THE REPUBLIC OF SOUTH AFRICA

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

Case Number: 668 / 2022

In the matter between:

WARREN MARK PRATT Plaintiff

and

LACTALIS SOUTH AFRICA (PTY) LTD Defendant

Coram: Cooper AJ

Heard: Monday, 20 October 2025 to Thursday, 23 October 2025 and Wednesday, 17 November 2025

Delivered: Friday, 15 May 2026

Summary: Misrepresentation by omission – when duty of disclosure exists in the context of termination of an employment contract and conclusion of a settlement agreement

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JUDGMENT

COOPER, AJ:

INTRODUCTION

1. In this action, the Plaintiff, an erstwhile employee of the Defendant, seeks payment of amounts allegedly owing in terms of a written, mutual separation agreement concluded

on 29 January 2021 (the "**agreement**"). The agreement was concluded to regulate the termination of the Plaintiff's employment with the Defendant with effect from 31 January 2021.[1]

2. The Defendant admits that the agreement was concluded but pleads that it was not obliged to perform in terms thereof because the agreement was *"void and unenforceable"*, alternatively that the Defendant was entitled to cancel the agreement which it did on 4 February 2021.[2] In either event the Defendant relies on the Plaintiff's failure to disclose certain facts, exclusively within the Plaintiff's knowledge, at the time of the conclusion of the agreement that the Defendant alleges constitutes an actionable misrepresentation by omission.

3. It is common cause that the terms of the agreement included the following clauses:

> *"4.2 The Parties … agree that this Agreement is entered into in full and final settlement of any and all claims and/or disputes, of whatsoever nature, which either party may have or may in future have, against the other arising out of or connected with the Employee's employment … and the employment agreement, and the termination thereof …"*

And,

> *"No representations*
>
> *No party may rely on any misrepresentation which allegedly induced that Party to enter into this Agreement, unless the representation is recorded in this Agreement".*

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[1] Geldenhuys J *Mutual Separation Agreements: The Good, the Bad and the Ugly* PELJ 2026 (29), expresses the opinion (relying on the authorities cited at footnotes 1 to 3) that *"A mutual or voluntary separation agreement … serves as a valid and acceptable alternative to resignation or dismissal as a method of termination of employment."*

[2] Defendant's plea par 6.2 and 6.3, read with Defendant's claim in reconvention paras 5 to 17.

4. Terms of this nature (i.e. "full and final settlement" clauses[3] and terms that exclude reliance on misrepresentations) are enforceable, in the absence of fraud. The headnote in *Wells v South African Alumenite Company* 1927 AD 69 sets out the legal position (together with the brief facts in that matter) (underlining added):

> "*A defendant … when sued for the purchase price … raised the defence that he had been induced to enter into the contract by certain misrepresentations ... he claimed a rescission of the sale on the ground of the alleged misrepresentations.* [The agreement] *contained the following* [term]*:* 'I hereby acknowledge that I have signed this … irrespective of any representations made to me by any of your representatives and same is not subject to cancellation by me.' *On exception taken by plaintiff.*
>
> Held, *that in the absence of any allegation that the representations made were fraudulent, defendant was bound by the* [agreement] *… and that his plea, therefore, disclosed no defence.*"[4]

5. Innes CJ, whilst recognizing the importance of the principle of *pacta sunt servanda* (i.e. that agreements freely and voluntarily entered into should be honoured),[5] summarized the reasons or principles for not upholding such a term as follows (underlining added):

> "*On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud. As remarked by*

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[3] In *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited* 2016 JDR 1695 (CC) at par 22 to 24 the Constitutional Court upheld a "full and final settlement" clause even where the agreement precluded all recourse to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court.

[4] The effects of fraud are the same in the context of settlement agreements or compromise, see *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) at p 922C-D.

[5] *Wells v South African Alumenite Company* 1927 AD 69 at p 73 *cf* *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) at par 86.

an eminent Judge, 'No subtlety of language, nor craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury.' *(Per Lord HALSBURY in Pearson & Son v Dublin Corporation, 1907, A.C. at p. 356.) Hence contractual conditions by which one of the parties engages to verify all representations for himself, and not to rely upon them as inducing the contract, must be confined to honest mistake or honest representations. However wide the language, the Court will cut down and confine its operations within those limits."*[6]

6. The upshot of this brief introduction is that the Defendant will succeed in its defence if it is able to prove, on a balance of probabilities,[7] that the agreement was induced by an intentional (i.e. fraudulent) misrepresentation by the Plaintiff.

7. The Defendant pleads that the fraudulent misrepresentation perpetrated by the Plaintiff was the Plaintiff's failure (i.e. omission) to disclose *"the material facts"*.[8] In loose terms, the Defendant pleads that the Plaintiff, having a duty to do so, deliberately and dishonestly failed to disclose a business relationship and ensuing conflict of interest. More particularly, he deliberately and dishonestly failed to disclose:

   7.1. That he had provided loans to Mr Richard Qonto ("**Qonto**"), or a company represented by Qonto (being a customer of the Defendant), with *"the intention of gaining personal financial benefits outside the interests of the company"* and that *"created a relationship which interfered with* [the Plaintiff's] *objectivity, judgment and ability to act in* [the Defendant's] *best interests."*[9]

   7.2. The conflict of interest (i.e. the conflict between the Plaintiff's interests and those of the Defendant) created by the business relationship, including the loans,

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[6] *Wells v South African Alumenite Company* 1927 AD 69 at p 72-73. This remains the legal position, see, for example, the majority judgment in *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* 2023 (6) SA 327 (CC) at par 125 to 127 and 141 to 142.

[7] *Christie's Law of Contract in South Africa* 7ed at p 342 to 343..

[8] Defendant's claim in reconvention par 6, read with par 5 and 10 and 11, 12, 16 and 17.

[9] Pleadings p 29 par 1.1.

commission or interest earned on those loans and the personal relationship between the Plaintiff and Qonto.[10]

7.3. That he had manipulated the Defendant's B-BBEE policies to advance Qonto or Qonto's business, at the expense of the Defendant, and for the benefit of his own personal financial interests.[11]

8. The Plaintiff denied all of these allegations – even, it would seem, the allegation that he had provided loans to Qonto or one of his businesses.[12]

9. As regards the failure to disclose *"the material facts"*, the Plaintiff pleaded that *"the alleged* 'material facts' *referred to are too vaguely pleaded for the plaintiff properly to respond thereto. The Plaintiff accordingly denies each and every allegation contained in this paragraph as if specifically traversed."* The Plaintiff did not seek further particularity to remedy the alleged vagueness of the Defendant's claim in reconvention.

ISSUES

10. The key issues are, accordingly:

10.1. What are the events that occurred that potentially warranted disclosure to the Defendant prior to the conclusion of the agreement;

10.2. Did the failure to disclose those facts constitute a fraudulent misrepresentation by the Plaintiff; and

10.3. If so, was the Defendant entitled to refuse to perform its obligations in terms of the agreement (either on the basis that the agreement was void, alternatively on

[10] Pleadings p 30 par 1.3, 1.4 and thereafter.

[11] Pleadings p 31 par 3.1.

[12] Plaintiff's plea to Defendant's claim in reconvention par 8 to 11. To the extent the Plaintiff denied the loans and business relationship with Qonto or his business entities, the denial was clearly false.

the basis that the Defendant was entitled to cancel the agreement and validly did so).

FACTS

(i) Introduction

11. The parties, the witnesses and the other *dramatis personae* are briefly discussed in this section. Thereafter the facts relevant to the key issues are discussed.

