IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C790/2014

DATE: 11 MARCH 2015

In the matter between:

Janette DU TOIT Applicant

and

CAPE WEST COAST BIOSPHERE RESERVE Respondent

J U D G M E N T

STEENKAMP, J:

The applicant in this matter, Ms Du Toit, raises an exception to a counterclaim brought by die respondent, her employer, the Cape West Coast Biosphere Reserve, which is a non-profit organisation (NPO).

The main issue before the Court is a claim by the applicant, who was the CEO of the respondent, for specific performance arising from her contract of employment. The respondent, in turn, brought a counterclaim on the basis that the applicant had made certain fraudulent misrepresentations causing the respondent to suffer damages.

The parties are *ad idem* that the contract of employment that governed the relationship between the parties contained a clause which set out the basis of commission payments to her. That clause, which is Clause 4.2 to the contract of employment, specifies that she would be paid 10% commission on all funds raised for the employer,

> *"...provided that such commission shall only be paid on government, parastatal, NGO or other similar national or international sources, where such sponsors/donors specifically provide for such payment by way of commission, administration fee or otherwise."*

In his argument before Court today, Mr *Aggenbach* made it clear that that is the only condition precedent that governs the contract of employment. However, what the applicant excepts to is:

1. what it calls a "further condition" pleaded by the respondent; and
2. the issue of the claim of fraudulent representation.

I will deal with them separately.

The issue of the so-called variation or further conditions arises from paragraph 6 of the respondent's response which is specifically incorporated in the counterclaim. That paragraph deals both with the alleged fraudulent misrepresentation and the so-called conditions. The respondent pleads that *"on or about"* 12 April 2013 the applicant in her executive position as CEO fraudulently misrepresented to one Rauch, a non-executive director, that there were funds available to pay her commission and that she was entitled to that commission.

The respondent goes on to say that on the "*abovementioned date*", without specifying whether that was on the 12th of April or about the 12th of April 2013, Rauch, acting *ultra vires* and on the fraudulent misrepresentation of the applicant, Rauch authorised her to make payment to herself "*but on the conditions that the applicant: (1) not refer to the payment as 'management fees', but as commission as only the respondent is entitled to management fees as the 'implementing agent' and/or 'implementer'; (2) obtain written authorisation from the department, allocating the alleged commission due to her; (3) inform the Board of the alleged commission due to her; and (4) obtain approval of the Board that the alleged commission is due and payable to her."*

The respondent says that Rauch did not have the authority to unilaterally authorise the payments and that the applicant "at no material time executed the conditions set out above."

The excipient maintains that, although Mr *Aggenbach* says that there was no variation of the contract of employment, these supplementary conditions imposed by Rauch are not pleaded in a way that makes it possible for the applicant to respond thereto. Specifically she points out that the respondent has not pleaded location or whether the contract was written or oral. I leave aside for the moment the issue of authority as Mr *Aggenbach* has specifically pointed out that the respondent's case is that Rauch had no authority to impose those further conditions or stipulations.

The principles in this respect are trite. Both parties pointed to the relevant case law and it is perhaps convenient to refer simply to the one authority that both Mr *Ackermann* and Mr *Aggenbach* referred to, and that is Levitan v New Haven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298h-299c where the Court stated:

> "*Prejudice to a litigant faced with an embarrassing pleading must ultimately lie in an ability properly to prepare to meet his opponent's case.*"

The question then is whether the applicant in this case is able to properly prepare for trial and to properly plead to the respondent's counter claim. Much of what Mr *Aggenbach* submitted is based on interpretation of the pleadings after the fact, for example that the documents that are still to be discovered will make it clear where and how Mr Rauch imposed these further conditions on the applicant.

The applicant, as I see it, is not at this stage placed in a position where she can properly plead thereto. She is therefore prejudiced. The respondent, on the other hand, will suffer no prejudice by the simple means of amending its response and counterclaim. I am not persuaded that the counterclaim should simply be struck out, but I am of the view that the respondent should be given the opportunity to remedy that defect.

With regard to the issue of fraudulent misrepresentation, that allegation is in itself based on the prior representations allegedly made by the applicant to Rauch. What is not clear is, for example, whether the applicant is alleged to have intentionally made fraudulent representations; and when the respondent says that the applicant *"at no material time executed the conditions set out above*" it is also not clear whether that was wilful and intentional and whether the

applicant in fact represented to Rauch whether she had executed those conditions or not, despite the fact that the respondent says he had no authority to impose them in first place.

In that regard as well, the applicant is embarrassed from pleading properly to that allegation and I am again of the view that that is a defect that can be simply be remedied by way of an appropriate amendment which will lead to no prejudice to either party and will place both parties and the Court in a position to properly consider these matters at trial.

As far as costs are concerned I take into account that the applicant is represented *pro bono* and that this is simply a preliminary skirmish in a further battle. In law and fairness I do not think it appropriate to impose a costs order on either party at this stage.

I therefore make the following ruling:

1. The applicant's exception to the respondent's counterclaim is upheld.

2. The respondent must file an amended response and counterclaim within 15 days.

3. There is no order as to costs.

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STEENKAMP, J

10 APPEARANCES

APPLICANT (Excipient):	L W Ackermann
Instructed by	De Jong attorneys.
15 RESPONDENT:	M Aggenbach
Instructed by	K J Bredenkamp