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Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: A292/2019

Before: The Hon. Mr Justice Le Grange
The Hon. Mr Justice Binns-Ward
The Hon. Mr Justice Wille

Hearing: 30 July 2020
Judgment: 5 August 2020

In the matter between:

DAVID ALEXANDER BARRIE-SMITH

Appellant

and

**MARSICANO MERCHANTS CC
t/a SOUTH ATLANTIC CABLES**

Respondent

JUDGMENT

(Delivered by email to the parties and release to SAFLII.)

BINNS-WARD J (LE GRANGE and WILLE JJ concurring):

[1] This is an appeal from the judgment of Le Roux AJ upholding the respondent corporation's claim for compensation for the damages that it suffered as a consequence of being induced by an allegedly fraudulent representation by the appellant to extend credit terms to a new concern that was then, in late July 2011, about to commence trading as Wilson Payne Electrical. The owner of the business was Marble Race Property 58 CC ('Marble Race'), which subsequently converted to a company and changed its name to become Wilson Payne Electrical Distributors (Pty) Ltd. From its inception Wilson Payne Electrical conducted business on open account with the respondent, Marsicano Merchants CC t/a South Atlantic Cables. In mid 2014, however, it fell into arrears with its payments for the goods that it had purchased on credit. The amount outstanding to South Atlantic Cables when the latter consequently ceased to do business with Wilson Payne Electrical was R520 906,05 (excluding VAT). Wilson Payne Electrical Distributors (Pty) Ltd has since been wound up, with no dividend being paid to its concurrent creditors. The winding-up application, which was at the company's own instance, was instituted in November 2014. The appellant deposed to the principal affidavit in support of the liquidation.

[2] The trial ran in two sessions during September and October 2017, and for some reason closing arguments were heard only in April 2018. The judge made an order on 10 September 2018, and furnished written reasons for the order only on 1 November 2018. The reasons gave no explanation for the delay, nor for the unconventional course in action proceedings of making an order followed only later with the reasons for it. As it was, the order that was issued did not read sensibly. It provided that the court granted judgment in favour of the plaintiff for '[p]ayment of R520 986,05, alternatively R457 963,13'. It is not clear from the record whether the problem was of the judge's making, or that of the court registrar. It was in any event of a sort that would be unlikely to occur had the judge, having reserved judgment at the end of the trial, followed the usual course of incorporating the order in a subsequently delivered reasoned judgment. The error does not yet appear to have been corrected, presumably because an application for leave to appeal was made shortly after the reasons for judgment were provided. Leave to appeal was granted by another judge more than nine months later, on 12 August 2019.

[3] The trial judge was informed during the course of the hearing that there was no dispute between the parties in respect of the quantum of the respondent's claim (which had

been agreed during the week preceding the trial in the sum of R520 906.05¹), and that the only issues for trial were therefore whether the credit arrangements entered into between Wilson Payne Electrical and the respondent had been induced by the alleged fraudulent representation by the appellant (baldly referred to as ‘the merits’). The intimation to the judge concerning the parties’ agreement on the quantum of damages would appear to have implied an acceptance by them that judgment in the respondent’s favour should follow if it succeeded in proving (i) the alleged fraudulent misrepresentation and (ii) its inducing effect in the conclusion of the agreement to extend credit terms to Wilson Payne Electrical. In other words, it would seem that causation was also conceded contingent upon the establishment of those two elements. The appellant’s counsel acknowledged as much in his heads of argument for the appeal.

[4] The grounds upon which the respondent brought the claim were pleaded in the following terms in its particulars of claim, as finally amended:

8. In the course of a meeting held at the plaintiff’s premises during or about the time that the credit application was submitted, the defendant stated or represented to the plaintiff, represented by Eugenio Fabrizio Marsicano, (‘Marsicano’) that an agreement had been concluded in terms of which Marble Race had secured funding by way of an investment of “one million pounds” (i.e. a multi-million Rand investment) from the defendant’s Irish acquaintances (‘the Irish investment’).
9. The defendants aforementioned statement:
 - 9.1 was false in that no such investment had been secured;
 - 9.2 was made fraudulently, alternatively negligently;
 - 9.3 induced the plaintiff to hold the belief at all material times that Marble Race:
 - 9.3.1 was owned by the defendant and funded by Irish investors, when in truth Marble Race was owned and funded by JF Engelbrecht;
 - 9.3.2 had secured adequate funding (more particularly, funding in the amount of “one million pounds”, i.e. several million Rand), when in truth it had not;
 - 9.4 caused the plaintiff to suffer loss in the respects pleaded more fully below.
10. In the alternative to paragraph 10.1 above (*sic*):
 - 10.1 Subsequent to the meeting referred to in paragraph 9 above (*sic*), the Irish investment was withdrawn or did not materialise;