12. The Defendant, previously known as Parmalat, is part of a large, French-based, multi-national dairy group. According to the evidence the Lactalis Group is currently the "*ninth biggest food company … and … the biggest dairy company global*". The Defendant, with its head office in Stellenbosch, is currently South Africa's *"number one dairy company"* (the Defendant is also referred to as "**Lactalis SA**").[13] At present Lactalis SA employs 2700 in South Africa.

13. The following persons were called to give evidence for Lactalis SA:

    13.1. Mr Christiaan Vermeulen, Lactalis SA's Human Resources Executive and member of its executive committee since 2009 ("**Vermeulen**").

    13.2. Ms Mohleku Fagan, an executive director of Lactalis SA *inter alia* responsible for *"the legal risk and compliance portfolio … in the Southern Africa region"* ("**Fagan**").

    13.3. Mr Willem Moolman, the chairperson at the disciplinary hearing relating to the Plaintiff that prepared the disciplinary findings and recommendations dated 12 March 2021[14] ("**Moolman**").

[13] This was according to the evidence of Mr Vermeulen.

[14] Annexure "P3" to the Defendant's plea and claim in reconvention.

13.4. Mr Siegried Goldner, a credit manager who administers the outstanding accounts of customers (i.e. the accounts of Lactalis SA's creditors) ("**Goldner**").

14. The Plaintiff was Lactalis SA's sales director at the relevant time ("**Pratt**"). Pratt previously worked at Lactalis SA's distribution centre in Parow, Western Cape, then as a regional sales or account manager and, before promotion to the sales executive role, as the national sales or account manager in respect of Lactalis SA's largest customer or account at the time. He served, together with Vermeulen and Fagan on Lactalis SA's executive committee and accepted that he was a prescribed officer of Lactalis SA.[15]

15. The other persons or entities relevant to the dispute were:

15.1. Qonto and his businesses, namely Pendairies (Pty) Ltd ("**Pendairies**") and Pendairies Agro Processing (Pty) Ltd ("**PAP**"), who were customers of Lactalis SA; and

15.2. Mr Vos, a regional sales or account manager who dealt with Qonto and reported to Pratt ("**Vos**").

16. Qonto passed away prior to the trial. However, an affidavit and transcript of his evidence on 4 March 2021 at a disciplinary hearing in respect of Pratt was handed up and accepted into evidence – after argument and pursuant to a ruling in terms of section 3(1) of the General Law of Evidence Amendment Act 45 of 1988. I do not attach much, if any, weight to this evidence.

17. In the Plaintiff's practice note and during the trial it was intimated that Vos would be called to give evidence for the Plaintiff. During the trial, however, I was informed that Vos had fallen ill. On the final day of the trial I was informed that Vos was not able to attend due to illness and therefore would not be called to give evidence. At the end of Pratt's evidence, the Defendant's case was accordingly closed (i.e. there was no request to deal with Vos's evidence at a later stage).

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[15] Pratt accepted this in cross-examination and Fagan's evidence in this regard went unchallenged.

(ii) *Qonto, Pendairies, Pendairies Agro Processing and Lactalis SA*

18. At the heart of the factual issues are Qonto and his dealings with Lactalis SA and later also with Pratt. In broad terms, Qonto, or his businesses, were customers of Lactalis SA (i.e. they purchased dairy products from Lactalis SA, on credit, for supply to the retail market) and also rendered or performed some delivery services for Lactalis SA.

19. Since Qonto formed *"part of the BEE structure"* of Lactalis SA, he qualified for certain preferential treatment. This included preferential discounts and rebates that were, depending on the nature of the benefit, paid to Qonto on a monthly basis.

20. Goldner (described in the heads of argument filed on behalf of Pratt as *"an excellent witness"*) summarized the historic relationship between Qonto and Lactalis SA as follows (underlining added):

> *"… when I started in 2009, Mr Qonto already had an account with us* [i.e. Lactalis SA] *in the name of Pendairies (Pty) Ltd. That account started trading in, if I recall correctly, 2002. And that account traded up until 2017, I believe. At that stage, Mr Qonto and the Pendairies account became behind in their payments. We could not supply further and he could not support his account. So at that moment in 2017, we stopped trading with the Pendairies (Pty) Ltd account. And at that moment, we had a write-off in our book of R1.8 million …*
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> *So then for a couple of months, there was no trading with Mr Qonto. And then in the beginning of 2019,*[16] *I got an email from Mr Qonto to state that he wants to try and bring his business back up to start his business up again. Obviously, at that stage, although it was part of our BEE structure, I was reluctant to supply on credit. So I suggested … he must open a new account … and then he decided that he wants to open that account in the name of Pendairies Agro Processing (Pty) Ltd, with his daughter as the director. But he managed the account. So the contract*

[16] Pratt testified that the new account was opened shortly after Lactalis SA refused to suppl

[should be, contact] *between me and the two Pendairies accounts for the last 13 years was directly with Mr Qonto himself."*

21. Although the "new" Pendairies account was initially a *"prepaid account"*, Qonto was again provided with a credit facility and ultimately, after the departure of Pratt in 2021, a further amount of debt remained outstanding that was irrecoverable. Goldner's evidence in this regard was as follows:

> "*... as I mentioned, the credit Pendairies agro-processing account was started on a prepaid account. Then we moved to a 300 000 facility meeting me, Mr Pratt, and our GM had at one stage where it was again in mid-2020, if I recall. We discussed the starting up of a tender business again. Then we started up on a 300 000* [credit limit]. *But as I said, with these cases, once we are in the tender business and the customer cannot supply, the exposure tends to creep up and creep up ...*
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> MR STELZNER: *... how much was the amount of money that Mr Qonto's company was owing?*
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> MR GOLDNER: *At the very final stage of the business it was 2.1 million."*

22. In summary, Qonto had two accounts with Lactalis. Initially under the name Pendairies and later under the name PAP. Each of the accounts accumulated significant amounts of debt owing to Lactalis SA and in each case this debt was ultimately irrecoverable.

23. Qonto was always the point of contact with Lactalis SA and his accounts were described as *"high maintenance"* that required, at times, involvement of the credit and sales teams on a daily basis.

(iii) Qonto, Pendairies, PAP and Pratt

24. Pratt's evidence regarding his relationship with Qonto was that he had been introduced to him *"sometime in 2009"* whilst working at the distribution centre in Parow and *"would* [thereafter] *infrequently have seen him from time to time"*.

25. After Pratt was promoted to the role of sales executive in 2019, Qonto *"made a point of reaching out to"* Pratt and after *"one or two further meetings"* in 2019 and 2020 a *"rapport had been established"*.

26. Shortly after the national lockdown (which initially ended on 16 April 2020), during April 2020, Qonto and Pratt met at Café Bagaso in the Tygervalley Shopping Centre, Bellville to discuss *"entrepreneurial interests"*. At the time Pratt owned Emme Jeans (Pty) Ltd ("**Emme Jeans**"), a men's jeans retailer that was operated by his wife. No doubt, business was not easy.[17] Similarly, it seems, Qonto's business interests were facing financial constraints.

