

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 34905/12

(1)	REPORTABLE: YES / NO ✓
(2)	OF INTEREST TO OTHER JUDGES: YES / NO ✓
(3)	REVISED: ✓
18/3/2014	
DATE	SIGNATURE

In the matter between:

THYSSENKRUPP ELEVATORS SA (PTY) LTD

Plaintiff

and

NEELAMBAL MOODLEY

Defendant

J U D G M E N T

MAHALELO, AJ:

[1] The plaintiff instituted action against the defendant for payment of the sum of R4 015 172, 75 (Four Million and Fifteen Thousand One Hundred and Seventy Two Rand and Seventy Five Cent) plus interest. The claim arose

from a series of fraudulent misrepresentations allegedly made by the defendant to the plaintiff and Standard Bank. The plaintiff is a company and the defendant was employed as a financial controller of the plaintiff .

[2] At the inception of the trial the plaintiff abandoned its claim on interest accrued as no evidence in relation thereto was led.

[3] In its particulars of claim the plaintiff alleged that during the period between March and August 2009 the defendant fraudulently misrepresented to it and Standard Bank that in addition to other amounts, amounts totalling R4 015 172,75 were due, owing and payable to the plaintiff's creditors amongst others, Logwin, Millennium Control and Bytes Document Centre. The plaintiff alleged further that the defendant caused the banking details of the creditors on the plaintiff's online banking system to be replaced with the banking details held and operated by her and fraudulently processed payments of various amounts into her own banking accounts. The plaintiff further more averred that the defendant knew that the above representations were false and the banking details she provided as those of the creditors were in fact her own.

[4] The plaintiff alleged that as a direct consequence of the defendant's fraudulent misrepresentations it suffered damages being, loss of capital sum in the amount of R4 015 172, 75 (Four Million and Fifteen Thousand One Hundred and Seventy Two Rand and Seventy Five Cent).

COMMON CAUSE FACTORS

[5] It is common cause that:

5.1 On or about 13th July 2007 the defendant concluded a contract of employment with the plaintiff as a financial controller.

5.2 The defendant had limited power of attorney to:

5.2.1 Sign financial and bank instruments as a co-signatory.

5.2.2 Had access to plaintiff's Internet banking.

5.2.3 Defendant resigned from plaintiff's employment on 25 September 2009.

THE ISSUE

[6] The court is called upon to determine whether the defendant fraudulently misrepresented to the plaintiff and Standard Bank by processing and transferring different amounts of money from the plaintiff's banking account to the banking accounts held and operated by her thereby causing the plaintiff to suffer damages.

THE PLAINTIFF'S CASE

[7] The following witnesses testified in support of the plaintiff's case:

- 7.1 John Wainwright.
- 7.2 Ettiene Van Dyk.
- 7.3 Terusha Naiker.
- 7.4 Inge Wilson.

[8] John Wainwright ("*Mr Wainright*") testified as follows: During September 2009 he was employed by the plaintiff as its new financial controller. He took over the position of the defendant who had resigned previously on 25 September 2009. Over and above the functions he exercised as a financial controller, he took over the responsibility of human resources and was thus in a position to testify to the defendant's personal employee information by virtue of the fact that such information was under his control.

[9] He identified the defendant's identity number; residential address and Absa account details contained in the contract of employment signed by the defendant and representatives of the plaintiff. He further confirmed that the defendant was paid a gross salary of R34 000, 00 by the plaintiff and the salary was paid into the defendant's Absa account number 9092585089 on

the 25th of each and every month. Mr Wainwright identified various Absa bank statements which reflected the Absa account number depicted on the defendant's employment contract. He furthermore identified various salary payments made by the plaintiff into this account by virtue of the defendant's Absa account number 9092585089 appearing against these transactions.

[10] During September 2009 while doing a routine inspection of the plaintiff's bank statements, he came across an anomalous credit payment. He could not find any source documentation pertaining to this credit payment. He requested the plaintiff's bank, Standard Bank, to provide him with audited bank statements. From the audited statements he was able to isolate a payment of R450 840, 00 to a creditor described as Millennium Control for which there was no supporting documentation. He further found out that the bank account number which appeared next to the payment was not a known bank account number for Millennium Control (ordinarily a legitimate creditor of the plaintiff). On further investigation the account turned out to be an FNB account number 62219320083. The plaintiff gave instructions to freeze the account. This resulted in the defendant contacting the plaintiff via e-mail indicating that she was unaware of any funds in her account and that the amount of R450 840,00 was an erroneous payment made into her First National Bank (FNB) account. The defendant offered to pay the money back into the plaintiff's account which in fact she did.