¹ The amount equated to the sum in which Wilson Payne Electrical was indebted to the respondent for goods purchased on credit when it was placed into liquidation. The notion that the respondent’s damages could be justifiably quantified in that way is supported by the approach adopted in comparable circumstances by the appeal court in *Fourie v First Rand Bank Ltd* [2012] ZASCA 119 (18 September 2012); 2013 (1) SA 204 (SCA); [2013] 1 All SA 291, at para 38-39.

- 10.2 the defendant failed to disclose this fact to the plaintiff despite being under a duty to do so.
- 11. The defendants breach of his aforementioned duty of disclosure:
 - 11.1 was wrongful;
 - 11.2 was fraudulent, alternatively negligent;
 - 11.3 induced the plaintiff to hold the belief at all material times that Marble Race had secured adequate funding (more particularly, funding in the amount of “one million pounds”, i.e several million Rands), when in truth it had not;
 - 11.4 caused the plaintiff to suffer loss in the respects pleaded more fully below.

Inducement and loss

- 12. As a result of the defendant's aforementioned misrepresentation, alternatively non-disclosure:
 - 12.1 The plaintiff, acting on the strength of such misrepresentation, alternatively such non-disclosure, granted the credit application and commenced and continued to supply goods on credit to Marble Race.
 - 12.2 The plaintiff suffered loss in the aforementioned amount of R520 906.05 (being the amount of Marble Race's indebtedness to the plaintiff (excluding VAT) which is irrecoverable), alternatively in the amount of R457 963.13 being the plaintiff's cost of sales in respect of the aforementioned goods supplied on credit to Marble Race (the composition of which appears from the column headed 'Total Cost' in annexure PC 2 hereto).
 - 12.3 The defendant is accordingly liable to the plaintiff in the amount of R520 906.05, alternatively R457 963.13.

[5] It was rightly common ground between counsel that the case turned on questions of fact, there being no issue between the parties on the applicable legal principles, which are well-established. As to be expected in the circumstances, the trial court's determination of the action adversely to the appellant was squarely founded on the judge's findings on the facts. It was perhaps predictable therefore that in his heads of argument the respondent's counsel placed considerable emphasis on the general rule of appellate practice that an appeal court will not readily interfere with a trial court's findings on issues of fact and credibility.

[6] While the incidence of the rule is trite, the nature of its import is, however, all too often mischaracterised. The true position was succinctly elucidated in the following terms in *Bernert v ABSA Bank Ltd* [2010] ZACC 28 (9 December 2010); 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 at para. 106: *‘The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading “the cold printed word.” The main advantage being the opportunity to observe the demeanour of the*

witnesses. *But this rule of practice should not be used to “tie the hands of appellate courts”.* It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.’ (footnotes omitted). The correct approach to the rule was reiterated by the Constitutional Court in *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 (26 April 2016); 2016 (4) SA 121 (CC); 2016 (6) BCLR 709, at para. 40: ‘... the deference afforded to a trial court’s credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case’. And, in what is widely accepted as the locus classicus on the subject, *R v Dhlumayo* 1948 (2) SA 677 (A); [1948] 2 All SA 566, Davis AJA stressed that the practice by appellate courts to ordinarily show due deference to the factual and credibility findings of trial courts should not negate their duty to give meaningful effect to the object of an appeal, which is to afford ‘a rehearing’ on the record (supplemented, only in exceptional cases, by additional evidence that the appeal court might admit).²

[7] It was therefore required of us to consider the evidence adduced at the trial, not with a view to looking to find fault with the trial judge’s findings, but to satisfy ourselves that there was not valid reason to hold on reconsideration that the result of the trial was wrong.

[8] The first witness called by the respondent was Mr Michael Cooke, who was the Cape Town manager of a business known as Glo Elec. He described Glo Elec as a competitor of the respondent’s business. It supplied electrical products to wholesalers. It did not do business directly with electrical contractors. The latter purchased their electrical product needs from wholesalers, such as Voltex.