27. Pratt's evidence regarding the meeting was as follows (underlining added):

> "… *he had said to me, Warren, I do not know if you know this, but I actually have more than just one company. I have Pendairies Agro Processing that does work with Lactalis, and then I have a whole other company that does not, and I said to him I was not aware of it, and he further went on to explain, and he says this Pendairies business that I have is a business that does tenders outside of any business that gets done with Lactalis.*
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> *I currently have a financier, and the financier squeezes me on the profits that we make there, and he said to me he makes 5% … And then he said to me, he said, Warren, he said, look, I am interested in finding a partner that I can go 50-50 with, so if that interests you, I have got tenders currently on the go, bread, rusks, and biscuits specifically is what he mentioned to me, and he said we can go 50-50 on the 30% ...*
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> *He then proceeded to call me sometime after, on or around the 28th of April when this email came out, and he said, look, we had this conversation, I am in a bit of a bind on my tender business with Pendairies, the one that does not engage with Lactalis, as I have said, she is completely separate, my credit limits with Giant and*

[17] The financial difficulties relating to Emme Jeans are alluded to in email correspondence in July 2020 – see Combined Bundle ("**CB**") p 298-299.

with Makro, both stores in the Western Cape, are very tight, and you will know that if I do not service these I will get a black dot next to my name, we spoke about potentially doing something, would you be interested? So I said to Mr Qonto, I said sure, there is certain terms and conditions that we agreed to …"

28. Despite Pratt's professed lack of knowledge of Pendairies, in approximately early April 2020, Pratt (at Qonto's request) instructed an assistant (Ms Bothma) to prepare a letter ostensibly in support of a request by Pendairies for funding from the National Empowerment Fund (the "**NEF**").[18] A draft letter was prepared and in an email to Fagan dated 22 April 2020, Pratt requested Fagan to *"take a quick read"* because Qonto required the letter *"for his tenders"*.[19] On 24 April 2020 a letter in support of funding was updated on instruction from Pratt to read as follows:

"Pendairies is part of Lactalis's BBBEE – Enterprise Development program and has been with the program since 15 September 2007 ...

Unfortunately due to extenuating circumstances around 2015, Pendairies came under duress and has not been able to pay back the outstanding debt, which at the date of this letter stands at R1 780 270.42.

The outstanding amount owed is too significant to extend further credit to Pendairies. Should the NEF stand as guarantee for the outstanding balance (or any other amount), Lactalis will make funds available equivalent to the amount guaranteed".[20]

29. The amount of R1 780 270.42 that was included in the letter referred to above, was obtained by Pratt, in an email dated 24 April 2020, from a person in Mr Goldner's credit department (Ms Grobbelaar). The email recorded that amounts were still being recovered on the "old" account (R25 000 had been recovered in November 2019 and

[18] CB p 177, read with p 176 (letter on Parmalat letterhead, at CB p 179).

[19] CB p 176.

[20] CB p 180-181.

R20 000 in April 2020).[21] The email from Ms Grobbelaar was sent in response to a request by Goldner to:

"Please send Warren the total amount we wrote off on Pendairies Old Debt – also the amounts recovered (cash & via rebates) since then".[22]

30. In cross-examination Pratt was confronted with the following proposition:

"[the email] *... shows that you were specifically informed of this recovery of R25 000 a month in respect of the Pendairies' old debt. Now, when you tell the Court that you made some enquiries and satisfied yourself that Lactalis wasn't really doing any business with the old Pendairies anymore, you neglected to point out, well, there was this relationship still. Lactalis was still recovering R25 000 a month on the old Pendairies debt."*

31. Pratt's explanation that his *"understanding was that it was Pendairies Agro Processing, paying back Pendairies Agro Processing debt"* was, in my view, unsatisfactory. The accounting entries showed a reduction of the discounts or rebates given to PAP (i.e. PAP's debt was effectively increased), to account for the recovery or reduction of the "old" debt of Pendairies that had previously been regarded as irrecoverable. The cross-examination was as follows:

"MR STELZNER: *Well if Pendairies Agro Processing was paying the debt. You've got an MBA cum laude and a whole string of accounting degrees ... And you know that when Pendairies Agro Processing (Pty) Ltd is paying to reduce a debt, it's reducing another entity's debt ...*

MR PRATT: *That was not my understanding ... I've shared my interpretation of my understanding at that stage ..."*

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[21] See CB p 164.

[22] See CB p 165. See also CB p 162-163.

32. Important email correspondence between Pratt and Qonto was obtained from Qonto, after Pratt's departure. The emails record the nature and some of the details of the relationship between Qonto and Pratt.

32.1. On Tuesday, 28 April 2020 Pratt recorded that Qonto had requested a personal loan of R80 000, repayable within one month, with effective "interest"[23] of 15% per month (i.e. this equates to a simple, annual rate of interest of 180% - the rate is obviously higher if interest is compounded)[24] (underlining added):

> *"Hi Richard,*
> *As per our discussion you have requested … a personal loan.*
> *…*
> *This agreement is between Warren Mark Pratt and Richard Qonto and will be entered into once the below terms along with banking information have been agreed to and supplied by Richard Qonto.*
> *Loan amount = R80 000 once off*
> *Loan payable = 28 April (once terms agreed …)*
> *Amount to be repaid = R92 000 once off*
> *Repayment date = 30 May 2020 (within 24 hours of you receiving payment)*
> *If you agree to the above terms, please respond … with your bank details so that I can make transfer …"*

32.2. Approximately 12 minutes later Qonto responded stating that this *"is exactly what we discussed and agreed upon."* Qonto, however, provided PAP's bank account details for the loan and said *"This my tender bank account and not my normal bank account"*.

[23] Pratt preferred to refer to this charge as a profit share or commission but commercially the charge was undoubtedly interest – repayment was not dependent on Qonto actually making any profit or earning any commission.

[24] The rate of 15% is calculated by dividing the monthly "interest" of R12 000 by the loan amount of R80 000.

32.3. A few days later, on Sunday, 3 May 2020 Qonto requested a further loan of R50 000 and within five minutes the funds were transferred by Pratt into PAP's bank account. Qonto wrote as follows:

> *"Our brief telecom refers.*
> *Would you please loan me R50k immediately for my food parcels tender. I will pay you back R51k on Wednesday.*
> *Please transfer to the same account as before."*

32.4. On Monday, 18 May 2020 Qonto requested a further loan of R500 000, *"to enhance Pendairies operations"* and *"set up the new operations"*. Qonto acknowledged that Pratt had *"already advanced R130k to Pendairies"* and requested an additional R370 000 to *"assist Pendairies to get stock from Parmalat"*. Qonto suggested an increase *"to my trading terms to 20%"* (i.e. PAP's trading terms with Lactalis SA) and that:

> *"In return you* [Pratt] *will get 50% of net profit … The current arrangement will fall away. You will get 50% profit share from the total business – both tenders and normal trading. You will also have unlimited access to the bank account …"*

32.5. Pursuant to this email, Qonto and Pratt had a meeting and on Tuesday, 19 May 2020 Pratt confirmed the terms of their *"new arrangement"* between *"Richard Qonto on behalf of Pendairies and WM Pratt"*. Pratt recorded that the *"arrangement"* would continue *"indefinitely"* and until the parties met to *"either evolve the agreement or dilute it in the form of capital repayments."* The terms, including effective "interest" of 15% per month (or 180% per year, on a simple interest basis),[25] were then recorded as follows (underlining added):

> *"WM Pratt will loan an additional R170 000 to Pendairies to take the total loan amount to R300 000. R12 000 will be paid on 30 May by Pendairies for*

[25] The rate is calculated by dividing the monthly "interest" of R45 000 by the loan amount of R300 000.

Commission on previous transaction as agreed. On the 1st of every month, commencing on 1 July 2020, Pendairies will pay WM Pratt a commission fee of R45 000. Should it be necessary, Richard Qonto will allow access to the bank account of Pendairies.

On confirmation of the above … Pratt will make the additional loan payment."

