

Can employers force employees to incriminate themselves?

By [Dr. Johannes Jacobus van der Walt](#)

2 Feb 2021

With a commercial South Africa only now starting to alight from unprecedented state-wide corruption, it comes as no surprise that employers confronted with allegations of misconduct, such as fraud and/or corruption, ask whether an employee can be compelled to provide self-incriminating evidence. The short answer: No. Allied hereto, employers also ask whether an employee can be compelled to provide evidence incriminating other employees. The short answer: It depends. In this article I explain the answer to each question, succinctly.



Image source: Getty Images

The Constitutional Court recently held (in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Jacob Gedleyihlekisa Zuma*) that, although former President Jacob Zuma does not have a right to remain silent in proceedings before the Commission, he is entitled to the privilege against self-incrimination. The legal principle underlying the judgment is of utmost importance, especially in the context of a commercial South Africa rife with public and private malfeasance.

The principle distilled from this judgment, which has been in development since 1995, is no person may be compelled to give self-incriminating evidence, irrespective of whether you are an accused or not, since to do so would constitute an infringement of the right to freedom and security of the person (s. 12 of the Constitution), which encompasses the privilege against self-incrimination. Crucially then, the ambit of privilege, or then right, against self-incrimination transcends the status of an accused by including within its ambit a witness to a Commission of Inquiry or a person summoned to an inquiry under the old Companies Act. So what about an employee?

The ConCourt held that

“ ... a statutory provision that compels witnesses to give self-incriminating evidence would be inconsistent with [s.] 12 of the Constitution. ”

If a statutory provision compelling witnesses to give self-incriminating evidence would be inconsistent with the Constitution, it follows that any interpretation afforded to the reciprocal contractual duty of good faith in terms of which an employer can compel an employee to give self-incriminating evidence would similarly be inconsistent with the Constitution.

The principle is, simply put, an employer cannot, whether during an investigation or at an inquiry, force its employee to give self-incriminating evidence.

Testifying against other employees

Regarding compelling an employee to give incriminating evidence concerning other employees, the ConCourt noted (in *NUMSA obo Nganezi v. Dunlop Mixing and Technical Services (Pty) Ltd*) that fiduciary duties are not implied – as a matter of law – into *all* employment relationships. Fiduciary duties may be inferred – as a matter of fact – from employment contracts and moral notions of trust, confidence, loyalty, and good faith. The contractual duty of good faith does not – as a matter of law – imply the imposition of a unilateral fiduciary obligation on employees to disclose known information of misconduct of their co-employees to their employers.

Internal legal counsel, executive employees, and financial managers are examples of positions that – by their nature – may justify the imposition of a unilateral fiduciary obligation to disclose known information of misconduct in the form of fraud and/or corruption of co-employees. Whether such an obligation may be imposed – as a matter of fact – in the context of a receptionist, is far less likely, and rightly so.

Workplace investigations and inquiries concerning misconduct involving criminal liability must have regard to the privilege against self-incrimination. Also, employers must keep in mind that they cannot, as of right, compel disclosure of known information of misconduct. Facts must support justification of such a right. Overzealousness and the failure of taking the nuances addressed herein into account may lead to an infringement of constitutional rights and an impediment to ascertaining the truth, but will definitely result legal risk by increasing in the probability of having, ultimately, subjected employees to unfair labour practices and/or dismissed employees unfairly.

For more, visit: <https://www.bizcommunity.com>