[9] Cooke described how, in July 2011, in response to an approach from the appellant, whom he had known through the industry for about 35 years, he had attended at Wilson Payne Electrical’s place of business with a credit application to be completed on behalf of the new business. He understood at the time that the respondent was starting a new wholesale business from the premises at which the business of Wilson & Herd had operated a similar

² At 698-700 (SALR).

business, and wished to purchase supplies from Glo Elec. Cooke engaged in general conversation with the appellant during his visit, in the course of which the appellant told him that the new business was being capitalised by his wife's wealthy aunt's family business. Mr Cooke was aware that the appellant's wife was Irish, or of Irish extraction. This information gave Cooke some assurance about the financial strength of the new business, although he said it did not affect his decision to recommend to his head office that the credit application completed by the appellant should be approved. Cooke said Glo Elec would not, however, have extended credit terms to, or done business with, Wilson Payne Electrical had it been appreciated that the new concern was actually controlled by one JF Engelbrecht. This would have been so because, using the vehicle JFE Electrical, Engelbrecht was a contractor, and by doing business with him through Wilson Payne Electrical Glo Elec would be undermining their other wholesaler customers. Something that could possibly lead to a boycott of Glo Elec by those established customers.

[10] The next witness was one Sean Roetz, who was the regional manager of Voltex, an electrical wholesale business. He also described having received a credit application from the appellant on behalf of Wilson Payne Electrical. He said that he had heard from various sources that the appellant was involved in a managerial capacity in a start-up wholesale business. Like the preceding witness, he said that he would not have approved the credit application had he been aware that the person behind the new business was in fact JF Engelbrecht. He stated that although he had been told by other people that the new business was being funded by Irish interests, the appellant had never communicated such information to him directly.

[11] Mr Roetz testified that at the time Marble Race converted to a company with the Wilson Payne name it had been necessary, in accordance with Voltex's policy, for it to submit a new application for credit. That happened in March 2012. The respondent corporation was given as one of the referees named by Wilson Payne Electrical in the new application for credit. Roetz said that he had therefore discussed the application with Mr Marsicano of the respondent, with whom he had occasional meetings about once a quarter. Marsicano told him that it was his understanding that that Wilson Payne Electrical was funded by Irish investors. Roetz showed no interest in ascertaining more specific evidence concerning the identity of the reported Irish investors, or the nature and size of their investment. It does not appear that the information that he had been given second-hand was regarded as material. He appeared to have been satisfied as to the new business's

creditworthiness simply by reason of his glowing view of the appellant's highly regarded personal reputation and depth of business experience. The pertinence of Roetz's evidence was that it served to confirm that Marsicano's understanding as of March 2012 that the new business had been capitalised by Irish investors. It negated the argument addressed to us by the appellant's counsel that Marsicano's evidence concerning his understanding that the business had been capitalised by Irish investors had been 'retrofitted', to use the expression employed by counsel.

[12] The third witness to testify in support of the respondent's claim was Mr Eugenio Marsicano, the sole member of the respondent close corporation. He testified that the respondent had previously done business on a cash only basis with Wilson & Herd. This was because he had had two previous unhappy experiences with entities with which a certain Mr Raad had been associated going under while heavily in debt to the respondent. Mr Raad's sister was the owner of Wilson & Herd and the business was managed by Raad. Marsicano had gathered from the letter that the appellant had sent out to suppliers in late July 2011 that Wilson & Herd was being 'revamped', as he put it, into Wilson Payne Electrical.

[13] The letter in question, which was dated 21 July 2011, was attached as annexure PC 1 to the respondent's particulars of claim. The document had Marble Race's name and registration number in the header and carried the new business's trading name, 'Wilson Payne Electrical' in large bold font at the top of the body of the letter. The letter went as follows:

Dear Supplier,

This will serve to advise you of the changes which will take place at this month end.

The business of Wilson & Herd will cease trading on the 29th July; Wilson Payne Electrical will purchase the stock, assets, employ some of the staff and take over the lease of the existing premises.

Wilson & Herd will remain responsible for collecting their data's book and the payment of creditors.

Wilson Payne Electrical will commence trading on the 1st August 2011.

Our bankers are ABSA Business Bank Durbanville T/phone no. 021-9155318.

Cheque account name: Marble Race Property 58 CC.

Check account number: 406[...].

All other detail is to be found on our letterhead.

We attach our credit application.

Sincerely,

[signature]

David Barrie-Smith

The footer of the document recorded the following information: ‘*Directors: D.A. Barrie-Smith (M.D.) (Pending appointment with CIPC).*’ (The abbreviation CIPC would appear from the context to refer to the Companies and Intellectual Property Commission, which is the body responsible under the Companies Act, 2008, for the registration of companies.)