32.6. These terms were confirmed the next day (at 6:14 am) by Qonto.

32.7. Approximately two months later, on Sunday, 2 August 2020, Qonto wrote to Pratt suggesting that *"I make your payment on the 15th of each month, after Parmalat had paid my Commission … The two figures are heavy and put my cashflow under severe pressure on month end."*

33. These terms were then implemented and Pratt, in total, paid R300 000 into PAP's bank account. Qonto paid R12 000 to Pratt on 30 May 2020 and R45 000 per month from July 2020 until 1 February 2021. A total of R372 000 was paid to Pratt. The last two payments, in January and February 2021 (at the time Pratt's employment relationship with Lactalis SA was breaking down) were in cash.

34. As regards the cash payments, in his evidence-in-chief Pratt stated, when contradicting a statement in Qonto's affidavit,[26] that *"I never received cash from Mr Qonto at Tyger Valley."* I was left with the impression that, in contradiction to Qonto's affidavit, Pratt had not received payments in cash from Qonto. However, in cross-examination, Pratt clarified that he had received cash payments from Qonto – it was just that this cash was not received at Tyger Valley. Pratt's evidence in this regard was as follows:

"MR STELZNER: *You also received cash?*
MR PRATT: *Correct.*
MR STELZNER: … *you were quite adamant to say, well, you never got any cash …*

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[26] Qonto's affidavit recorded that *"I started paying this amount since May 2020 into his bank account and some amounts in cash when we met in various restaurants in Tygervalley … He gave me strict instruction and warning that I must never disclose this to anyone."*

MR PRATT: *Mr Qonto called me in the last week of January. He told me that he had just done a deal with a Pick n Pay family member on some ginger and he was carrying quite a significant amount of cash with him would I be prepared to take a payment in cash? And he asked the same of me for the following payment. So I met with Mr Qonto in the last week of January. This is now the last week while I was signing the exit agreement. I met him at Cape Gate Centre out in Kraaifontein. And then the next time that I received a payment from Mr Qonto was on the 2nd of February. I met him at Epping roundabout midday. He paid me cash then too. He said he was carrying a lot of cash. Bank charges this, would I just take the cash? I said, fine. I'd met him at Epping that day. This is now post me exiting the employee of Lactalis, it's the 2nd of February. And I'd met him there because he had ambitions of setting up a truck stop in Epping with a Puma service station …*

MR STELZNER: *So the one cash payment was before you signed the separation agreement and then the other one was shortly after you signed the separation?*

MR PRATT: *It was in the week of, as I mentioned … it was on his request … he was carrying a lot of cash …*

MR STELZNER: *… how much cash was paid?*

MR PRATT: *R45 000, M'Lord.*

MR STELZNER: *In the week before signing the termination agreement and then on the 2nd of February?*

MR PRATT: *R45 000 as well.*

MR STELZNER: *Within the space of 10 days, you got R90 000 in cash from Mr Qonto.*

MR PRATT*: Ja, I would honestly have to go back and refer to my bank statements …"*

35. Pratt did not disclose the business relationship with Qonto and his entities to Lactalis SA (in contrast to Pratt's other business dealings – which he disclosed to Lactalis SA and for which he used his work email address). Indeed, the use of his personal email address (and perhaps also the cash payments in January and February 2021), suggest that he preferred to keep it secret.

36. The business relationship was, however, discovered a few days after Pratt's departure.

(iv) The discovery

37. On Friday, 1 January 2021 Pratt, who had been experiencing difficulties with Lactalis SA's new Chief Executive Officer ("**CEO**"), lodged a formal grievance with Vermeulen.

38. Vermeulen, who was ill with COVID in early 2021, returned to the office on 25 January 2021. On or about 26 January 2021 a meeting was held between Pratt, Vermeulen and the CEO (Mr Marek Warzywoda). Pratt's evidence in this regard was as follows:

> *"So I will be honest with you and say to you that when we met on the 26th of January, before we even got to a decision, I myself made a point to address my own grievance face-to-face with both Mr Vermeulen and Mr Warzywoda, because I was not going to leave it that it was simply going to be ignored.*
>
> *I have given nearly 12 years of service to this organisation, and I felt I had a right to have my voice heard. And so we, I am going to use the word, got into it, and it became incredibly hostile. Incredibly hostile. Lots of backwards and forwards. Lots of arguing. I dare say Mr Warzywoda got a very red face through that as well. So hostile, in fact, that Mr Warzywoda, post the meeting on the 26th of January, never spoke to me again, and failed to greet me goodbye on Friday the 29th of January when I left the building. When things did eventually settle, I advised naturally that I would then take the separation agreement."*

39. After the meeting the agreement was signed. Vermeulen described the agreement as *"generous"* or of a *"good nature"*[27] while Pratt said he was *"happy to concede"* the amounts, despite being *"grossly under what I would have hoped for"*, so that he could just "get his money" and "walk away".[28]

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[27] It included double the statutory severance amount and a bonus of R200 000 – despite the difficult business environment as a result of COVID.

[28] Pratt's evidence was: *"But in light of, by this stage, just exiting, getting my money and walking away, I was happy to concede …".*

40. Vermeulen testified that, due to Pratt's *"intense haste"*,[29] arrangements were made to pay Pratt on an expedited basis (due to Pratt's insistence). However, on the day the payment had been arranged to be made by Lactalis SA to Pratt (i.e. 2 February 2021), Fagan came to Vermeulen's office and informed him that:

> *"… we have a problem. We've just received allegations that Warren is accused of being in an inappropriate relationship with one of our customers, a distributor, this particular customer is part of our BBBEE framework, our strategy, where we give … special treatment and make special concessions …"*

41. Vermeulen immediately contacted the payroll department to stop the payment to Pratt and said that:

> *"… I phoned payroll and I just felt this is shocking. If it's true, it is dishonest, it is a total breach of trust, and if it was to be true, in my mind, it's absolutely despicable given that this is a transformation customer that we are trying to help and the reputation of our business. And we've been working for years investing in this and that one of our own at an executive level could be involved in this dishonest relationship and benefiting privately from this."*

42. Fagan testified that she was contacted by Qonto and, given the nature of the allegations, requested him to provide evidence. In the interim she immediately informed the CEO and thereafter Vermeulen. She explained that she obtained emails and certain bank statements from Qonto on or about 2 and 3 February 2021 that corroborated Qonto's disclosure of the business relationship with Pratt. Ultimately Qonto (on 5 February 2021) deposed to an affidavit setting out what, according to him, had occurred and the matter was reported to the South African Police Service. Fagan said:

[29] Vermeulen testified that in his 40 years in human resources he was surprised by the "*intense haste on Mr Pratt's side that I've never seen before in dealing such as these around coming to a conclusion and also a haste in terms of making the payment*".

"[In terms of Prevention and Combating of Corrupt Activities Act] ... *We were reporting the corrupt activities that had occurred and this relates to these transactions that have happened, which, according to us, was a prejudice to the company because Mr Qonto was not paying the account with Lactalis, and he was using the money to rather pay Mr Pratt, according to what he explained to us. And this has resulted in us writing off quite a significant amounts, where we made basically significant losses with this particular account of Mr Qonto's ...*

What we identified as the corrupt act was, to us, what we believed was fraud that had taken place because Mr Pratt had a benefit which actually had a prejudice on the company Lactalis. And our understanding of that legislation or that requirement is that if there is that type of activity, we need to report it."

43. As regards the business relationship between Pratt and Qonto, Goldner also testified as follows:

"MR GOLDNER: *Sorry, ... when I first found out, I think in the middle of February, that allegations were made and there was an investigation that ... there was an amount ... paid into Mr Pratt's account of R45 000 for an ongoing investigation. So I just felt, you know, the account is suddenly on hold. We are not trading anymore. I need to explain a 2 million bad debt or possible write-off on the back of a write-off of almost 2 million again two years later. And, you know, that really hit my career as well. Because, you know, it is not nice for credit guys to come up with a request to have bad debts written off. So yes, so that is ...*

... in my mind, there is no logic explanation for me why Mr Qonto would pay money into any employee's bank account."

