



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 11489/2017P

In the matter between:

UMGENI WATER

PLAINTIFF

and

SHELDON NAIDOO

FIRST DEFENDANT

UMGENI WATER PROVIDENT FUND

SECOND DEFENDANT

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time upon which it was handed down is deemed to be 10h30 on 15 December 2022.

ORDER

The following order is granted:

1. There shall be judgment in favour of the plaintiff against the first defendant for payment of the amount of R2 203 565.04;
2. Interest shall run on the judgment amount at the prescribed legal rate of interest from date of demand to the date of final payment;
3. It is declared that the plaintiff is entitled to execute this judgment against the first defendant's provident fund administered by the second defendant;
4. The first defendant shall pay the plaintiff's costs on the scale as between attorney and client.

JUDGMENT

MOSSOP J:

‘Oh, what a tangled web we weave when first we practise to deceive.’¹

[1] The plaintiff is involved in the bulk distribution of water in KwaZulu-Natal and has designed a graduate development programme (the programme) for which it accepts selected graduates from universities to be trained by it, with a hope that they will remain with the plaintiff once they have successfully completed the programme. The first defendant successfully applied for a place in the programme. The plaintiff alleges that this occurred because of a fraud perpetrated on it by the first defendant.

[2] In its particulars of claim, the plaintiff sets out the basis of its allegation of fraudulent conduct on the part of the first defendant. It pleads that it had advertised that applicants for the position of process control technician were required to possess, at least, a bachelor’s degree in Engineering. The first defendant applied for the position and represented that he had a B.Sc. degree in Engineering that he had obtained from the University of KwaZulu-Natal (the University). He put up a copy of his degree certificate and his academic results. His application succeeded and he was appointed to the position.

[3] The plaintiff alleges that the first defendant’s representations were false and fraudulent and that he did not have a B.Sc. degree from the University, or from any other university.² Not knowing of the falsity of the first defendant’s representations, the plaintiff appointed him to the advertised position on 1 September 2008 and he remained with the plaintiff until he tendered his second, and final, resignation on 29 November 2016. The plaintiff pleaded further that it would not have appointed the

¹ Sir Walter Scott in his epic poem ‘Marmion: A Tale of Flodden Field,’ 1808.

² *Home Talk Developments (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; 2018 (1) SA 391 (SCA); [2017] 3 All SA 382 (SCA) paras 29-31.

first defendant if the true facts were known to it. It now seeks the repayment to it of all amounts that it paid the first defendant.

[4] The second defendant is joined in the action because of the interest that it has in the matter and no relief is sought against it by the plaintiff. The first defendant has a pension benefit with the second defendant, a fact that is not in dispute. The plaintiff seeks a declaratory order that should it obtain a judgment against the first defendant that it be permitted to execute against such pension benefit.

[5] The first defendant asserts in his plea that he is indeed possessed of a B.Sc. degree conferred upon him by the University. In support of that plea, he attached to it both his degree certificate and his academic record. He pleads that he applied for a position on the programme and pleads that later he applied for a position with the plaintiff as a process technician. He was successful and was appointed and it is from that position that he resigned at the end of November 2016.

[6] The essential issue to be determined therefore is whether the first defendant graduated from the University with a B.Sc. degree in Chemical Engineering.

[7] At trial, the plaintiff was represented by Mr de Wet SC and the first defendant was represented by Ms Qono. They are both thanked for the assistance that they provided to the court.

[8] The plaintiff called two witnesses. Mr Peter Anthony Gray Thompson is presently the managing director of Umgeni Water Services, a subsidiary of the plaintiff. However, at the relevant time he was the manager of Process Services with the plaintiff and was the first defendant's superior. He confirmed that the advertisement that the plaintiff ran called for applicants possessed of a university degree in chemical engineering to apply for appointment. The first defendant applied and confirmed that he had a B.Sc. Chemical Engineering degree and presented his degree certificate confirming this.

[9] Mr Thompson indicated that the programme has a duration of five years but may be extended. It is structured so that the appointees are exposed to mentors who

guide them through the different facets of the programme. The appointees are rotated through a number of disciplines so that they acquire experience in each discipline. The goal of the programme is to allow appointees to become professional engineers registered with the Engineering Council of South Africa (ECSA).

