IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: A134/2023

In the matter between:

CARE CURE (PTY) LTD Appellant

and

HEIDI JOHANNA LANDMAN Respondent

JUDGMENT BY: MHLAMBI, J

CORAM: MHLAMBI ADJP *et* BOONZAAIER, AJ

HEARD ON: 29 JANUARY 2024

DELIVERED ON: 10 May 2024

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[1] The appellant noted an appeal against the whole of the judgment of the *court a quo* which was delivered on 21 April 2023 in terms of which the appellant, as the defendant, was ordered to pay the plaintiff the amount of R 364 761.00 with interest and its counterclaim was dismissed with costs. The appeal is based on 17 grounds which were barely dealt with in the appellant's heads of argument as the latter consisted mostly of a reference to certain portions of the evidence.

[2] The respondent's action in the summons was based on a settlement agreement, styled *"Full and Final Settlement Agreement"* between the appellant and the respondent dated and signed on 17 February 2017. Paragraph 2.1 of the said settlement agreement provided that it was entered into in full and final settlement of all claims of any nature whatsoever arising from the termination of the employment of the employee with the employer with specific reference to the employment relationship.

[3] It was agreed between the parties that the respondent would be paid the amount of R 364 761.00, payable as a retrenchment package, in three monthly instalments commencing at the end of February 2017. On signature of the document, the respondent resigned as the director of the respondent and its affiliated companies.

[4] In its plea, the appellant stated that no true contract existed between the parties since the plaintiff, before signing the settlement agreement, made misrepresentations to the defendant which were so fundamental, that the defendant's apparent consent to the contract was, in truth, no consent at all. The appellant filed a counterclaim for alleged fraudulent claims totalling R 206 025.30 for the period 01 March 2014 until 28 February 2017 by the respondent to the appellant which the appellant honoured and paid.

[5] The main grounds of appeal are contained in paragraph 7, 8, 10 to 12, 14 to 17 which read as follows:

"7. *The honourable magistrate erred in finding that the appellant's evidence falls short of the required standard of proof as set out in Novick v Comair Holdings Ltd and others 1979 (2) SA 116 (W).*

8. *The honourable magistrate erred by not considering the testimony of Dr Cronje, that the respondent misrepresented him, when he asked her if someone was misappropriating the funds of the appellant. Further that if the appellant knew about the misappropriation by the respondent, the appellant would never have concluded the settlement agreement, but would have proceeded with disciplinary steps to dismiss the respondent,*

10. *The honourable magistrate erred in finding that the transactions referred to by the appellant dated back to the year 2013, past the required period of three (3) years when*

debts are usually prescribed. The honourable magistrate failed to consider that the appellant only became aware of the existence of the debt on/or about 20 May 2017.

11. *The honourable magistrate erred in finding that the appellant had no intention of honouring the settlement agreement and instructed Marelize to look for discrepancies in the respondent's expenses, directly after the respondent left.*

12. *The honourable magistrate should have found that the respondent misrepresented the appellant when she denied any wrongdoing or misappropriation when confronted by Dr Cronje and that the appellant would never have concluded the settlement agreement.*

14. *The honourable magistrate should have found that the misrepresentation was material since it induced the appellant to believe that the respondent was a truthful person, in good standing, without misconduct, which was one of the operative courses that induced the appellant to conclude the settlement agreement.*

15. *The honourable magistrate should have found that the appellant had proved on a balance of probabilities that no true contract exists between the parties, because of the respondent's misrepresentation, that the misrepresentation was of such a nature that the appellant was entitled to cancel the settlement agreement during May 2017, alternatively in the proceedings.*

16. *The honourable magistrate erred in not finding that the respondent made fraudulent claims relating to personal expenses, by representing it to be official expenses and further made fraudulent claims relating to travelling expenses for the period March 2015 until December 2015.*

17. *The honourable magistrate erred in not considering all the evidence properly and should have found that the appellant proved it defence and claim in reconversion on a balance of probabilities.*

[6] In its judgment, the court *a quo* found that it was not in dispute that the parties concluded a settlement agreement terminating the plaintiff's employment or that the money claimed was never paid over to the respondent.[1] The court found that the evidence of Dr Cronje did not provide much value to the defendant's case because he was solely concerned with why the company was not turning a profit, as it should, and suspected that the respondent and Estelle, an employee, were stealing from the company.[2] It was clear in his testimony that when the

[1] Paragraph 45 of the judgment.
[2] Paragraph 67 of the judgment.

opportunity arose to merge the appellant with another company, he, being the shareholder in the appellant, directed that the plaintiff be sacked and got one Malan, also an employee, to execute the termination of employment.[3]

[7] The appellant, the court opined, did not want the respondent to be part of the company anymore and had no intention of honouring the settlement agreement as a certain Marelize was instructed to look for discrepancies in the respondent's expenses directly after she left the appellant's employment.[4] The totality of the evidence revealed that the appellant deliberately sought out transactions which were never queried internally or with external auditors long after the agreement had been concluded. The appellant failed to demonstrate the causal link between the making of the misrepresentation and how it would have been induced into signing the contract as it, as per the evidence of Cronje, a decision was already made to get rid of the plaintiff.[5]

[8] In the court's view, the appellant's evidence on this aspect fell short of the required standard of proof as set out in *Novick v Comair Holding.*[6] though reference was made to certain ..was the appeal assailable on the basis of misrepresentation or fraud? Whilst the counterclaim correctly dismissed and whether that claim had prescribed?