44. In the circumstances, Vermeulen, Fagan and Goldner were unanimous: They were shocked by the discovery of the business relationship between Pratt and Qonto.

45. It was in these circumstances that Vermeulen telephonically contacted Pratt on 3 February 2021. It is common cause that Vermeulen invited Pratt to a meeting the next day at 11h00 and that Pratt refused to attend. At 21h00 on 3 February 2021 Pratt

sent an email to Vermeulen and the CEO stating that the *"meeting ... serves no purpose"*. Pratt also stated that he trusted that, *"... you will authorize the payment run tomorrow in line with the terms set out in our agreement so that the monies will be paid into my bank account on Friday, as the directive was returned by SARS on Monday already"*.

46. In an email at 22h00 on 3 February 2021, in response to Pratt's email, Vermeulen stated that, *"I sincerely urge you to reconsider your decision ... for us to engage regarding the concern that has arisen post the signing of the mutual separation agreement."*

47. On 4 February 2021 Pratt responded, saying *"The discussion ... has nothing to do with a handover, but with the agreement which has been signed ... I am expecting my monies to be paid ... Also my wife is currently unemployed and 3 months pregnant and this is putting undue stress on her and the baby ..."*.[30]

48. On 4 February 2021 Vermeulen, on behalf of Lactalis SA, addressed a letter to Pratt recording that it had been discovered that Pratt had allegedly been involved in *"fraudulent activities involving a customer of ours"*. It was recorded that, had Lactalis SA been aware of the business relationship between Pratt and the *"customer"* it would never have concluded the agreement and, as a result of Pratt's fraudulent misrepresentation, the agreement was either void *ab initio* or Lactalis SA was entitled to rescind from the agreement and did so. In the circumstances, Lactalis SA regarded Pratt as an employee (since the agreement, in terms of which Pratt's employment contract had been terminated, was void or had been cancelled).

49. In March 2021 a disciplinary process was held. Pratt was given notice of the charges and of the date and venue for the disciplinary hearing. Pratt refused to attend – stating that he was no longer an employee of Lactalis SA and was, therefore, not obliged to attend. After hearing evidence from Qonto, Fagan, Vos, Goldner and Vermeulen on 4

[30] It seems, unfortunately, that the financial difficulties facing Pratt's other business interests (namely, Emme Jeans) were not entirely satisfactorily resolved post COVID.

March 2021, the chair of the disciplinary delivered his findings and recommendation on 12 March 2021, namely that Pratt be summarily dismissed.

50. According to Lactalis SA, the finding and recommendation were considered and Pratt was then summarily dismissed on 15 March 2021. Lactalis SA paid the amounts due to Pratt pursuant to his summary dismissal (i.e. the salary due to him for the period of his continued employment until mid-March 2021 and his outstanding leave).

(v) *<u>Pratt's explanation</u>*

51. Pratt explained that, after the meeting with Qonto in April 2020 but before providing him with a loan, he performed a "due diligence" exercise to ensure that the entity he was providing the loan to was not a customer of Lactalis SA. The "due diligence" Pratt referred to was a *"CIPC search"*[31] which confirmed that Pendairies and PAP existed as separate companies. Pratt also apparently performed a search on the *"Lactalis Sales Cube system"* and found records for PAP but *"nothing … for Pendairies".*

52. As part of his "due diligence" Pratt did not, however, ask Goldner or any other employee at Lactalis SA about the *"Pendairies Old Debt"*,[32] which related to Pendairies (not PAP).

53. Pratt's defence was, accordingly, that he was entitled to provide "financing" to Qonto, or one his companies, without disclosing this to Lactalis SA, provided that Qonto or the company was not doing business with Lactalis SA.

54. Pratt accepted, however, that if the entity that he provided the loan to was a customer of Lactalis SA he would be obliged to disclose this because that *"would have created a conflict"* of interest. Pratt accepted, furthermore, that a failure to disclose such a

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[31] A review of the registry of the Companies and Intellectual Property Commission.

[32] It will be recalled that in order for Pratt to complete a letter of support for Qonto's (actually Pendairies') application for funding from the NEF, Pratt requested the credit department to determine the amount of the outstanding debt on the "old" Pendairies account. Goldner referred to the historic Pendairies debt in email correspondence dated 23 April 2020, that included Pratt, as the *"Pendairies Old Debt".*

business relationship would constitute a *"big problem"* and a *"serious breach"* of his fiduciary duties as a prescribed officer of Lactalis SA. Indeed, the very reason for performing the "due diligence" was apparently to establish this fact (i.e. that Penadieries was *"separate"* and there would, accordingly, be no conflict of interest).

55. In a telling period of cross-examination, Pratt's evidence, which in my view is at the heart of the matter (and is therefore quoted at some length), was as follows (underlining added):

> MR PRATT: *What I'm saying to you is that Pendairies Agro Processing is the business that Lactalis was doing work with …*
>
> MR STELZNER: … *<u>So what you're telling the Court now is that there's nothing wrong with this 300 000 funding arrangement and the repayment of the R45 000 a month by Mr Qonto, or one of his companies, if it related solely to the old Pendairies.</u>*
>
> MR PRATT: *I'm saying … Mr Qonto had explained to me, the business that he had there was separate. Specifically, he had mentioned that at Café Bagaso, and he had said, this doesn't trade with Lactalis, this entity.*
>
> …
>
> MR STELZNER: … *So it was on that basis that <u>you satisfied yourself that you could now advance R300 000 to Mr Qonto, because there's going to be no conflict of interest</u>. <u>As far as that arrangement was concerned, it had to do with another company which at that stage had no commitments or business relationship with Lactalis</u>.*
>
> MR PRATT: *<u>That was my understanding, correct.</u>*
>
> MR STELZNER: *<u>Okay. Now, the converse, you must concede the converse then. That if this arrangement with Mr Qonto was to assist Pendairies Agro Processing, well, then there would have been a big problem.</u>*
>
> …
>
> MR PRATT: *<u>Correct.</u>*
>
> MR STELZNER: … *<u>if it had to do with Pendairies Agro Processing (Pty) Ltd, if you were assisting that supplier, which had an ongoing relationship with the company, there would have been a major problem.</u>*

MR PRATT: *Correct*.

MR STELZNER: *Can you explain to the Court what all those problems would have been? Let's talk about conflict of interest. …*

…

MR STELZNER: *And you're a prescribed officer in terms of the Companies Act. You have a fiduciary duty towards your employer. Do you agree with me?*

MR PRATT: *As per the Companies Act, correct.*

MR STELZNER: *And you understand what that entails?*

MR PRATT: *To act in the best interests of the company.*

MR STELZNER: *And not to put your own interests in conflict with those of the company.*

MR PRATT: *Correct.*

MR STELZNER: *And so in that context, explain to His Lordship why this deal with Mr Qonto would be a big problem if it was to assist Mr Qonto with the business of Pendairies Agro Processing (Pty) Ltd.*

MR PRATT: *Pendairies Agro Processing was a customer of Lactalis.*

MR STELZNER: *Ja, and?*

MR PRATT: *Well, that would have created a conflict with Pendairies Agro Processing.*

MR STELZNER: *And for you, as a senior executive, sales executive, entrusted amongst other things with looking after the company's best interests vis-à-vis its customers and its suppliers and its distributors?*

MR PRATT: *Yes, I would need to make sure that I'm acting within the best interests of the company at all times And for the 11 and a half years that I was employed at that company, they only got that from me.*

MR STELZNER: *Okay. So you knew that you can't do any … deals on the side for yourself?*

MR PRATT: *Not in the context of a customer or supplier, correct.*

MR STELZNER: … *And you also understand that that's a serious breach of your fiduciary duty as a prescribed officer of the company to do secret deals with customers?*

MR PRATT: *<u>If there was that conflict, then yes, I understood there to be no conflict.</u>*
MR STELZNER: ... *<u>And you also understand from the company's policies that conflicts of interest, whether they're major ones or small ones, they need to be disclosed to the company by all employees, but particularly ones employed at your level?</u>*
MR PRATT: *<u>Correct.</u>"*

56. As regards Qonto's email to Pratt on 28 April 2020 that recorded that the payments were to be made into PAP's bank account and the fact that Pratt then paid the loan into PAP's bank account (rather than Qonto's or Pendairies' bank account) he said, *"It's quite clearly and evidently ... an oversight ..."*.

