

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021-26383

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVIEWED: YES / NO
26 March 2025 DATE	 SIGNATURE

In the matter between:

VITALITY CORPORATE SERVICES
LIMITED

1st Plaintiff

DISCOVERY HEALTH (PTY) LTD

2nd Plaintiff

And

MABODITSANE
MOROKE

JACOBETH

Defendant

JUDGMENT

Raubenheimer AJ:

Order

[1] In this matter I make the following order:

1. Judgment in favour of the Plaintiffs in the amount of R500 000;
2. Interest at the legal rate from date of service of the summons on the amount of R500 000 to date of final payment;
3. Cost of the action on scale C.

[2] The reasons for the order follow below.

Introduction

[3] The first plaintiff, Vitality Corporate Service (VCS) and the defendant concluded an employment contract on 22 August 2019 in terms of which the defendant was employed as a Human Resource Business Partner at the level of Divisional Manager.

[4] The defendant, Ms Moroke, commenced with employment in terms of the contract on 1 October 2019.

[5] The contract contained a sign-on bonus provision to the effect that on commencement of her employment with VCS she would be paid an amount of R500 000. The contract further provided that should her employment be terminated within 24 months for any reason except operational reasons the bonus is repayable in full.

[6] The sign-on bonus was paid to and received by the defendant during December 2019.

[7] The defendant tendered her resignation on 30 December 2019 and left the employment with VCS on the same day.

[8] VCS instituted action against the defendant for the repayment of the sign-on bonus.

The defences of the defendant

[9] The defendant raised the following defences:

9.1 The first plaintiff is an external company that has not domesticated itself in the Republic of South Africa in terms of the Companies Act. It is consequently not a properly registered legal entity and consequently cannot enter into contracts in South Africa.

9.2 The court lacks jurisdiction as the matter is an employment related matter over which the Labour court commands exclusive jurisdiction;

9.3 The contract is null and void *ab initio* as a result of material misrepresentations made by the first plaintiff and on which misrepresentations she responded and was prompted to enter into the contract;

9.4 The first plaintiff amended the terms and conditions of the employment contract unilaterally, which constitutes a repudiation of the contract and thus entitling the defendant to cancel the contract.

[10] The defendant abandoned the jurisdictional point in open court at the commencement of the trial.

The common cause facts

[11] It was common cause that the parties had concluded a contract of employment containing a sign-on bonus in the amount of R500 000 payable

on commencement of employment with the first plaintiff, that the defendant had received the sign-on bonus and had resigned from the employment with the first plaintiff within two months of the commencement of the contract of employment.

The issues in dispute

[12] The three remaining defences remained in dispute and both parties led evidence on these as well as other relevant aspects.

[13] The first plaintiff led the evidence of Sharon Reuben who at the time was the head of Human Resources with the first respondent. The defendant testified in her own case.

The evidence

[14] The defendant is a Human Resource specialist and has extensive experience in the entire spectrum of the Human Resource function in large organisations.

[15] Her evidence was that she had been involved in managing the Human Resource function during corporate restructurings and has extensive experience in advancing diversity in the workforce of companies.

[16] She has advanced qualifications in Human Resource Management and Labour Law. She furthermore testified that she had been involved in corporate retrenchments at previous employers.

[17] She applied for the position with the first plaintiff and after a series of interviews she was offered the position, which she then accepted.

[18] Shortly after commencing with her duties she became involved in meetings

with high level management meetings dealing with the business case for the possible transfer of the operations to the United Kingdom (UK).

- [19] During these meetings, the possibility of relocating the operations of the first plaintiff to the United Kingdom (UK) was discussed at length. She was presented with a draft document dealing with the possibility of the relocation and the potential ramifications should such relocation be implemented. It entailed the possibility of the retrenchment of the current staff complement.
- [20] The initiative was subject to approval by the Board of the first plaintiff and the relocation would not be implemented unless the Board approved the relocation plan which included the retrenchments.
- [21] The relocation plan provided for a number of options of which the relocation was but one. The relocation option further had a number of options of which total relocation was one. Some of the other options entailed partial relocation together with a restructuring of the local operations.
- [22] The defendant's complaint was that the first plaintiff misrepresented the position that she applied for and based on that misrepresentation she applied for was offered the position and accepted the offer.
- [23] The essence of the alleged misrepresentation was that she were to be functioning in a Human Resources role in a managerial capacity. She did not anticipate that the role would entail retrenchments and that she would have to not only manage the retrenchments but also implement the retrenchment plan and actually retrench the entire workforce of approximately 260 employees.
- [24] She conceded during cross examination that retrenchments is a normal and integral part of the Human Resource Management function in an organisation.