[9] The critical questions in this appeal are, firstly, whether at the time of the conclusion of the settlement agreement, the respondent made misrepresentations to the appellant which induced it to enter into that agreement. Secondly, whether the counterclaim had prescribed.

[10] A party who has been induced to enter into a contract by misrepresentation of an existing fact is entitled to rescind the contract, provided that the misrepresentation was material, was intended to induce him to enter into the contract and did so induce him.[7] Once it has been discovered that the

[3] Paragraph 69 of the judgment.
[4] Paragraph 71 of the judgment.
[5] Paragraph 74 of the judgment.
[6] *Supra.*
[7] Christes the law of contract in South Africa on page 281; Novick v Comair Holding Ltd 1979 (2) SA 116 (W) 149- 150.

representation was incorrect, it is against good faith for the party who made it, to continue to hold an innocent party to a contract so obtained.[8]

[11] In cross-examination, Dr Cronje, a semi-retired oncologist, shareholder and the director of the respondent, on being asked how the respondent deceived him into making a contract of that nature or whether she did make any misrepresentation to him at the conclusion of the settlement agreement, he responded as follows: "*I did not discuss any possible misrepresentation because at that stage the decision was that we have to get rid of Mrs Landman. The reason was different from that reason that we are sitting here today.*"[9] On a further question: "*Who wanted to have this contract drafted and signed, is it not the company?*"[10] His response was: "*Well, we had to have a contract drafted and signed to get rid of Mrs Landman.*"[11]

[12] This addresses the concerns raised in the grounds of appeal numbers 7,8,11,12,14,15 and 16. It is crystal clear that the respondent never made a misrepresentation at the time that the settlement agreement was entered into. The appellant was determined to get rid of the respondent and needed the settlement agreement to execute its plan. The delay or refusal to effect payment as agreed and the sudden investigation of the respondent's expenses after her departure from the company is a clear indication that the appellant was not of intention to comply with the settlement agreement. The court a quo correctly found that the appellant's evidence fell short of the required standard of proof as set out in *Novick.*[12]

[13] In dealing with the counter claim, the court *a quo* stated that it became clear during cross-examination that the appellant relied on past credit card statements dating as far back as the year 2013, past the required period of three (3) years when debts usually prescribe.[13]

[14] The Prescription Act[14] provides that a debt prescribes after a period of three (3) years save where an act of parliament provides otherwise. The prescription of

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[8] Christe *supra.*
[9] The transcribed record, lines 1-4 on page 654.
[10] Lines 15-16 on page 654.
[11] Lines 17-18 on page 654.
[12] Supra.
[13] Paragraph 51 of the judgment.
[14] Act 68 of 1969.

such a debt shall commence to run as soon as the debt is due. If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, the prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

[15] The court *a quo* stated that although a special plea was made that the appellant's claim had prescribed and ought to be dismissed, it was so intrinsically linked to the facts of the case and more specifically their defence that it could not be adjudicated separately given the nature of the defence. However, the counterclaim stood to be dismissed and the appellant's claim should succeed.[15]

[16] In the special plea, the respondent pleaded that the alleged debts became due during the period 2014 up until 2016 and March 2015 up until December 2015. The counterclaim was served on the plaintiff on 11 May 2020, three (3) years after the alleged debts became due. Even though the court *a quo* did not elaborate and traverse the aspect of prescription, it, nevertheless, upheld the special plea that was raised and dismissed the counter claim; having taken into account other circumstances that showed the improbability of the evidence presented in support of the counterclaim. It is evident that the appellant was aware long before the deed of settlement was entered into that the company was not doing well financially and suspected the employees of committing theft. As the external auditors could not pick up on any irregularities, he confronted the plaintiff and Estelle individually with each other's alleged theft which motivated him to consult another branch of PWC auditors in Welkom to address the issue.[16]

[17] The period of prescription begins to run against a creditor when the creditor has the minimum facts which are necessary to institute action.[17] The appellant, in its reply to the counterclaim, pleaded that it only obtained knowledge of the facts giving rise to the debt on/or about 20 May 2017, when it was decided that the deed of settlement was not binding on the appellant. The prescription Act does not require legal conclusions on the part of the creditor before a debt can

[15] Paragraph 76 of the judgment.
[16] Paragraph 38 of the judgment.
[17] McMillan v Bate Chubb & Dickson Incorporated [2021] ZASCA 45 paras 38-39.

be said to be due. Knowledge that the relevant agreement was not legally binding is not a fact that the appellant needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription.[18] The period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute an action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case 'comfortably'.[19] Besides, there is no evidence that it was wilfully prevented from coming to know of the existence of the debt.

[18] In our view, one cannot find fault with all the findings of the court *a quo* and that it was correct in granting the action and dismissing the counterclaim. The appeal must accordingly succeed.

[19] It is trite that the successful party is entitled to the costs. The respondent requested that punitive costs be awarded taking into account the ill-conceived process followed by the appellant. Having considered all the relevant circumstances, it is both fair and equitable that such a cost order should be granted.

[20] In the result, the following order is made:

Order:

The appeal is dismissed with costs on an attorney and client scale.

[redacted]

MHLAMBI, ADJP

[18] Fluxmans Incorporated v Levenson 2017 (1) All SA 313 SCA.
[19] Fluxmans, supra.

I concur,

[redacted]

BOONZAAIER, AJ

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