57. Pratt's explanation for disclosing his other business interests to Lactalis SA (namely, his interest in Emme Jeans) and using his work email address for emails in that regard but not doing so in respect of his business relationship with Qonto was difficult to understand. Pratt said (underlining added):

> *"I saw no issue ... <u>This was merely a financing arrangement with an entity that had no business with Lactalis</u> ... and under those understandings that I had, I saw it that the transaction was fine."*
>
> And,
>
> *"... that declaration was done because I was listed and had an actual stake and was a director of those particular entities. Never did I ever have a stake, a profit share, an interest in the company, Pendairies. That was a finance agreement between myself and an organisation which I'd led to believe, and I'd set aside myself that didn't operate with Lactalis. <u>It was completely separate. And on that ground, I was quite happy that there was no disclosure required</u>."*

58. Of course, Pratt's other business interests (in particular, Emme Jeans), genuinely had no business with Lactalis SA but despite this he disclosed them.

(vi) *Summary*

59. The undisputed facts can briefly be summarized as follows:

59.1. Pratt was the sales executive of Lactalis SA. He was a member of the executive committee that managed the business of Lactalis SA.

59.2. In April 2020, shortly after the national lockdown, Pratt met with Qonto to discuss their (struggling) business interests. Pursuant to the meeting and at the behest of Qonto, in April and May 2020, Pratt paid a total of R300 000 into PAP's bank account. This was a loan that bore interest at 15% per month. In other words, it generated R45 000 per month for Pratt.

59.3. Pratt did not disclose this to Lactalis SA. Pratt used his personal email address to communicate with Qonto regarding this loan.

59.4. Pratt was aware that he was obliged to disclose any potential conflicts of interest to Lactalis SA and that a failure to do so would be *"very serious"* and *"highly inappropriate"*. Pratt had previously disclosed business interests (such as his interest in the men's jeans retailer, Emme Jeans), that had no relationship with Lactalis SA. He had also used his work email address to deal with matters relating to that business.

59.5. At the time of the loan by Pratt, Lactalis SA was recovering outstanding debt from one of Qonto's businesses (namely, Pendairies) and another of Qonto's businesses (PAP) was indebted to Lactalis SA.

59.6. Pratt departed Lactalis SA at the end of January 2021.

59.7. At the time of Pratt's departure (if the two cash payments of R45 000 are taken into consideration - one in the last week of January 2021 and the other on or about 2 February 2021), Pratt had received R372 000 from Qonto or his businesses.

59.8. Lactalis SA, however, was unable to recover a total of almost R4 million from Qonto or his businesses - approximately R1.8 million remained owing by Pendairies and approximately R2.1m remained owing by PAP. Qonto passed away in (it seems) September 2021 and all of this debt was ultimately irrecoverable.

LEGAL PRINCIPLES

60. As alluded to above a fraudulent misrepresentation renders an agreement voidable (rather than void) and entitles the innocent party to rescind the contract.[33]

61. According to *Christie's Law of Contract in South Africa* 7ed the application of the principles relating to fraudulent misrepresentation to *"misrepresentation by silence causes little difficulty"*. Fraudulent misrepresentation by silence is described as follows (underlining added):

> *"Assuming the existence of circumstances that give rise to a duty to speak, silence resulting from negligent, or grossly negligent unawareness, or forgetfulness of the facts cannot be fraudulent, but silence resulting from fraudulent diligence in ignorance, or from knowledge of the facts and a deliberate decision not to reveal them, or to remain silent after taking steps to conceal them, must be. … Recklessness amounting to fraud may exist when a half-truth has been told or when a person knows the facts but does not reveal them because the person has not bothered to consider their significance."*[34]

62. The test applicable when considering an alleged fraudulent misrepresentation, more particularly a fraudulent non-disclosure in a pre-contractual setting, was described as follows by King AJ in *Orban v Stead and Another* 1978 (2) SA 713 (W) at 717F (underlining added):

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[33] *North West Provincial Government and Another v Tswaing Consulting CC and Others* 2007 (4) SA 452 (SCA) at par 11 to 12. More generally, see *Christie's Law of Contract in South Africa* 7ed at p 315.

[34] *Christie's Law of Contract in South Africa* 7ed at p 342.

"Fraud in relation to a contract consists of a precontractual representation of a false fact. This representation must be made with knowledge that it is false and with the intention that it be acted on. The representation must be material, which means that it is likely to induce a reasonable man to act on it. This representation must be one of the causes of the representee concluding the contract. The representee must, of course, be ignorant of the falsity of the representation. The representation can be express or by conduct. Silence can also amount to a representation. A fraudulent non-disclosure takes place when a person is under a duty to disclose to another and fails to do so."[35]

63. Similarly, in New Adventure Investments 19 (Pty) Ltd v The Trustees for the time being of the SAS Trust 2002 JDR 0399 (C), Moosa J dealt with the elements for a claim based on a fraudulent misrepresentation by non-disclosure as follows (citation omitted):

"It is settled law that fraudulent non-disclosure of a fact can give rise to the cancellation of a contract, if:

(a) such fact is material …

(b) the withholding of the fact is intended to induce the innocent party to conclude the contract … and

(c) there is a legal duty to disclose such a fact …"[36]

64. As regards when a duty to disclose arises, there is no general duty to *"tell the other all he knows about anything that may be material"*.[37] Such a duty has been found,

[35] See also Hutchison *et al The Law of Contract in SA* 3ed p 129 and 138 and *Christie's Law of Contract in South Africa* 7ed at p 322 to 326.

[36] New Adventure Investments 19 (Pty) Ltd v The Trustees for the time being of the SAS Trust 2002 JDR 0399 (C) at par 35. See also Hutchison *et al The Law of Contract in SA* 3ed p 126 par 4.2.3.1 and *Amler's Pleadings* 10ed p 204 to 205 and p 270.

[37] Absa Bank Ltd v Fouche 2003 (1) SA 176 (SCA) at par 5. See also Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A) at p 922C-D

however, to arise (amongst other "special" circumstances)[38] when a fiduciary relationship exists between the parties.[39]

65. The Supreme Court of Appeal in Absa Bank Ltd v Fouche 2003 (1) SA 176 (SCA) provided a more general test for when a duty to speak arises as follows (citations omitted, underlining added):

> *"It is by now settled law that the test for establishing wrongfulness in a pre-contractual setting is the same as that applied in the case of a non-contractual non-disclosure ... In each case one uses the legal convictions of the community as the touchstone ...*
>
> *The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context - a non-disclosure - have been synthesised into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material ... That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie lawful... A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances'*

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and p 924A-B and Meskin N.O. v Anglo American Corp. of SA Ltd 1968 (4) SA 793 at p 796, 801 and 802.