[14] The letter had been accompanied by an application for credit. The pro forma application form, which was completed by the appellant, had been collected by him from Mr Marsicano during an unannounced visit to the respondent’s offices two or three days earlier. The appellant had been accompanied by Mr Raad. Marsicano testified that he had been struck by the incongruity of the two men visiting him in each other’s company because he considered them to be most unlikely business associates. He said the appellant had a ‘sterling’ reputation in the electrical business community, whereas Mr Raad’s was ‘somewhat tarnished by his previous failed business dealings’.

[15] Mr Marsicano related that his two visitors told him about how the appellant was going to take over Wilson & Herd’s business using a new vehicle in which the appellant would hold a 100% proprietary interest. The appellant would be responsible for running the business, whilst Raad would be in charge of sales. Marsicano said that the appellant reminded him of the chance encounter that they had had at Istanbul Airport two months previously when the appellant was on his way back to Cape Town after a visit to Ireland. The appellant told Marsicano that he had secured financing for the new venture worth £1 million during that visit. Asked by the respondent’s counsel what he saw as being the significance of the mention of the ‘Irish investment’, Marsicano answered: ‘Well the way I see things now is not the way I saw things then. The way I saw things then it was a statement that they had significant financial muscle behind them.’ He said that he considered that the mention of the investment had been directed at allaying his fears arising from his prior unhappy dealings with Raad. He considered that the appellant, who had an excellent reputation, could be trusted to protect and maximise the benefit of an investment by his wife’s family. He therefore told the appellant then and there that he could consider the credit facility to have been granted.

[16] The appellant nevertheless took away a form to complete in respect for the application for credit, which was returned to Marsicano on 22 July 2011, together with a copy of the letter quoted in paragraph [13] above.

[17] There was a degree of ambivalence in the evidence concerning whether it had been the plaintiff or Raad who had expressly represented that the new business was being funded by Irish investors. Nothing turns on it in my judgment, however, because the evidence that both men were making a joint pitch was clear. If it had been Raad rather than the appellant who uttered the critical words does not matter. If that were the case, it is clear from the evidence concerning the context in which the words were uttered that the appellant associated himself with the representation and was party to their intended misleading effect. I shall come presently to the documentary evidence to which the respondent's counsel took us in argument, which established very clearly that the reference at the meeting to the Irish investment was not idle chatter.

[18] Mr Marsicano said that he was unaware that Mr JF Engelbrecht had bound Crystal Ball Properties 132 (Pty) Ltd as surety for Wilson Payne Electrical. He said that he knew Engelbrecht was major player in the electrical contracting field and, for the same reasons as those given by a previous witness, Mr Cooke, in respect of the position of Glo Elec, would not have been prepared to supply product to him directly. He said that had he known of Engelbrecht's proprietary interest in Wilson Payne Electrical he would not have been willing to extend credit terms to the new business. The deed of suretyship signed by Engelbrecht on behalf of Crystal Ball Properties was dated 24 August 2011.

[19] Mr Marsicano was also taken to a deed of cession executed by the appellant on behalf of Wilson Payne Electrical Distributors (Pty) Ltd in March 2012, in terms of which the latter ceded its book debt to Crystal Ball Properties 132 (Pty) Ltd *in securitatem debiti*. Marsicano stated he had not been informed about the cession at the time. Crystal Ball Properties, which was another entity controlled by Engelbrecht, was the only creditor to receive a substantial dividend when Wilson Payne Electrical Distributors (Pty) Ltd was wound up.

[20] Mr Marsicano testified that he heard in or about June 2013 that Mr Dave Collins was replacing the appellant as managing director of Wilson Payne Electrical Distributors (Pty) Ltd. He understood at the time that the change was in consequence of a deterioration in relations between the appellant and Mr Raab concerning the running of Wilson Payne Electrical. He contacted the appellant because of his concern about where that left the appellant and his Irish investors. The nature of Marsicano's concern could only have been related to the question whether he could continue to regard Wilson Payne Electrical as creditworthy. The appellant assured him that he would remain the sole shareholder in the

company and that he would be looking after the investment and visiting the business on a regular basis.

[21] Wilson Payne Electrical Distributors (Pty) Ltd circulated a letter to the company's suppliers and customers, dated 20 June 2013, concerning the appellant's retirement. It went as follows:

To our Suppliers and Customers.