[10] When the first defendant was initially appointed, Mr Thompson explained that the plaintiff accepted his qualifications without demur and did not validate them. As pleaded by the first defendant, he confirmed that in 2016 the first defendant had applied for appointment as a process technician. The minimum entry level qualification for that position was a B.Sc. degree in Chemical Engineering. Mr Thompson testified further that in the period between the first defendant entering the programme and the date upon which he applied for the position of process technician, a change had occurred at the plaintiff. It now employed a private company to do that which it had not done when it first allowed the first defendant into the programme: all qualifications now had to be verified, including the first defendant's qualification. The first defendant submitted his degree certificate and his academic transcript reflecting the subjects that he studied and the results and marks that he achieved for each subject to the plaintiff, who supplied them to the verifying company.

[11] The verification of the first defendant's degree failed. The plaintiff, and Mr Thompson, were notified by the verifying company that the University had no record of a B.Sc. Chemical Engineering degree ever being conferred upon the first defendant. The first defendant's degree certificate was therefore false.

[12] Mr Thompson testified that he called the first defendant in and broke the news to him. Mr Thompson initially was of the view that there must be a mistake. He asked the first defendant to give him something tangible to demonstrate that he had attended the University and did have the degree that he claimed to have. This could be either in the form of the original record of his academic results or his official graduation photographs or even family snapshots of the happy occasion. The first defendant confirmed that he had such snapshots. Mr Thompson is himself scientifically qualified and knew that in the final year of study in the Faculty of Chemical Engineering students are required to break up into groups comprised of

approximately six students and work collectively on a design project. This apparently takes up much of the final year of study towards that degree. Mr Thompson asked the first defendant to give him the names of those fellow students who were members of his project design group. His intention was to contact them and confirm that the first defendant had, indeed, been at the University, contrary to the feedback that he was receiving from the verification company.

[13] Mr Thompson recalled that the first defendant initially indicated that he had lost his academic results, but shortly thereafter said that he had located them. Having initially said that he did have family photographs of his graduation ceremony, he later said that he did not attend his graduation ceremony and therefore did not have any. He further indicated that he could not recall the names of any of the people who he had worked with in his project design group.

[14] Mr Thompson then contacted the University personally. He was told that the first defendant did not hold a degree awarded by it. Mr Thompson testified that he called the first defendant in again and gave him time off to allow him to go to the University personally to sort out the problem. Mr Thompson remained convinced that a simple mistake had been made that should be easily capable of being resolved, although he was beginning to develop certain misgivings. He testified that he liked the first defendant, had invested a lot of time and effort in him, and wanted to help him sort out this strange turn of events.

[15] Notwithstanding the time off that he was given, the first defendant was not able to clarify anything, or produce anything, from the University when he returned to the plaintiff that assisted in assuaging the misgivings of the plaintiff, or the growing misgivings of Mr Thompson. The University, according to the first defendant, apparently told him that if he wished to raise any query with it, it should be done 'through lawyers'.

[16] Having presented nothing to Mr Thompson to substantiate that he had a degree, the first defendant then tendered his resignation to Mr Thompson and indicated that he would serve out his month-long contractually agreed notice period. This was not accepted by Mr Thompson, as disciplinary proceedings had by then

already been commenced by the plaintiff against the first defendant. However, a few days later, on 29 November 2016, the first defendant submitted another resignation letter, indicating that he now would be resigning with immediate effect. He indicated that this had been necessitated by the fact that he had an illness that posed a serious threat to his life and on medical advice, he was compelled to stop working. The plaintiff accepted this letter of resignation.

[17] Mr Thompson finally testified that had the plaintiff known that the first defendant did not have a degree, he would never have been accepted into the programme. The programme was designed for, and intended for, graduates. The plaintiff only employs graduates. He explained that having an unqualified person working for the plaintiff could potentially be extremely hazardous to the well-being of a large number of people who are dependent on water supplied to them by the plaintiff. Graduates employed by the plaintiff are, inter alia, required to perform calculations to determine which chemicals, and in what quantity, should be added to water that is supplied, literally, to millions of people within the province of KwaZulu-Natal by the plaintiff. Any error in performing such calculations caused through a lack of knowledge could potentially have incredibly serious consequences for the general populace.