[11] Mr Wainwright, now familiar with the defendant's FNB bank account number 62219320083, identified further anomalous payments which had been

made from the plaintiff's bank account into the defendant's same FNB account.

[12] According to him the different anomalous payments made into the defendant's FNB account were as follows:

12.1 R350 50, 00

12.2 R74 750, 00

12.3 R74 450, 00

12.4 R150 000, 00

12.5 R398 675, 91

[13] Mr Wainwright furthermore testified that he adopted the same method mentioned hereinabove in uncovering further irregular payments made in addition to other amounts from the plaintiff's bank account into the banking account number 2488002976 with Nedbank. He stated that the payments were made as follows:

13.1 R280 550, 00 paid in on 31 March 2009.

13.2 R480 500, 00 on 28 April 2009.

13.3 R500 000,00 on 25 May 2009.

13.4 R651 397, 00 on 10 July 2009.

13.5 R351 789, 00 on 17 July 2009.

13.6 R590 630,00 was transferred on 22 July 2009.

[14] According to him the Nedbank account belonged to the defendant. Mr Wainwright testified that there were all in all fourteen irregular payments made into the defendant's three different banking accounts. The total of all the amounts transferred into defendant's accounts was R4 015 172, 75. (Four Million and Fifteen Thousand One Hundred and Seventy Two Rand and Seventy Five Cent)

[15] Etienne van Dyk ("*Van Dyk*") testified that he is employed by First National Bank ("*FNB*") as operations manager. He has access to FNB customers' accounts as well as bank statements and he is able to identify customers' accounts numbers with the customers' identity number or name. He further explained that when a customer opens a new account the customer is required to complete a customer agreement form wherein the full names, identity number and address are stated. All of the transactions in the customer's account will be reflected on a bank statement. The bank statement is accessed from the bank's database and it is 100% correct.

[16] On 20 March 2009 the defendant opened an account with FNB. She completed the customer agreement form and was allocated account number 62219320083. Mr Van Dyk identified FNB bank statements. He further testified that the following amounts were transferred into the defendant's FNB account number 62219320083:

16.1 R350 500, 00 was transferred on 5 June 2009.

16.2 R74 750, 00 was transferred on 12 June 2009.

16.3 R74 450,00 transferred on 13 June 2009.

16.4 R398 675,91 transferred on 11 July 2009.

[17] Mr Van Dyk furthermore stated that all the transfers mentioned were effected by way of online banking and the information contained in the bank statements was 100% correct.

[18] Terusha Naiker ("*Mrs Naiker*") testified as follows: She is employed by Nedbank as a sales manager. She also has access to Nedbank customers' accounts from Nedbank database. Mrs Naiker was able to identify Nedbank statements and stated that they are a true reflection of transactions undertaken on each and every Nedbank account. She identified Nedbank account number 2488002976 as being that of the defendant. She confirmed that the following amounts were transferred into the account:

18.1 R280 550,00 transferred on 31 March 2009.

18.2 R480 500,00 transferred on 28 April 2009.

18.3 R500 000,00 transferred on 25 May 2009.

18.4 R651 397,38 transferred on 10 July 2009.

18.5 R351 789,90 transferred on 17 July 2009.

18.6 R590 630,56 transferred on 22 July 2009.

[19] Mr Naiker testified further that the transfers of the amounts mentioned were effected electronically from the plaintiff's Standard Bank account. She

stated furthermore that the bank statement was a true reflection of the transactions which occurred in the account.

[20] Inge Wilson testified as follows: She is employed by Absa Bank as a quality assurance consultant. She also has access to Absa accounts held by customers. She explained that account number 9092585089 was an Absa account held by the defendant. This account was directly credited with R90 529; 00 on 13 March 2009 and R21 400,00 on 20 March 2009. The reference account number for all the direct credit was account number 23017244 being the plaintiff's Standard Bank account.

[21] According to Mrs Wilson there is no possibility that the bank statements could be incorrect as they are all extracted from Absa Bank's database.

[22] The defendant's plea largely comprises a bare denial but for the identity and the description of the plaintiff and the defendant. No defence on the merits has been raised. No version was put to any of the plaintiff's witnesses. The defendant did not testify and she did not call any witnesses in support of her case.