Re: Retirement: David Barrie-Smith

Dear Sir/Madam

I need to advise you that due to health related problems, which are debilitating rather than life threatening, I am unable to continue in my position at W.P.E.D.

There would be risk in remedial operations which might improve my condition, I do not consider this option viable.

I will still be available to W.P.E.D to assist with the change over.

We are just completing our second year of trading at W.P.E; and I believe have established ourselves favourably with both customers and suppliers.

My investors have indicated their intention to remain invested in the business, having been appraised (sic) of my health problems and the changes it necessitates.

Mr Dave Collins has been appointed Managing Director.

In thanking you for your support over the past year I would like to assure you that there will be at no time be a lack of continuity.

Yours Sincerely,

David Barrie-Smith.

The sentence that I have underlined is indicative, in my judgment, of the appellant's appreciation that at least some of the business's suppliers had a material interest in being reassured that what they understood to be the third party financial investment underpinning the business would not be affected by his departure. There is no reason to believe that the nature of the appellant's appreciation in this regard would have been any different at the inception of the business when he was endeavouring to get those suppliers to transact with the business on terms of credit. It is also notable that the statement was made in the context of the appellant's encouragement of a widespread misperception that the investors were Irish, a matter I shall deal with in more detail presently.

[22] At the time that word began to spread about the pending liquidation of Wilson Payne Electrical Distributors (Pty) Ltd in late 2014, Mr Marsicano, being concerned about the extent of the respondent's exposure in respect of Wilson Payne Electrical's indebtedness for goods purchased from the respondent on credit, made enquiries of the appellant as to whether he still retained his proprietary interest in the business, who was actually in control of it, and

what had become of the Irish investors. Some of these communications were telephonic and others by email. The appellant's documented replies were vague and unsatisfactory. He claimed a loss of memory and said that, as far as he was aware, the investors in the business remained the same as they had been when the business was launched. He did not deny having represented to Marsicano that there had been an Irish investment, yet it was starkly apparent in the evasive manner in which his emails were couched that he studiously sought at that stage to avoid confirming the identity of the investor(s) as Irish.

[23] The appellant gave evidence. He testified that in May 2011 he had accompanied his wife on a visit to latter's extensive family in the Republic of Ireland. While there, he had attended the funeral of a distant relation of his wife's. Another distant cousin had engaged him in conversation at the graveside, and on learning that he was retired suggested that he should acquire a business to keep himself busy. The cousin, a Mrs Dorman, indicated that she would be able to assist him in raising capital to finance the business if he were to send her a credible business plan.

[24] According to the appellant, this indication from Mrs Dorner chimed harmoniously with an indication that Mr Johan Engelbrecht had given him, only a few days before, of the possibility of a business opportunity becoming available. The indication had been given during a telephone conversation that the appellant had with Engelbrecht on the eve of his departure for his trip to Ireland. He had told Engelbrecht that he was finding his retirement 'chilling', by which it would appear that he meant boring and depressing. Engelbrecht had told him he should contact him about a business opportunity immediately upon his return from Ireland.

[25] He also regarded it as portentous that on his journey back to Cape Town from Ireland he had by chance encountered Mr Marsicano at Istanbul Airport, where they had both been in the lounge waiting to catch a connecting flight home. He actually said that when he saw Marsicano he could have jumped up and down with excitement. It was not altogether clear why the appellant should have regarded his chance encounter with Marsicano as cause for such exuberance. It would seem, however, that he was trying to convey to the trial court that he had regarded his conversations with Engelbrecht and Mrs Dorman and his meeting with Marsicano as a constellation of happenings that afforded some sort of providential confirmation that he would soon be escaping the boredom of retirement and getting back into the electrical business.

[26] The appellant testified that he visited Engelbrecht on the day after his return to Cape Town. Engelbrecht introduced him to the idea of taking over and resuscitating the ailing business of Wilson & Herd. With the assistance of Engelbrecht's daughter, he undertook a two-week long due diligence investigation into the business and concluded that it was beyond salvation. It was decided instead that a new business could feasibly take over the lease of Wilson & Herd's business premises in Goodwood and purchase some of its stock and engage some of its employees. The essence of that decision was what was subsequently conveyed to suppliers in the letter of 21 July 2011 quoted in paragraph [13] above.