- [25] When she realised that she would have to implement the retrenchment plan she decided that she would rather resign and consequently tendered her resignation in writing with immediate effect.
- [26] Her resignation amounted to a repudiation of the contract of employment which repudiation the first plaintiff accepted and consequently, the first plaintiff instituted a claim for the repayment of the sign-on bonus.
- [27] Mrs Reuben testified on behalf of the first plaintiff. She is the Deputy General Manager of the second plaintiff which is the mother company of the first plaintiff. The defendant reported to her.
- [28] Mrs Reuben is also a Human Resource specialist with extensive experience in corporate Human Resource Management and has been in the employment of the second plaintiff for an extended period of time.
- [29] She was involved in the discussions, planning and meetings of the relocation of the operations of the first plaintiff for an extended period of time.
- [30] According to her, the document relied on by the defendant has always been in concept format and subject to approval by the Board.
- [31] At the time of the resignation of the defendant the document had not yet served before the Board as it was scheduled to be discussed at the Board meeting in February 2020.
- [32] According to her testimony the relocation plan was only partially implemented and a limited number of employees were retrenched. The position of the defendant has been refilled
- [33] She testified that there misrepresentation as restructuring involving relocation, retrenchments and reassignment of roles and functions are all part of the normal functions of a Human Resource Manager.

Discussion

[34] The defence that because the plaintiff is not registered in South Africa it cannot enter into a contract as it does not have legal personality does not hold water.

[35] A juristic person in terms of the Companies Act includes a foreign company which is defined as "an entity incorporated outside South Africa irrespective whether it is a profit or non-profit entity or carrying on business or non-profit activities in South Africa."¹

[36] Being a juristic person, the plaintiff is competent to enter into contracts whilst conducting business in South Africa.

[37] For the defendant to successfully raise the defence of misrepresentation against a claim for breach of contract the following has to be proven:

37.1 There must have been a misrepresentation amounting to a false ² or incorrect statement.³ The misrepresentation may be an implied misrepresentation.⁴

37.2 The false statement must have been made by a party to the contract before the conclusion or at the time of the conclusion of the contract.⁵

37.3 The misstatement must have induced the complaining party to enter

¹ Sect 1 Companies Act, Act 71 of 2008

² Wright v Pandell 1949 (2) SA 279 (C)

³ Trust Bank of Africa Ltd v Frysche 1977 3 SA 562 (A), Karroo and Eastern Board of Executors and Trust v Farr and Others 1921 AD 415

⁴ Standard Bank of South Africa Ltd v Coetzee 1981 1 SA 1131 (A)

⁵ Karabus Motors (1959) Ltd v Van Eck [1962] 1 All SA 403

into the contract.⁶

- [38] The misrepresentations contended for by the defendant is that the plaintiff had before the conclusion of the employment contract made the decision to wind up its business in South Africa, retrench its employees and relocate its operations to the United Kingdom. As part of the winding up and relocation of the operations the defendant was required to prepare and implement a retrenchment plan in respect of the employees including herself.
- [39] She furthermore contends that the non-disclosure of the facts mentioned in par [45] amounts to a misrepresentation before contract conclusion by means of silence and had she known of the true state of affairs she would not have entered into the contract.
- [40] The evidence for the plaintiff was that a business case was prepared for consideration by the Board of the plaintiffs. At the time when the defendant signed the contract of employment in August 2019, the business case was not yet contemplated. By the time, the witness for the plaintiffs, the defendant's senior, became involved in the discussions about the business case in mid-December 2019 the discussion document was a far cry from final and even further from being ready for presentation to the applicable decision-making body. The business case dealt with, among other things, the possible transfer of the operations to the UK and the possible retrenchment of employees. The project was known as Project Compass.
- [41] Project Compass was always subject to approval by the Board of the plaintiff. The project was eventually approved by the Board in the first quarter of 2020 at a substantially reduced level. The project was completed by July 2022 by which time the majority of the approximately 260 employees were retained and redeployed in South Africa in various departments of the

⁶ Investec Bank Ltd v Lefkowitz [1997] 1All SA 581, Woodstock, Claremont, Mowbray and Rondebosch Councils v Smith and another (1909) 26 SC 681

plaintiff.

