



**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: A 152 / 2021

In the matter between:

**DISCOVERY LIFE LIMITED**

Appellant

and

**ANDRIES MUNRO**

Respondent

Coram: *Saldanha et Wille, JJ*

Heard: 18<sup>th</sup> of November 2022

Delivered: 25<sup>th</sup> of November 2022

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## JUDGMENT

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**WILLE, J:**

### ***Introduction***

[1] This is a civil appeal against the whole of the judgment and order of the Honourable Magistrate, Mr G Hattingh, in the Magistrates Court held at Mossel Bay on the 5th May 2021. The appellant is a registered long-term insurer, and the respondent was contracted to it as an independent contractor. The magistrate dismissed the appellant's claims against the respondent and, in turn, upheld the respondent's counterclaims against the appellant. It is against these orders that the appellant appeals. The appellant's claims relate to certain pre-paid commissions in the amount of R11565,97 paid to the respondent in respect of contractual "claw-back" provisions and the reimbursement of an upfront cash payment in the amount of R215631,00 (described as a "neutralisation" payment) made to the respondent. The appellant also claimed *mora* interest on each amount at the rate of nine (9) per cent per annum and costs on an attorney and client scale.

### ***Appeal grounds***

[2] The appellant had noted sixteen (16) grounds of appeal, the core of which were the following, namely; (a) that the appellant had a valid contractual basis for the termination of its agreements with the respondent; (b) that the finding by the magistrate that the appellant had prematurely terminated its “Independent Contractor” agreement with the respondent was wrong; (c) that the finding by the magistrate that the appellant’s cancellation of the “Acceptance of Offer” agreement was unlawful was wrong; and, (d) that the respondent failed to make out a case in connection with both the merits and quantum of his two claims in-reconvention.

### ***Overview***

[3] The respondent entered into two discrete written agreements with the appellant. The first agreement is styled the Independent Contractor Agreement<sup>1</sup>, and the second has the label of an Acceptance of Offer Agreement.<sup>2</sup> The first agreement mainly regulated the independent contractor relationship between the appellant and the respondent. The second agreement is essentially an incentive agreement which provides for an upfront cash payment to the respondent and the allocation of a certain amount of shares to him by the appellant.

[4] The share allocation to the respondent is also referenced in the independent contractor agreement as part of the appellant’s “Phantom Share Scheme”. The payment in the incentive agreement was inextricably linked to a threshold referred to as the “minimum average annual production” over a three (3) year period, which is set out in the form of a

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<sup>1</sup> For ease of reference, I shall refer to this agreement as the “*independent contractor*” agreement.

<sup>2</sup> For ease of reference, I shall refer to this agreement as the “*incentive*” agreement.

formula that measured the respondent's "production-sales." This production threshold is different to that required to be attained on an annual basis by an independent contractor in terms of that agreement.

### ***Termination***

[5] The appellant purportedly terminated the independent contractor agreement on the 23<sup>rd</sup> of February, 2015. This was by way of a letter of the same date. The purported termination was with immediate effect. The reason for the cancellation was that the respondent was allegedly engaged in legal proceedings with the Financial Services Board and would not have been able to discharge his obligations in terms of the independent contractor agreement. The termination letter referenced the independent contractor agreement in terms, but also referred to certain terms of the incentive agreement.

[6] By way of illustration, the letter of termination, in addition, referred to the upfront cash payment made to the respondent in terms of the incentive agreement. The letter of termination records, amongst other things, the following;

*'...You have informed us that you are engaged in legal proceedings with the Financial Services Board and will not be able to discharge your obligations in terms of the Agreement, thus constituting a material breach thereof...'*

[7] The termination letter also referred to certain clauses in the incentive agreement. Further, it alleged breaches of the minimum threshold average sales-production obligations and the alleged breach of the stipulated period for the incentive agreement. Clause 13 of the independent contractor agreement indicates in terms the following:

*‘...This agreement may be terminated in the following circumstances, amongst others;*

*“...13.3 Where either party provides the other with one calendar month’s written notice of termination...”*

[8] The termination letter relied squarely on clause 13.3 of the independent contractor agreement. The termination letter recorded the following terms in connection with the termination of the independent contractor agreement, namely:

*‘...Clause 13.3 provides that the Agreement may be immediately terminated where the Financial Consultant has breached a material term of the agreement...’*

*and*

*‘...The agreement is hereby terminated in reliance on clause 13.3 we hereby notify you of an immediate termination of the agreement...’*

### ***Pleadings***

[9] The appellant, in its particulars of claim, relied on the terms of the termination letter for the immediate cancellation of the independent contractor agreement in respect of its claim for the repayment of the pre-paid commissions and the repayment of the upfront cash amount in terms of the incentive agreement. The appellant also relied on the termination letter aimed at the independent contractor agreement for its cause of action against the respondent for the repayment of the amounts advanced to the respondent under the incentive agreement.