[27] As to capitalising the new business, the appellant testified that he had spent time putting together a business plan to be considered by the Irish investors that Mrs Dornan had indicated she could interest in the project. No documentary evidence in corroboration of this exercise was produced at the trial. As I understood the appellant's evidence which, by reason of his inclination to ramble, was often unclear, he seemed to indicate that red tape had frustrated his ability to make meaningful progress with the idea of attracting foreign investment into the venture. This, he claimed, caused him to abandon his intention to submit a business plan for consideration by Irish investors. It does seem, however, from Mr Roetz's evidence, summarised earlier, that in the apparently closely-knit electrical business circles in Cape Town it had become widely understood that the new business being set up by the appellant was to be funded by Irish investors.

[28] The appellant said that in the circumstances it had been arranged instead that the new business would instead be capitalised by way of a R3 million overdraft facility from Absa Bank that would be underwritten with a suretyship to be provided in favour of the bank by Crystal Ball Properties 132 (Pty) Ltd, a company controlled by Mr Engelbrecht. It had been arranged that Absa Bank would be able to indicate the financial integrity of the nascent enterprise to any persons making enquiry to it.

[29] As already mentioned, the deed of suretyship by Crystal Ball Properties was executed only in August 2011, but the appellant claimed that the arrangement was in place when he met with Mr Marsicano in July to discuss the respondent doing business with the new venture. In other words, it would appear that the appellant admitted that by the time he and Mr Raad met with Marsicano the prospect of an Irish investment had been discounted and replaced by the overdraft arrangement.

[30] The appellant's evidence was equivocal and contradictory on the matter of whether an Irish investment had been mentioned to Mr Marsicano. In his plea he had bluntly denied each and every allegation in paragraph 8 of the respondent's particulars of claim.³ At times he seemed to suggest that Marsicano's allegation that he had been told about the Irish investment originated from something he had told Marsicano when they had a conversation at Istanbul Airport, whereas at other times he seemed to concede that either he or Raad had mentioned it when they met Marsicano in July, and yet sometimes also denied that this had happened. The net effect of this is that the appellant's evidence on this critical question was, to say the least, wholly unreliable.

[31] What is beyond dispute, however, is that as the apparent sole member, and later 100% shareholder, in the entity in which the business of Wilson Payne Electrical was conducted, the appellant was fronting for Mr Engelbrecht. The appellant candidly admitted as much under cross-examination. He conceded the proposition put to him by the respondent's counsel that he had held the shares in Wilson Payne Electrical Distributors (Pty) Ltd as Mr Engelbrecht's nominee. It also emerged during his cross-examination that the appellant had held his appointment as managing director in terms of a letter of appointment that bound him to keep Engelbrecht's interest in the business secret. He also conceded that Engelbrecht had independently approached Mr Raad to become involved in the proposed new venture as an employee of the Wayne Payne Electrical, even before the appellant's trip to Ireland. (Mr Raad's evidence suggested that he was first approached by the appellant, which would have been after the latter's return from Ireland, but I regard that as improbable. Raad, we should remind ourselves, was closely associated with running the business of Wilson & Herd, which was owned by his sister, and it is plain that the idea put to the appellant by Mr Engelbrecht involved investigating the viability of taking over Wilson & Herd. In my view it is unlikely that Engelbrecht would have propounded that idea without some prior interaction with Raad. I therefore find that the appellant's evidence in this respect was probably more reliable than that of Mr Raad.)

[32] The implication of the secrecy clause for the appellant's ability to frankly disclose the financing of the new business was obvious. It was unlikely to satisfy the curiosity of an astute businessman to be told only that the business had secured an overdraft. The existence of an overdraft facility made available without strong collateral would offer very tenuous

³ Paragraph 8 of the respondent's particulars of claim is quoted in full in paragraph [4] above.

comfort to a potential trade creditor. A keen businessman being asked to deal on credit terms with a new business entirely reliant on overdraft finance for its operational expenditure would want to know on what basis the bank had been persuaded to extend loan financing. During his evidence the appellant let slip that he actually regarded Mr Marsicano as one of the very few personalities in their business field that would want to enquire into by whom the new business was being financed. The unguarded observation obviously carried considerable significance in the context of the case.

[33] The appellant's evidence that any enquiry to the bank would be met with the assurance that the bank had given the new business a 'C' credit rating, did not warrant any inference that the bank would be willing to disclose that it had done so on the strength of a suretyship from one of Mr Engelbrecht's companies. On the contrary, having regard to the critical importance attached by Engelbrecht, and accepted by the appellant, to keeping Engelbrecht's involvement sub rosa, the inherent probability is that the bank would have been instructed to strictly maintain customer confidentiality in regard to such information.