[42] The defendant confirmed that overseeing the personnel aspects of a company restructuring is one of the functions of a senior Human Resource position such as the one in which she was employed. She furthermore confirmed that she had been involved in the mentioned aspects at previous employers in such a capacity.

[43] It is not a requirement that a contracting party be obliged to disclose to the other contracting party everything known about anything that may be material.⁷

[44] The information to be conveyed must be of such nature that the disclosing party is the only source of such information and the right to be so informed "would be mutually recognised by honest men in the circumstances"⁸

[45] Due to the concession by the defendant that restructuring and retrenchments are normal Human Resource functions and that she had been involved in such projects at previous employers it can consequently not be concluded that she was unaware or could not have anticipated the possibility of a restructuring and concomitant retrenchments.

[46] The highest hurdle that she failed to negotiate was that at the commencement of her employment no decision in respect of Project Compass had been made. The project was eventually implemented over a prolonged period and far less employees were impacted.

[47] The defendant has consequently not succeeded in discharging the onus to prove the existence of a misrepresentation and this defence is dismissed.

[48] The repudiation of the contract is based on the alleged unilateral changes to

⁷ ABSA Bank Ltd v Fouche 2003 (1) SA 176 SCA

⁸ Pretorius v Natal North Sea Investment Trust Ltd (under Judicial Management) [1965] 3 All SA 1

the terms and conditions of the employment contract.

[49] The alleged unilateral changes entailed that the defendant, a Divisional Manager, was required to report to the Deputy General Manager, Ms Reuben and no longer to Ms Soobramoney, who had left the employment of the Discovery Group.

[50] The defendant's functions, and contractual terms remained unchanged.

[51] The defendant alleges that she was transferred from the first plaintiff to the second plaintiff without being consulted.

[52] When the defendant resigned her letter of resignation specifically mentions that she is resigning from the employment of the first plaintiff. She conceded that there was no contract of employment between her and the second plaintiff.

[53] Repudiation occurs when the repudiating party unlawfully unequivocally indicate to the other party that it no longer intend to be bound by the contract or that it will not perform in terms of the contract.⁹

[54] In assessing whether a repudiation has occurred the court should be cognizant of the following factors:¹⁰

54.1 The character of the contract;

54.2 The number and weight of the wrongful act or assertions;

54.3 The intention indicated by the word or acts constituting the

⁹ Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd [2001] 1 All SA 581

¹⁰ Re Rubel Bronze and Metal Co and Vos [1918] 1 KB. Inrybelange (Edms) Bpk v Pretorius [1966] 2 All SA 458. Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou [1978] 3 All SA 445

repudiation;

54.4 The intention indicated by the words or actions;

54.5 The deliberation with which the repudiation conduct was committed;

54.6 The general circumstances of the case.

[55] The test to be applied in assessing the evidence is whether a reasonable person would conclude that the repudiating party intended not to fulfil the part of the contract.¹¹

[56] The conduct constituting the repudiation must be clearcut and unequivocal and not susceptible to any other hypothesis.¹²

[57] As parties to a contract is assumed to be predisposed to adhere to the terms of the contract repudiation is not lightly presumed.¹³

[58] In applying the principles to the facts the conduct of the plaintiff falls short of the requirements of repudiation. The only change that was effected was to the reporting line of the defendant. The reason for this change was due to the departure of the person to whom she reported. Her reporting line was still to a person on a higher level in the corporate hierarchy what she was on.

[59] None of the other terms and conditions of the employment contract such as salary, benefits or responsibilities were amended.

¹¹ Highveld 7 Properties (Pty) Ltd v Bailes [1999] 4 All SA 461. Nedcor Bank Ltd v Mooipan Voer en Graanverspreiders CC [2002] 3 All SA 477 (T)

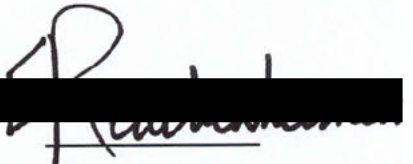
¹² Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd (n 5 above)

¹³ B Braun Medical (Pty) Ltd v Ambasaam CC 2015 (3) SA 22 (SCA)

[60] This defence is consequently dismissed.

Conclusion

[61] Due to the above grounds I conclude that the defendant is liable to repay the retention bonus in the amount of R500 000 (Five hundred thousand Rand). I consequently make the order as stated in par 1 above.



E Raubenheimer

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **26 March 2025**

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DATE OF ARGUMENT: 4 February 2025

DATE OF JUDGMENT: 26 March 2025