[38] *Cf* Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A) at p 433.

[39] Hutchison *et al The Law of Contract in SA* 3ed p 138 and Van der Merwe *et al Contract General Principles* 4ed p 63, both textbooks refer to Orban v Stead and Another 1978 (2) SA 713 (W) at p 718, where King AJ held, "*The duty to disclose normally arises out of the relationship of the parties. Thus, it is clear that such a duty arises in the so-called fiduciary relationship such as between attorney and client. Such a duty also arises where, because of the facts of any case, there is an involuntary reliance of the one party on the other for material information.*"

See also Meskin N.O. v Anglo American Corp. of SA Ltd 1968 (4) SA 793 at p 796, 801 and 802.

Having established a duty on the defendant to speak, a plaintiff must prove the further elements for an actionable misrepresentation, that is, that the representation was material and induced the defendant to enter into the contract. In the case of a fraudulent misrepresentation, that must have been the result intended by the defendant."[40]

DISCUSSION

66. One of the key questions is whether Pratt had a legal duty to disclose his business relationship with Qonto and Qonto's business interests. This will be addressed first and thereafter the remaining elements of a claim based on a fraudulent misrepresentation by non-disclosure will be considered.

67. Pratt was a very senior employee of Lactalis. As mentioned, he was the sales executive, reported directly to the CEO and was a member of the executive committee that managed the business of Lactalis SA.

68. Indeed, Pratt accepted that he was a prescribed officer of Lactalis SA. A prescribed officer is defined in the regulations to the Companies Act 71 of 2008 (the **"Companies Act"**) as a person who:

> *"… exercises general executive control over and management of … a significant portion, of the business and activities of the company; or*
>
> *regularly participates to a material degree in the exercise of general executive control over and management of … a significant portion, of the business and activities of the company".*[41]

69. In my view, a fiduciary relationship existed between Pratt and Lactalis SA.[42] Arguably, this may be sufficient for the conclusion that Pratt had a duty to disclose the business

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[40] Absa Bank Ltd v Fouche 2003 (1) SA 176 (SCA) par 4 to 6.

[41] Companies Regulations, 2011; GN R351 in GG 34239 of 26 April 2011 at par 38.

[42] Phillips v Fieldstone Africa (Pty) Ltd and Another 2004 (3) SA 465 (SCA) at par 27.

relationship that came to exist between him and Qonto, and the potential conflict of interest that resulted, at the time of the conclusion of the agreement.[43]

70. In addition, it was common cause that in terms of Pratt's employment contract he was obliged to disclose any potential conflicts of interest to Lactalis SA. This too may be sufficient for the conclusion that Pratt had a duty to disclose, at the time of the conclusion of the agreement, the business relationship with Qonto.[44] Indeed, it seems that it was on the basis of this obligation that Pratt *inter alia* disclosed his interest in Emme Jeans to Lactalis SA – as mentioned, this was a business interest that did not appear to create any conflict of interest.

71. In my view, the following additional considerations support the conclusion that Pratt had a duty to disclose the business relationship with Qonto at the time of the conclusion of the agreement:

71.1. The knowledge of the business relationship and the potential conflict of interest lay within the exclusive knowledge of Pratt.

71.2. Pratt was aware that Qonto's business (PAP) had obtained credit from Lactalis SA and that the *"Pendairies Old Debt"* remained outstanding. In other words, Qonto and his businesses, to the knowledge of Pratt, had obtained credit from Lactalis SA and had a poor credit history with Lactalis SA. Despite this knowledge Pratt extended further (significant) credit in circumstances where Pratt was likely aware that Qonto and his businesses were struggling financially,[45] that the initial loan of R130 000 had not alleviated Qonto's financial difficulties[46] and that the

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[43] See par 64 above.

[44] *Herholdt v Nedbank Limited* 2012 JDR 1465 (LAC) at par 26 to 29.

[45] Not only were the loans supplied shortly after the national lockdown but Qonto informed Pratt in an email dated 2 August 2020 that the burden of paying Pratt was *"heavy and put my cashflow under severe pressure …"*. This also evidences that the loan was significant for Qonto and his businesses. CB p 228.

[46] CB p 231.

terms of the credit were extremely onerous. As dealt with in greater detail below, this, in my view, created a potential conflict of interest.

71.3. The business relationship created a conflict of interest.

71.3.1. Given the facts set out above, I do not accept that the loan given by Pratt was *"completely separate"* from Lactalis SA. Firstly, Pratt paid the money into PAP's bank account and this suggests that the loan was in fact with PAP. Secondly, regardless of which entity the loan was provided to, Pratt regarded Qonto, or any one of his business interests, as responsible for the loan.[47] Thirdly, even if the loan had been given to Pendairies (rather than Qonto or PAP), Pendairies was still indebted to Lactalis SA and this "old" Pendairies debt was being settled (albeit with relatively small and infrequent payments).

71.3.2. On any basis (whether the loan was to Qonto, Pendairies or PAP), the loan placed Pratt in a position where his personal financial interests conflicted with the interests of Lactalis SA. Lactalis SA had provided credit to Qonto's businesses (both Pendairies and PAP) and Pratt had also provided credit to one of Qonto's businesses. Pratt was incentivized to ensure that he received payments from Qonto or his businesses, potentially to the detriment of Lactalis SA. Pratt was, moreover, given his broad powers as sales executive, able to improve PAP's general trading terms – this included the power to authorize payments to PAP and providing other, more general, potential business advantages. That Pratt was aware of the potential conflict of interest is evident from the following extract from his cross-examination:

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[47] Pendairies and PAP were clearly vehicles for Qonto's business interests. That Qonto was ultimately responsible for the loan is also, for example, evident from the WhatsApp messages sent by Pratt to Qonto when, according to Pratt, Qonto was on *"his deathbed"* in hospital with COVID in September 2021.

"... if we go back to what I had mandate over, if I truly wanted to seek some form of advantage over ... what I had span of control over. The quickest and easiest thing for me to do would have been to increase a trading term upon his request. The quickest and easiest thing for me to do would have been to give him the maximum pricing discount. That's what I had mandate and control over."

Although Pratt said he did not improperly advance Qonto's business to the detriment of Lactalis SA, this was contested by Lactalis SA.[48] The point, it seems to me, is that Pratt was aware of the potential conflict of interest but deliberately chose not to disclose it.

71.3.3. Pratt must also have been aware that Qonto was using the money he received from Lactalis SA to pay him. Pratt received (although he said he did *"not pay much attention"* to it) an email from Qonto on 2 August 2020 in which Qonto requested to pay Pratt on the 15th of each month specifically because this was *"after Parmalat had paid my Commission"*. Pratt, as the sales executive and a member of Lactalis SA's executive committee, was effectively giving with the one hand and taking with the other.

71.3.4. Pratt had therefore created a situation where Qonto (as the person in control of both Pendairies and PAP) was obliged to choose between paying Pratt or Lactalis SA – and, indeed, Qonto chose to pay Pratt rather than and to the detriment of Lactalis SA.[49]

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[48] A number of emails were referred to that demonstrated that Pratt sought, or was involved in seeking, to improve Qonto's business terms and circumstances with Lactalis SA. Fagan testified that she had felt manipulated by Pratt when this relationship with Qonto was discovered because she had been requested to make special arrangements for Qonto. Pratt said this was in the ordinary course of his duties and due to a genuine desire to assist Qonto. The usurious rates charged by Pratt, however, cast doubt on any genuine desire to assist Qonto.