[18] Under cross examination, Mr Thompson confirmed that graduates in the programme are closely supervised but that as they gained more experience, they were given greater responsibilities. He mentioned that notwithstanding that the first defendant was with the plaintiff for eight years and had been provided with the necessary exposure to permit him to be registered with ECSA, he never registered. In retrospect, Mr Thompson said that this was a warning sign that had been overlooked by him and the plaintiff, the inference being that such registration did not occur as the first defendant knew that his qualifications would never withstand serious scrutiny by ECSA.

[19] The only other witness called by the plaintiff was Ms Nonhlanhla Gladness Mofokeng, who is the acting head of central student records of the University. She identified a document that the plaintiff claimed is the true record of the first defendant's academic progress at the institution where she is employed and

confirmed that it accorded with the University's records. It revealed that the first defendant commenced his studies in the Faculty of Chemical Engineering in 2002 but was thereafter excluded from that faculty in 2004 because he had failed to make significant academic progress with his studies. By way of contrast, the academic record relied upon by the first defendant shows six years of successful study by him and makes no reference at all to him being excluded from the faculty.

[20] Ms Mofokeng also considered the first defendant's degree certificate and stated that it was not valid. The certificate reads as follows:

'This is to certify that

Sheldon Naidoo

was admitted this day
at a congregation of the University
to the degree of

**Bachelor of Science in Engineering
(Chemical Engineering)**

having satisfied the conditions prescribed for the degree

24th April 2008'

[21] She testified that on such certificate the date at the bottom of the certificate (which appears in a substantially smaller font to those employed in the rest of the degree certificate) was the date upon which that faculty conducted its graduation ceremony and was, therefore, the date upon which the degree was conferred upon a graduate. In this case, the degree certificate indicated that the Faculty of Engineering had its graduation ceremony on 24 April 2008. She had with her in the witness box a printed and bound book that recorded all the relevant details of all graduation ceremonies held by the University during the year of 2008, being the year in which the first defendant claimed that his degree was conferred upon him, as well as the names of all persons who graduated that year from the University. By referring to her book, she was able to confirm that the Faculty of Law and Management had their graduation ceremony on 24 April 2008, and not the Faculty of Engineering. The Faculty of Engineering had its graduation ceremony on 18 April 2008. That then should have been the date that appeared on the first defendant's degree certificate.

The first defendant's degree certificate was accordingly originally a Faculty of Law and Management degree certificate and was, therefore, not a valid degree certificate.³ Ms Mofokeng confirmed that irrespective of whether a graduate attended his or her graduation ceremony, his or her name would still appear in her book. The first defendant's name did not appear in it. That meant he had not graduated in 2008 at all.

[22] The defendant testified and called no witnesses. He asserted that he has a B.Sc. Chemical Engineering degree and had initially commenced his studies at the University of Durban-Westville in 2002 and finished them at the end of 2007 at the University.⁴ He testified that he had gone to the University's student record centre and picked up a copy of his degree certificate and his academic results on the same day and that these were the documents that he relied upon to establish that he does have the requisite qualification. They were documents issued to him by the University. He further confirmed that he had not gone to his graduation ceremony as he was working at the time outside the province of KwaZulu-Natal. He claimed that he could not get to his graduation ceremony due to financial constraints.⁵ He also mentioned that he had a serious health issue that had flared up shortly before the issue of his qualification arose. For some reason, he did not wish anyone to know of the problem and did not even tell his immediate family about it. Only he and his partner knew of it. The partner was not called to testify. He was compelled to see a psychologist because of the effect that his health had on him. His health was the true reason why he had resigned from the employ of the plaintiff and not the issue of his qualification.

[23] The first defendant's counsel took him through the amounts identified in the particulars of claim as comprising the plaintiff's claim against him. He accepted that he had been paid those amounts and did not dispute any of them, but he denied that

³ The original degree certificate was never produced by the first defendant. He claims that it was placed in a safe at his parents' home together with another document that recorded only the subjects that he passed (and did not record any of the subjects that he initially failed), but that the safe itself, and all its contents, was thereafter stolen.

⁴ The University of Durban-Westville and the University of Natal merged with effect from 1 January 2004 and became the University of KwaZulu-Natal.

