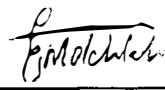


THE REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG HIGH COURT: PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: <b>NO</b>
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✓ (3)	REVISED
<u>22-11-16</u>	
DATE	SIGNATURE

Case number: 46098/2010.

**MOMENTUM GROUP LIMITED**

**Plaintiff**

**AND**

**SUNNET MYBURG**

**Defendant**

Heard: 25 July 2016

Delivered: ~~18~~ 22 November 2016

Summary: Counter claim by the defendant. Claim for damages arising from alleged misrepresentation. Damages for pure economic loss. Duty to disclose detailed information-misrepresentation claim.

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## Judgment

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Molahlehi AJ

### Introduction

- [1] The initial claim in this matter, which was instituted by the plaintiffs, concerned payment of the amount of R150 000.00. The claim arose from the employment contract of the defendant. The defendant conceded to the liability in respect of that claim.
- [2] The defendant's claim in the present matter is based on the alleged misrepresentation by the plaintiff. She contends that but for the misrepresentation made by the plaintiff's representative, she would not have resigned from her previous employment with ABSA bank to join the plaintiff. The defendant is claiming payment in the amount of R150 455.00 from the plaintiff.

### Background facts

- [3] It is common cause that the defendant resigned three months after assuming employment with the plaintiff. Prior to taking employment with the plaintiff, the defendant was, as

indicated earlier, employed by ABSA bank in the brokerage department for a period of 27 (twenty seven) years. She resigned from ABSA to join the plaintiff.

The case of the defendant

- [4] The defendant in support of her case testified that prior to accepting the offer of employment she had two meetings with Mr Williams, the representative of the plaintiff. At the first meeting, the parties discussed the proposal that the defendant should join the employ of the plaintiff.
- [5] The details of the terms of the employment contract it would seem was discussed at the second meeting. At this meeting, the copy of the statement of the commission earned by the defendant whilst at ABSA was handed over to Mr Williams.
- [6] The defendant testified that during the meeting she indicated to Mr Williams that she would want to be placed at the plaintiff's head office and that she wanted to start working immediately. According to her, Mr Williams indicated during that meeting that there were 50 000 leads available to work from. She understood that the leads mentioned by Mr Williams were of such a nature that she would be able to earn a commission and did not simply refer to the name and number of the client.
- [7] During cross-examination, the defendant conceded that she did not discuss with Mr Williams the quality and the nature of the leads. She also stated that she decided to take the offer of employment after discussing the matter with her husband. Her husband had earlier discussed the matter with Mr Van Zyl of the plaintiff.

[8] Following the discussions with Mr Williams and the acceptance of the employment contract, the defendant commenced her employment with the plaintiff during June 2009. Her complaint is that Mr Williams did not keep to his promise in that she was not given the office, she was not placed at the head office and did not have access to the electronic system of the plaintiff. She was given the board room as an office. The most important aspect of her complaint is that she was not given the number of leads which had been promised. She testified that she only received four leads during her first month which she received from the call centre. Those leads according to her were not of good quality and included policies that had matured and had been surrendered.

[9] The defendant also testified having informed Mr Williams that she is not a person who will go into the street looking for clients and that her expectation was to commence working immediately on assumption of her duties.

[10] Following her resignation the defendant instituted the present proceedings, claiming damages arising from the alleged misrepresentation made by the plaintiff.

[11] The second witness of the defendant was Mr Van Linden, the expert witness for the respondent, testified about the calculation of defendant of the salary of the defendant.

#### The case of the plaintiff

[12] The first witness of the plaintiff was Mr Williams, the regional manager. He testified that he was introduced to the defendant by Ms Lizzette Joubert, one of the employees of the plaintiff.

[13] He did not dispute that at the first meeting with the defendant they did discuss the leads which were available. He also indicated that the issue of office space, telephone lines and computers to be used by the defendant were discussed.

[14] At the second meeting with the defendant, the amount which the plaintiff would pay regarding the neutralisation of the financial consequences of her having to leave the employ of ABSA was discussed.

[15] Mr Williams conceded that the defendant did complain about not having an office and was given the board room next to the head office. He did not dispute having discussed the issue of the leads with the defendant but contended that he could never have said that they were of good quality. He did not deny having said to the defendant that she did not blame her for resigning. He also did not recall ever making any representation to the defendant regarding her employment.

[16] The second witness of the plaintiff was Ms Lizzett Joubert, who testified that she knew the defendant prior to her joining the plaintiff and that she introduced her to Mr Williams. She attended the meeting between Mr Williams and the defendant where the employment contract was discussed. At that meeting, the issue of an office where the defendant would work from, was discussed but she could not recall what was agreed to regarding the office of the defendant. She confirmed that the defendant was in fact allocated the board room which she used as her office. She also confirmed that 50,000 leads were discussed but that it was never said that they would be allocated to the defendant.

[17] The third witness of the plaintiff was Mr Myburg, a former colleague of the defendant's ex-husband. He testified that he received the call from the defendant's ex-husband who informed him that his wife was intending to take employment with the plaintiff. They did not discuss the issue of the leads but the concern of the defendant's husband was the nature of the commission which the plaintiff would pay to his wife if she was to join the plaintiff. It seems that he was satisfied when he was informed that the commission is paid at a hundred percent.

[18] The fourth witness of the plaintiff was Mr Moodley, the in-house attorney. He testified mainly about the calculation of the damages that had been made by the plaintiff's expert witness.

#### Evaluation/analysis

[19] The case of the defendant, as I understand it, is based on delictual damages arising from the alleged misrepresentation made by Mr Williams as the representative of the plaintiff. The damages claimed are not based on a cancellation of the employment contract, in the form of resignation by the defendant, but rather on the alleged misrepresentation as stated above.