[10] The respondent, in his plea, squarely placed in issue the appellant's unlawful cancellation of these agreements. In the counter-claim, the respondent pleaded the unlawful cancellation of the agreements and set out his monetary claims against the appellant in the form of; (a) the lost commissions he would have earned to the end of his remaining three (3) year period, but for the unlawful termination of the independent contractor agreement and; (b) the value of his aliquot shareholding with the appellant as at the date of the unlawful cancellation of the agreements.

### ***Consideration***

[11] The appellant conceded that the cancellation of the agreements with the respondent was unlawful. The appellant needed to give the respondent the requisite months' notice as stipulated in the independent contractor agreement. As a result, counsel for the appellant attempted in vain to rely on some of the other averments advanced in the termination letter. These references found no application, and his submissions in this regard were to no avail.

[12] One of the antecedent prerequisites for the lawful cancellation of an agreement with a cancellation clause is that provisions such as prior notice must be complied with before a valid termination can be established.<sup>3</sup> In this matter, prior notice of one calendar months' notice was such a prerequisite.

[13] In addition, the right to terminate a contract unilaterally in the absence of a breach depends on the terms of the contract<sup>4</sup>. This right also depends on the nature and other terms of the contract<sup>5</sup>. The agreements concluded with the respondent may very well have

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<sup>3</sup> *De Wet NO v Uys NO* 1998 (4) SA 694 (T) 706.

<sup>4</sup> *Van Streepen & Gems (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A).

contained such clauses in the independent contractor agreement considering the nature of the relationship between the appellant and the respondent. However, no primary facts were alleged in the particulars of claim in this connection and none of these clauses were relied upon by the appellant. Besides, none found application in the trial in the court *a quo*.

[14] Moreover, whether the cancellation of one agreement that is linked to another agreement necessarily leads to the cancellation of the linked agreement also depends on the terms of the agreements. So too, a contractual claim may survive cancellation of an agreement if, before cancellation, the claim had accrued and was due and enforceable as a cause of action independent of any executory part of the agreement.<sup>6</sup>

[15] More significantly, the respondent relied on the unlawful cancellation by the appellant of the agreements and positively pleaded facts that demonstrated that the appellant had breached the agreements. This, however, did not absolve the appellant from proving the “lawful” cancellation of the agreements where the appellant’s entire claim was premised on the unlawfulness of the respondent’s actions.<sup>7</sup>

[16] The respondent’s obligation to perform in terms of the agreements was accordingly euthanised through no fault of the respondent, but due rather to the unlawful cancellation of the agreements by the appellant. Thus, the respondent’s obligations were extinguished, especially where the terms of the independent contractor agreement did not stipulate that the respondent bore the risk of this non-performance<sup>8</sup>. The impossibility of performance

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<sup>5</sup> *Cell C (Pty) Ltd v Zulu* 2008 (1) SA 541 (SCA).

<sup>6</sup> *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 (A).

<sup>7</sup> *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) 712.

by the respondent (in allegedly not meeting the average production-sales threshold over the period of three (3) years as stipulated in the incentive agreement) and as determined by the appellant itself, was not at the instance of the respondent.

[17] In as much as the respondent bore an onus in this connection, it was squarely discharged by his evidence in the court *a quo*. He testified that he was removed without lawful notice from the appellant's system and licensing as an independent contractor. He was, therefore, not able to contact his clients that had defaulted. He was hamstrung and unable to mitigate his future losses due to the unlawful cancellation of the agreements by the appellant.

[18] Finally, the appellant conceded that as far as the respondent's counter-claim based on his loss of earnings due to the unlawful cancellation of the independent contractor agreement was concerned, the respondent had at the trial in the court *a quo*, tendered sufficiently good evidence and provided the "best evidence" in the circumstances in respect of his loss of earnings.

[19] The quantum of the remaining counter-claim by the respondent was determined concerning his aliquot shareholding at the time of the unlawful cancellation of the agreements with him. He calculated this portion of the counter-claim on the share price of his aliquot shareholding at the initial date of the allocation to him. This was without any escalation or growth thereon. He claimed he did this to keep this portion of his counter-claim below the monetary threshold of claims allowed in the magistrates' court. This

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<sup>8</sup> *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA).



counter-claim was similarly adequately proved on a balance of probabilities by the respondent in the court *a quo*.

### ***Costs***

[20] The respondent was legally represented in the court *a quo* , and the costs order in this connection remains intact. As far as the costs of appeal are concerned, the respondent appeared in person. Accordingly, the respondent is entitled to his reasonable disbursements, including the cost of his reasonable travelling and accommodation expenses, to attend the appeal hearing in Cape Town.

### ***Order***

[21] In the result, I would propose an order in the following terms:

1. The appeal is dismissed, and the court's orders *a quo* are confirmed.
2. The respondent is entitled to recover from the appellant his reasonable disbursements and the costs of his reasonable travelling and accommodation expenses of and incidental to the appeal.

**WILLE, J**

I agree, and it is so ordered.