⁵ He confirmed later that he had been working as a driver for a family business. Why his family would not have loaned him money to attend his graduation ceremony was never satisfactorily explained.

he was obliged to repay anything to the plaintiff. He testified that he had rendered a service to the plaintiff and had been paid for those services by the plaintiff and that there had never been any queries raised by the plaintiff regarding the quality of the work that he had performed for it.

[24] Before the first defendant was cross examined, Ms Qono sought an amendment to the plea to the effect that if fraud on the part of the first defendant was established by the plaintiff, to permit it to recover the amounts claimed in the particulars of claim from the first defendant would cause the plaintiff to be unjustly enriched. The trial stood down for the amendment to be formulated, subject to strict timelines that I imposed on the first defendant. The plaintiff replicated overnight, and the trial proceeded the next morning.⁶ In its replication, the plaintiff stated that it could not have been enriched by the services of an unqualified engineer. Everything that the first defendant had received from the plaintiff, his training, and his salary, had been occasioned by his fraud and to permit him to keep what he received would be akin to rewarding him for his fraudulent conduct. His conduct was so scandalous and morally reprehensible that no court could come to his assistance.

[25] Under cross examination, the first defendant was asked to consider the academic results that he relied upon to establish that he had met the academic requirements for the awarding of the degree that he claimed to have. Those results showed progress each year through the subjects necessary for the awarding of a B.Sc. Chemical Engineering degree. The prescribed period for the obtaining of such a degree is four years but the first defendant completed his degree, according to him, after six years of study. Those results indicate that these were six consecutive years of study, from 2002 to 2007. However, the first defendant had discovered a document, dated 9 February 2006, that had been written by a Professor N M Ijumba (Professor Ijumba), the Dean of the Faculty of Engineering, and which was addressed to the first defendant. It is entitled 'Re-Admission to Faculty'. It stated the following:

'The Faculty Exclusions Appeals Committee has considered your application for re-admission. I am pleased to inform you that your appeal has been successful. You may

⁶ The amended page of the plea was handed up by Ms Qono.

therefore register for study in this Faculty in the 1st semester of 2006 under the conditions specified below.⁷

[26] The academic record that the first defendant relies upon makes no mention whatsoever of him at any stage being excluded from the Faculty of Engineering. It was put to him by Mr de Wet that there simply is no opportunity for this to have occurred as, on the first defendant's version, he progressed, albeit slowly, through each year of study without any controversy. However, the academic results relied upon by the plaintiff, confirmed by the University as being correct, records that he was excluded from the Faculty of Engineering at the end of 2004. The wording used on the academic results recording his exclusion was the following:

'Excluded from Engineering Faculty – Bachelor of Science in Chemical Engineering 31-DEC-2004.'

The letter from Professor Ijumba consequently fits seamlessly into the plaintiff's narrative but finds no traction in the first defendant's version. The first defendant could not explain how the letter from Professor Ijumba could be reconciled with the academic record that he relied upon.

[27] The first defendant's attention was then drawn to the two sets of academic results that were mentioned in evidence, those relied upon by the plaintiff and those relied upon by the first defendant respectively. The academic results relied upon by the plaintiff, and confirmed by Ms Mofokeng as being accurate, commence at the beginning of 2002 and terminate at the end of 2004. The results relied upon by the first defendant also commence at the beginning of 2002 and run continuously beyond 2004 until the end of 2007. There is thus a period where the competing documents record results and marks achieved over the same period (2002 to 2004). But that common period has different results and marks for the same subjects. For example:

(a) For the subject identified as 'Engineering Physics' in his first year of study, the plaintiff's results record that the first defendant failed with a mark of 42, while the first defendant's results indicate that he passed with a mark of 57;

⁷ The condition imposed was that the first defendant had to pass 64 credits in the first semester of 2006.

(b) For the subject identified as 'Fluid Mechanics' in his second year of study, the plaintiff's results record that he was absent from the examination, while the first defendant's results indicate that he passed with a mark of 60; and

(c) For the same subject, 'Fluid Mechanics', which he now wrote in his third year of study, the plaintiff's results show that he failed with a mark of 28. There is no mention of that subject in the first defendant's results in his third year of study because he had already passed it, according to him, in his second year of study.