[23] The essential elements for a claim based on fraud are:

23.1 A representation by the other party or his agent.

23.2 Fraud (*dolus directus* or *eventualis*) which involves knowledge by the representor or the principal that the representation is false.

23.3 The representation must have induced the representee.

[24] The wrongfulness of a fraudulent misrepresentation consist in the fact of making a wilful false representation to another with the intent that he or she will act or rely on it and suffer harm in consequence. A false representation is usually made in words but it may also be by conduct. There must be some positive statement or act, something more than merely passive or negative conduct.

[25] A party alleging fraud must not only plead it but must also prove it clearly and distinctly. The *onus* is the ordinary civil *onus*.

[26] The defendant has in no way challenged the evidence of plaintiff's witnesses. She has not disputed that she was the holder and operator of the three different banking accounts held at FNB, Absa and Nedbank. She has not presented any evidence to dispute all the transactions performed in the three banking accounts from March to August 2009. The defendant has also not disputed that the different amounts mentioned were transferred from the plaintiff's Standard Bank account into her own three banking accounts and that this happened at the time she was employed as the plaintiff's financial

controller. The evidence relating to the bank statements from the three banks mentioned therefore remains unchallenged.

[27] It is therefore probable under the circumstances that the amounts of money were transferred into the defendant's accounts with her full knowledge and the money was meant to benefit her. This is evident from the fact that immediately after the defendant's FNB account was frozen, she contacted the plaintiff via e-mail and offered to pay the money back. Furthermore immediately after large amounts of money were transferred into her accounts there were many debits made from the same accounts. These debits were made to benefit her. It is clear that the defendant had the intention to misappropriate the money and had no intention to pay it back. This is further demonstrated by the fact that it was not just a once off transfer made to her accounts, it was a series of irregular payments made to her three different banking accounts. No explanation was tendered by the defendant in respect of all the irregular payments made into her accounts.

[28] I conclude that the plaintiff has not only pleaded the elements of fraud referred to hereinabove, it has furthermore proved each and every element and has discharged its *onus* to show that the defendant fraudulently transferred amounts totalling R4 015 172,75 into her own banking accounts. The defendant had knowledge that the banking accounts she provided were false in that they were not of the plaintiff's creditors. The defendant, in utilising the plaintiff's legitimate creditors and in fabricating fictitious amounts which were allegedly due to them when the amounts were not, misled the

plaintiff into believing that the amounts were due, owing and payable and caused the payments to be made without any legitimate commercial reason. The defendant therefore caused the plaintiff to suffer loss as a result of the direct consequence of her actions.

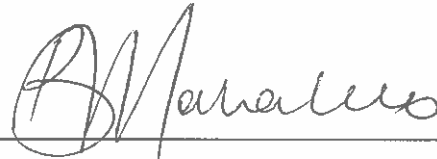
COSTS

[29] The matter was set down for three days. On the first day the matter did not proceed because of the non- appearance of the defendant. As a result counsel for the plaintiff argued that the wasted costs occasioned by the postponement should be borne by the defendant. A medical certificate was handed in , indicating that defendant was unavailable due to ill health. I have no reason to doubt this. Counsel for the plaintiff further asked for a punitive costs order against the defendant because of the manner in which the defendant conducted the trial. According to him the plaintiff was put in unnecessary expenses of running a three day trial where no defence has been disclosed on paper and the defendant failed to testify or call any witnesses. The defendant's counsel presented no argument in relation to costs.

[30] The award of costs is a matter within the court's discretion. I am of the view that the manner in which the defendant conducted this trial was so unreasonable to justify a special costs order.

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

1. Judgment is granted in favour of the plaintiff for the amount of R4 015 172, 75. (Four Million and Fifteen Thousand One Hundred and Seventy Two Rand and Seventy Five Cent)
2. Interest on the aforesaid amount at the rate of 15,5% per annum from date of this judgment to date of final payment (both days inclusive).
3. Costs of suit on attorney and client scale.



M B MAHALELO
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

FOR THE PLAINTIFF; ADV HJ FISCHER

INSTRUCTED BY; EDWARD NATHAN SONNENBERG INC

FOR THE DEFENDANT; ADV P NDOU

INSTRUCTED BY; SALEEM EBRAHIM ATTORNEYS