive* (New York, 4 August 2014) <<https://www.timeslive.co.za/politics/2014-08-04-pallo-jordans-phantom-doctorate/>>.

‘Grogan 281 Supra Who Refers to MEC: Department of Finance, Northern Province v Mahumani (2004) 25 ILJ 2311 (SCA)’.

Grogan J, *Dismissal, Discrimination, and Unfair Labour Practices* (2nd edn, Juta 2007).

‘Hamata & Another v Chairperson, Peninsula Technikon Disciplinary Committee & Others (2002) ILJ 1531 (SCA)’.

‘Harley v Bacarac Trading 39 (Pty) Ltd (2009) 30 ILJ 2085’.

Ho J and others, ‘The Influence of Competition on Motivation to Fake in Employment Interviews’ (2019) 18 *Journal of Personnel Psychology*.

Jimu I, ‘Fake Qualifications and the Challenge of Regulating Higher Education in Southern Africa’ (2018) 6 *Modern Africa: Politics, History and Society*.

Kemp G, *Criminal Law in South Africa* (3rd edn, Oxford University Press 2019).

Koko K, ‘Bogus Prasa Engineer Daniel Mthimkhulu Guilty of Fraud’ (*Mail & Guardian*, 2022) <<https://mg.co.za/news/2022-01-31-bogus-prasa-engineer-daniel-mthimkhulu-guilty-of-fraud/>> accessed 21 June 2022.

‘Labour Court Ntseliseng Khumalo v University of Johannesburg Case No JS 533/16 of 8 February 2018’.

Lindeque M, ‘Prasa Hit By Another Qualifications Probe’ *Eyewitness News* (Johannesburg, 9 August 2015) <<https://ewn.co.za/2015/08/09/Prasa-hit-by-another-qualifications-scandal>>.

‘LTE Consulting (Pty) Ltd v CCMA and Others Case No JR1289/14 of 8 August 2017’.

‘Nogcantsi v Mquma Local Municipality and Others [2017] 4 BLLR 358 (LAC)’.

‘Potwane v University of KwaZulu-Natal Case No 5347/2012 KwaZulu-Natal High Court’.

‘Rainbow Farms (Pty) Ltd v Dorasamy and Others (Unreported Case No D 303-11, 25-2-2014)’.

‘Rand Water v Stoop & Another (2013) 34 ILJ 576 (LC)’.

Regchand S, ‘UKZN Professor Quits amid Row’ *Independent Online and affiliated companies* (25 November 2008) <<http://www.iol.co.za/news/south-africa/>>

ukzn-professor-quits-amid-row-426771>.

‘S v Swarts En ‘n Ander 1961 (4) SA 589 (GW)’.

SAPA, ‘SABC Chairwoman Zandile Tshabalala Lied about Her Qualifications’ (*Timeslive*, 13 July 2014) <<https://www.timeslive.co.za/politics/2014-07-13-sabc-chairwoman-zandile-tshabalala-lied-about-her-qualifications/>> accessed 16 June 2022.

‘Section 1(e) of the Act’.

‘Section 33(1) of the Constitution’.

‘Section 34(2) of the Basic Conditions of Employment Act 75 of 1977’.

‘Section 4(a), Read with Section 7, of the National Qualifications Framework Act 12 of 2019’.

‘Section 4(c) of the Act’.

‘Section 7 of the Act’.

‘Section 9(1)(b) of the National Prosecution Authority Act 32 of 1998’.

Sithole S, ‘Matric-Less Motsoeneng Waxes Lyrical about Matric Certificates’ *Mail & Guardian* (6 January 2015) <<https://mg.co.za/article/2015-01-06-matric-less-motsoeneng-waxes-lyrical-about-matric-certificate/>>.

‘South African Post Office Ltd v CCMA and Others (2011) 32 ILJ 2442 (LAC)’.

‘South Africans Ambassador to Japan Mohau Pheko’ (*Timeslive*, 16 June 2015) <<http://www.timeslive.co.za/politics/2015/02/27/south-africa-s-ambassador-to-japan-mohau-pheko-admits-lying-about-phd>> accessed 16 June 2022.

‘The Higher Education Act under Section 66 (1)’.

‘The Judgment May Be Civil in Form or a Compensatory Order Made in Terms of Section 300 of the Criminal Procedure Act 51 of 1977’.

Tshishonga NS, *Addressing the Unemployed Graduate Challenge Through Student Entrepreneurship and Innovation in South Africa’s Higher Education* (IGI Global 2022).

‘University of Limpopo Manager Arrested for Fake Qualification’ *SABC* (23 September 2015) <<http://www.sabc.co.za/news/a/a9bfd90049f456769ededfa53d9712f0/>>

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University-of-Limpopo-manager-arrested-for-fake-qualification-20152309>.

‘Wallace v Rand Daily Mails Ltd 1917 AD 479’.

‘Workplace Law 11th Ed 246-247. Hoch v Mustek Electronics (Pty) Ltd (2000) 21 ILJ 365 (LC)’.

Act 24 of 1956.

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