[20] The claim is based on delict and concerns pure economic loss alleged to have been suffered by the defendant. The key aspect of the representation which was made concerns the 50,000 leads. In this respect, the defendant contends that but for the

representation made by Mr Williams, in particular about the leads, she would not have resigned from ABSA in order to take employment with the plaintiff.

[21] It has been accepted, since the decision in *Administrator Natal v Trust Bank of Africa BPK*<sup>1</sup> that the principles of aquilian liability on negligent misrepresentation does apply in our law. In order for negligence or gross negligence, for that matter, to attract delictual liability it must be shown that the conduct relied on was wrongful. In other words, the existence of negligence does not automatically lead to delictual liability.

[22] The defendant's claim is based on pure economic loss. The issue of wrongfulness in the context of delictual liability for pure economic loss is determined on the basis of whether or not there existed a legal duty on the alleged wrongdoer.

[23] In order to succeed in a delictual liability claim based on economic loss, the plaintiff must show that the act or omission of the wrongdoer was, according to *Telematrix (Pty) Ltd v Advertising Standards Authority*,<sup>2</sup> wrongful and negligent and was the cause of the loss suffered by the innocent party.

[24] In *Telematrix (supra)* the Supreme Court of Appeal in dealing with the issue of delictual liability said:

“[13] When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not *prima facie* wrongful

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<sup>1</sup> 1979 (3) SA 824 (A).

<sup>2</sup> .2006 (1) 461 SA (SCA)

(‘unlawful’ is the synonym and is less of a euphemism) and that more is needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered (and not the converse as Goldstone J once implied unless it is a case of prima facie wrongfulness, such as where the loss was due to damage caused to the person or property of the plaintiff). In other words, conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful, something akin to and perhaps derived from the modern Dutch test ‘in strijd . . . met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt’ (contrary to what is acceptable in social relations according to unwritten law).

[25] The issue of public policy consideration in determining liability for pure economic loss received attention earlier in *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole*,<sup>3</sup> where the court held that:

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<sup>3</sup> [ 2013 (5) SA 183 (SCA)]



"[21] The element of wrongfulness is more problematic. Since we are dealing with pure economic loss – as opposed to a loss resulting from injury to person or property – wrongfulness is not presumed. More is needed. Considerations of public and legal policy dictate whether FHS should be held legally liable for the loss resulting from the misstatement or whether it should be afforded legal immunity . . . .

With reference to these considerations of policy some categories have crystallised where legal liability for pure economic loss will be imposed as a matter of course . . . ."

[26] The two policy consideration that plays a significant role in the determination of the existence of wrongfulness in the context of negligent misstatements are stated in the case of Cape Empowerment Trust (supra) in the following terms:

" . . . first, whether the representation was made in a business context and in response to a serious request and, secondly, whether the plaintiff was dependent upon the defendant to provide the information or advice sought."

[27] The most important indicator and the one that carries considerable weight in determining whether liability for wrongfulness should be imposed on the party accused of misrepresentation is the "vulnerability of risk" on the part of the party complaining of the misrepresentation. This concept entails having to determine whether the party accused of wrongful conduct could not avoid the risk of harm to the other party. In Cape

Empowerment Trust, the court in dealing with the concept of “vulnerability of risk,” had the following to say:

“[28] . . . .What is now well established in our law is that a finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant. . . .” The role of this consideration is best illustrated, I think, by McHugh J in *Perre v Apand (Pty) Ltd* (1999) 198 CLR 180 (H C of A)] *supra* para 118:

‘Cases where a plaintiff will fail to establish a duty of care [or, wrongfulness in the parlance of our law] in cases of pure economic loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interfere with a legitimate acts of trade. In many cases there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant’s conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken or could have taken steps to protect itself from the defendant’s conduct and was not induced by the defendant’s conduct from taking such steps, there is no reason why the law should

step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.”

[28] In the present case it is common cause that whilst Mr Williams made the statement about the 50 000 leads, he did not provide information about their nature and quality. Also of importance is the fact that the defendant never inquired as to what the information about the leads entailed. There is no evidence in this regard that Mr Williams had a legal duty to inform the defendant of the nature and the quality of the leads.

[29] It is also important to note that the defendant did not plead that the plaintiff in informing her about the leads had a legal duty to also inform her about the nature and quality of the leads which Mr Williams was referring to. In addition, there is no evidence as to how many of those leads would be given to the defendant.


[30] In the context where the defendant was familiar with the sector and the work is done in the position she had accepted, it seems to me reasonable to expect her to have enquired more about the details relating to the leads before relying on the information furnished by Mr Williams. It further seems to me that whilst knowing what her expectation was regarding the nature and the quality of the leads, she decided not to communicate the same to the plaintiff. It would, therefore, be unreasonable and untenable, in my view, to impose liability on the plaintiff when regard is had to public policy consideration.

[31] It is thus my view, having regard to the totality of the facts and the circumstances of this case, that the defendant has failed to show that Mr Williams acted negligently in not disclosing the nature and quality of the leads. The defendant has failed to show that the plaintiff in making the representation about the leads reasonably foresaw the loss of the defendant suffered and failed to prevent the same.

[32] In light of the above the applicant's claim stands to fail. I see no reason why costs should not follow the results.

Order

[33] In the premises the defendant's counter claim is dismissed with costs.

  
E M Molahlehi  
Acting Judge of the Gauteng High

Court: Pretoria.

Appearances:

For the Plaintiff: Adv J F Steyn

Instructed by Gerings Attorneys

For the Defendant:

Instructed by: Rianie Strijdom Attorneys