[34] As a matter of probability, it may also be inferred from the evidence, including that of the appellant himself, that the idea that the new business was to be funded by Irish investors had been given wide currency in local electrical business circles. In the context of the apparent absence of any documentary evidence to substantiate the claim that an Irish investment was ever actively pursued, one is driven to wonder why this was so. Putting the story about would certainly help to put people off any idea that the new business was in fact that of Mr JF Engelbrecht, which, it was shown, was a crucial objective at the time. Events showed that Mr Engelbrecht would never have had any need for outside funding. There was certainly no demonstrated need for the appellant to find funding for *Engelbrecht's* business, whether in Ireland or locally.

[35] The following passages in the appellant's evidence under cross-examination were revealing:

There was a rumour around town that I had come back with money bags full of money which came from Irish investors. One didn't have to do anything else. It was there in the marketplace. One had to do absolutely nothing, and didn't.

Q. You, yourself, never did anything to stoke that rumour? - I can't answer that truthfully, M'Lady, for the simple fact that I don't believe I ever did anything positive to stoke it, but from the point of view of passively fending off if somebody said 'How did you get all this Irish money?', or this or that or the other thing, certainly, I colluded therewith - I allowed the preconceived idea to hold sway.

And a little later:

... You allowed it to be said that there was an Irish investment when you knew that to be false? –
Probably, ja.

And later still:

... But for the next two or three weeks I was inundated with calls about who this was and who that was for no practical business reason or anything other than just the interest of people. We were a very small community. I was a senior person. They all wanted to know what the heck I was doing. ... I had already told everybody that I was going to take Irish finance. There was no point in ... There was absolutely no point or any reason that I could see to change that it was an Irish investment. ...

[36] In all probability the Irish investment had always been a phantom, except for deceptive purposes. It is evident from the context that the deception was considered a necessary stratagem to induce suppliers to agree to extend credit terms to the new business.

[37] In *Hulett and Others v Hulett* [1992] ZASCA 111 (2 June 1992); 1992 (4) SA 291 (A); [1992] 2 All SA 308, at 310 fin -311B (SALR), Hoexter JA endorsed the following dictum of Wilson J in the High Court of Australia in *Gould and Another v Vaggelas and Others*, [1985] LRC (Comm) 497⁴ at 517 d-f:

Where a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract. However, it is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances. Examples commonly given of such circumstances are that the plaintiff not only actually knew the true facts but knew them to be the truth or that the plaintiff either by his words or conduct disavowed any reliance on the fraudulent representations.

In the current matter the appellant did not adduce any relevant evidence ‘to obstruct the drawing of th[e] natural inference of fact’.

[38] The appellant maintained, however, that there had been no intention to prejudice the creditors of the new venture because its actual financial backer (Engelbrecht) was good for ‘many, many more million rands than a million pounds’ worth of rands’. He said that it made no difference to Wilson Payne Electrical’s creditworthiness whether it was funded by an Irish

⁴ Also reported at [1984] HCA 68 (6 November 1984); (1984) 157 CLR 215; (1984) 56 ALR 31; (1984) 58 ALJR 560 and accessible on Auslii.

investor or by Engelbrecht. It was not altogether clear whether the contention was directed at materiality or causality, but irrespective of its basis it missed the point in my judgment.

[39] The misrepresentation was directed at inducing the respondent to enter into a contractual arrangement that it would not have entered into if the true facts had been disclosed. The representation was therefore not only prejudicial, but also calculated to prejudice. It was known to the appellant and Raad that Marsicano would have considered it to be against the respondent's best interests to extend credit to an electrical contractor clandestinely seeking to set up business as a wholesaler in competition with its established customers. They appreciated that that was the very reason why it was so important that Engelbrecht's involvement be kept secret. That Engelbrecht's financial support objectively might have been regarded by a prospective credit grantor as adequate to sustain the viability of the new business was irrelevant. The *respondent* would not have granted the credit application on the strength of Engelbrecht's support. The representation concerning an Irish investment was a deception conceived to hide the reality. It was as a result of the respondent having entered into the arrangement that it subsequently sustained the damages that it would have not been exposed to if the facts not been misrepresented.