[49] Pratt received R372 000 from Qonto or his businesses, while Lactalis SA could not recover the further credit that had been provided to PAP of approximately R2.1 million. See par 59.8 above.

72. Pratt's business relationship with Qonto (or Pendairies) and the consequent conflict of interest are, in the circumstances of this matter,[50] facts or information of such a nature that *"the right to have it communicated to* [Lactalis SA] 'would be mutually recognised by honest men in the circumstances'".[51] Put differently, I find that Pratt had a duty to make this disclosure to Lactalis SA.

73. In addition, in my view (on a conspectus of the evidence and on a balance of probabilities), Pratt knew that he was obliged to disclose this business relationship to Lactalis SA. [52] As mentioned, Pratt was a well-qualified, senior executive and seasoned

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[50] In other words, the facts dealt with in par 70 above and, in particular, the fact that Pratt was the sales director (i.e. the most senior sales executive in Lactalis SA).

[51] *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) par 5.

[52] As an aside: Even if, contrary to what I have found, Pratt did not know that he was required to make the disclosure, then, in any event, such belief or professed lack of knowledge of the obligation to disclose would, in my view, be the result of reckless or *"fraudulent diligence in ignorance"* – and knowledge or fraudulent intent will be imputed in these circumstances. See Kerr *The Principles of the Law of Contract* 6ed p 281 where the following is said (with reference to *Rex v Myers* 1948 (1) SA 375 (A) at p 382):

"The state of mind of the representor in respect of the misrepresentation determines the class [intentional, negligent or innocent] *into which it falls.*

> 'To prevent a false [i.e. an incorrect] statement from being fraudulent there must, I think, always be an honest belief in its truth.

A representor who knows that his representation is incorrect has no belief in its truth. One enquires into the 'honesty' *of his belief only when he believes in the truth of what he says. If such an enquiry is raised the leading rule is that a belief is not honest which,*

> 'though in fact entertained by the representor, may have been itself the outcome of a fraudulent diligence in ignorance – that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues of the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense), believe"

See also *Christie's Law of Contract in South Africa* 7ed at p 341 to 342.

Pratt admits that if he knew the *"Pendairies Old Debt"* related to Pendairies then he would have been obliged to disclose the business relationship to Lactalis SA – see para 53 to 55 above. However, to the extent Pratt did not know that the *"Pendairies Old Debt"* related to Pendairies, Pratt simply had to ask. In my view he diligently and recklessly avoided doing so. If anything, the "due diligence" performed by Pratt – whilst at the same time personally making enquiries about the *"Pendairies Old Debt"* (see par 28 and 29 above) – must have alerted him of the need to ask Goldner or his team about these separate companies and their indebtedness to Lactalis SA. This was particularly the case given Pratt's knowledge of the difficulties Lactalis SA had experienced with Qonto's accounts in the past – and in the context of Pratt intending to personally provide credit to Qonto or his businesses. Pratt "diligently" failed to make this simple enquiry because he "desired businessman. I do not accept that Pratt honestly believed[53] that providing credit on the terms provided (i.e. in the form of an extremely onerous loan) to a business of Qonto (whether it be Pendairies or PAP – both of which were special customers of Lactalis SA, being preferential or *"Enterprise Development"* customers), did not create a conflict of interest; or that he honestly believed that he was not obliged to disclose this to Lactalis SA. Even on Pratt's version (i.e. that the loan was provided to Pendairies), Pratt was aware that he could assist Qonto and all his businesses (and thereby Pratt's own personal financial interests), to the detriment of Lactalis SA, by favourably adjusting or influencing Qonto's (i.e. PAP's) trading, credit and/or other general business terms with Lactalis SA.[54] It was quite clearly material information.[55] Pratt's use of his personal email address (and the cash payments in January and February 2021), together with the fact that he had previously disclosed business interests that genuinely had no relation to Lactalis SA establish, in my view, an intention to conceal the relationship. In my view this was done because Pratt knew that he was obliged to disclose this business relationship.

74. Pratt's non-disclosure was therefore deliberate, intended to deceive and knowingly in breach of his duty to disclose.

75. In light of the facts dealt with above, Pratt's deliberate decision not to disclose the business relationship with Qonto (or Pendairies, or PAP) and the conflict of interest that ensued, was also, in my view: material, induced the agreement and was intended

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and was determined" to ensure that he obtained an additional monthly income of R45 000 per month. This was a very significant additional amount when compared to his gross monthly salary at the time, of approximately R150 000 per month (i.e. approximately R80 000 per month after the deduction of tax).

[53] See fn 52 above.

[54] Additional profits, rebates or discounts for PAP meant additional money for PAP and Qonto. This in turn meant that Qonto or PAP would have additional money to settle Pratt's loan (even if it was to Pendairies). See also par 71.3 (and sub-paragraphs) and fn 52 above.

[55] To Lactalis SA, since its customer (whether it be Pendairies, PAP, or, effectively, Qonto) would be burdened with this onerous and significant debt and to Pratt, who would be earning a significant amount of extra income every month (for the amounts, see fn 52 above).

to induce the agreement[56] (or, to use the language of another commentator, was wrongful, intentional and causally connected to the agreement).[57]

75.1. Pratt knew that if he disclosed these business dealings (i.e. loans provided to, what was described as, a particularly vulnerable customer),[58] their usurious terms and the ensuing conflict of interest, he would not have received permission to participate in this business relationship, he would have faced disciplinary steps and the agreement would not have been concluded.

75.2. Pratt withheld this information and concealed it by using his personal email address – he did this to advance his own personal financial interests, to the detriment of Lactalis SA. It resulted in him being able to conclude an agreement he would otherwise not have been able to conclude at all.

75.3. Vermeulen's evidence was unequivocal, had Lactalis SA known about these business dealings, their terms and the consequent conflict of interest, the agreement would not have been concluded. Pratt would have faced disciplinary steps. Vermeulen described the failure to disclose this information and the business relationship itself as *"abhorrent"*. He said:

> "*We were not only saddened, we were angry, disappointed, saddened, the reputation of the company, we stand so much to lose. Even if it comes to the fore that it was unacceptable behaviour by an individual within the company still it's our company name. And here we have that gentleman who we were supposed to uplift, empower, and what we were doing through one of our*

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[56] *New Adventure Investments 19 (Pty) Ltd v The Trustees for the time being of the SAS Trust* 2002 JDR 0399 (C) at par 35. See also Hutchison *et al The Law of Contract in SA* 3ed p 126 to 128.

[57] Van der Merwe *et al Contract General Principles* 4ed p 92 to 98.

[58] By this I mean a customer who was clearly already struggling to keep his business afloat and who certainly did not require additional credit on terms supplied by Pratt.

representatives was making that individual dependent on somebody else, I just found it absolutely despicable."

76. Pratt's failure to disclose these facts accordingly constituted a fraudulent misrepresentation that entitled Lactalis SA to cancel the agreement, which it validly did.

CONCLUSION

77. In the circumstances, the Plaintiff's claim is dismissed and the Defendant is entitled to a declaratory order confirming its cancellation of the agreement.

78. In my view there is no reason for costs not to follow the result. In addition, given the complexity of the matter a cost award on scale C is warranted.

ORDER:

In conclusion, an order is issued in the following terms, namely that:

1. The Plaintiff's claim is dismissed.

2. It is declared that the Defendant's rescission of the separation agreement is valid.

3. The Plaintiff is directed to pay the Defendant's costs, on scale C.

[redacted]

COOPER, AJ
Acting Judge of the High Court of SA
Western Cape Division, Cape Town

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