[40] The appellant's counsel contended that anything that may have been said by the appellant or Raad to give Marsicano the impression that the new business was funded by Irish investors was mere idle chatter (or 'braaivleis chat', as he put it colloquially) and fell short of amounting to fraudulent misrepresentation. The respondent's counsel put that suggestion effectively to rest by reference to various documents that made it clear that the Irish investment story had been a deliberate stratagem employed to deceive parties from which the new business intended to obtain terms of credit and that it had been devised in the context of a realisation that the new business's viability would actually be dependent upon it obtaining terms of credit from its suppliers.

[41] Mr *Blumberg* demonstrated with reference to the terms of the application for credit form completed by the appellant how the ownership of Wilson Payne Electrical was a material consideration in the extension of credit to new business. He drew attention to a provision in the contract that obliged the credit applicant to inform the respondent of any change of ownership of the business, coupled with the acknowledgement that any change of ownership would result in any amount then owing to the credit grantor thereupon becoming immediately payable. Mr *Blumberg* submitted that that provision fell to be understood in the context of the draft deed of contract between the appellant, Raad and Engelbrecht, which

contained a clause that Engelbrecht's '*involvement must at all times remain a secret; all parties will vehemently protect this secret ...*'. Another document that appeared to record points under discussion between the principal parties when the setting up of a new business from the ashes of Wilson & Herd was being investigated confirmed that it had been contemplated that the new business would be dependent upon obtaining credit terms from Wilson & Herd's existing suppliers. Under subheading 'Confidentiality', it recorded '*The use of an auditor independent of both W&H and JFE [i.e. Engelbrecht] might be advantageous ...; if practical and effective could be briefed to answer queries from suppliers as to the source of funds etc, DBS [i.e. the appellant] has possible person.*'

[42] In a letter to Johan Engelbrecht, dated 28 August 2012, in the context of discussions concerning who might succeed him as the managing director of Wilson Payne Electrical, the appellant wrote: '*Finally, please at this stage do not consider me, you owe me nothing, I have been able to get out of my head, the love of wholesaling and have not enjoyed the responsibility the way I used to. I will remain very happy to have people believe I have contact with financiers in Ireland who guarantee the overdraft and want to remain invested with WPE, and that my health requires me to play a lesser role at WPE.*'

[43] When communicating with suppliers and customers concerning his intended departure from an active role in the business of Wilson Payne Electrical on account of his ill health in August 2012, the appellant's circular letter advised '*... my investors have indicated their intention to remain invested in the business having been appraised (sic) of the above*'. An intended follow up to that letter, drafted at a time when it was contemplated that one Henry Ekkermans would succeed him as managing director of Wilson Payne Electrical, provided for the appellant to say to suppliers and customers '*Our overseas financier, fully apprised of the changes, supports them*'. This was consistent with the representations actually made in 2013 when Mr Collins succeeded to the position; see paragraph [21] above.

[44] I agree with Mr *Blumberg*'s submission that the documentation clearly illustrates that the representations made by the appellant and Raad about an Irish investment in the business were made and maintained as part of a deliberately preconceived strategy to conceal the identity of the business's actual financier and to deceive the suppliers, including the respondent, from whom terms of credit were to be sought. The misrepresentation was unquestionably fraudulent.

[45] That the damages were sustained in circumstances not foreseen or intended by the appellant does not detract from the fact that they would not have been sustained but for the appellant's fraudulent misrepresentation having induced the contract. Factual causation having been established, there are no considerations of legal policy that would militate in favour of relieving the appellant from the consequences of the fraud. The causal link was sufficiently direct.

[46] There was also no merit in the appellant's suggestion that Mr Marsicano could have ascertained the facts upon enquiry to Absa Bank. That much is affirmed by the fairly recent reiteration by Brand JA in *Fourie v First Rand Bank Ltd* [2012] ZASCA 119 (18 September 2012); 2013 (1) SA 204 (SCA); [2013] 1 All SA 291⁵ of the following statement of the law in *Oranje Benefit Society v Central Merchant Bank Ltd* 1976 (4) SA 659 (A) at 673H:

‘... once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper enquiry.’

The learned judge also cited *Central Merchant Bank Ltd v Oranje Benefit Society* 1975 (4) SA 588 (C) 594E-H and De Wet & Van Wyk, *Die Suid-Afrikaanse Kontraktereg & Handelsreg* 5 ed vol 1 at 47 in support of the proposition.

[47] In the result the following order is made:

Save that the order of the court a quo is rectified by deletion therein of the words ‘..., alternatively R457 963,13’, the appeal is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court

A. LE GRANGE
Judge of the High Court

E.D. WILLE
Judge of the High Court

⁵ In para 22.

APPEARANCES

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