These are but some of the discrepancies that arise from a consideration of the two competing sets of results in the common period. There are more.

[28] The position is thus not that the plaintiff's version of the academic results is an incomplete version of the first defendant's much longer version. The subjects recorded in both documents are the same, but the results achieved are different in virtually every instance. When asked to explain this, the first defendant was forced to concede the obvious, namely, that they are the results of two different students. Yet both academic results bear his name and his student number. One is therefore a forgery. The question must then be asked: who has the greater incentive to forge these academic results, the University or the first defendant?

[29] Concerning the quality of the witnesses, Mr Thompson appeared to be an intelligent, kind and considerate man who initially completely believed in the first defendant and was more than prepared to assist him in resolving the issue. When it became obvious to him that the first defendant did not have a degree, he became a formidable opponent to the first defendant. No criticism can be levelled at Ms Mofokeng who simply provided a voice to the academic records possessed by the University pertaining to the first defendant. She was not challenged in her evidence, which was clear and to the point, and she was a good and confident witness.

[30] The first defendant was, generally, a witness who had an answer for every question he was asked, even if the answer was weak in its content. He was an unimpressive witness. When it was put to him that he initially told Mr Thompson that he had family snapshots of his graduation ceremony but later said that he had not attended the ceremony, his answer was that he could not remember saying that he

had family snapshots. When asked why he had not given Mr Thompson the names of the members of his design project, his initial answer was that he had not kept in touch with them. That, of course, was no answer to the question. As previously stated, the first defendant said that he could not remember a single name of any of his design team members. He also indicated that he never kept a copy of the design project thus he could not produce it for Mr Thompson's consideration. That he could not remember a single name of any of his design team members that he worked with over the final year of his studies beggar's belief and is worthy only of rejection. Asked why he did not call his final year design project supervisor to verify that he was an active member of the faculty and a participant in the final year design project, the first defendant answered vaguely that it had 'crossed his mind', but that:

'Life in general just happened.'

I am not entirely sure what that answer was intended to convey, but it seems to be that the first defendant could not be bothered to make the effort of speaking to his supervisor or calling her to give evidence. I find this to be a strange, unsatisfactory response that appears to demonstrate a seeming indifference on the part of the first defendant to the undoubtedly serious allegations levelled against him.

[31] On the issue of his life-threatening disease, the first defendant was far from convincing. He and his partner knew of it, but not a single member of his family was told of it. He was invited to disclose it to the court on several occasions when cross examined but refused to do so. He called no medical experts to confirm it.

[32] After a careful consideration of the competing versions, and after observing the witnesses, I have no doubt that the first defendant was an untruthful witness. The documentary evidence put up by the plaintiff is convincing and overwhelming in its effect. I must thus conclude that the degree certificate claimed by the first defendant to be his is a forgery, as are the academic results upon which he relies. I accept the academic results validated by Ms Mofekeng, and which are relied upon by the plaintiff, as being the true and correct history of the first defendant's academic achievements. He was excluded from the Faculty of Engineering in 2004 and despite being offered the opportunity to be readmitted in 2006, never resumed his academic

studies at the University. He could not have acquired his degree with the marks that he received in the three years that he spent at the University (the degree being a four-year degree) prior to being excluded. In the result, I must conclude that the first defendant does not have a B.Sc. Chemical Engineering degree conferred upon him by the University.

[33] In asserting as he did in his application for employment with the plaintiff that he was possessed of such a degree, the first defendant falsely represented the true state of his qualifications with the intention of securing the benefit of employment from the plaintiff. The misrepresentation succeeded and he gained the prize that he sought, to the detriment of the plaintiff, who would otherwise not have offered him any form of employment. In so doing, the first defendant acted fraudulently.

[34] The esteemed English judge Lord Denning uttered these oft quoted words in relation to fraud in *Lazarus Estates Ltd v Beasley*:

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . .'.⁸

[35] It is settled law in this country that '[f]raud is conduct which vitiates every transaction known to the law.'⁹ That having been said, fraud is not easily inferred,¹⁰ nor when it is established should it be considered as a 'flame thrower, withering all within reach'.¹¹ As Cameron J remarked further in *Absa Bank Limited v Moore and another*:¹²

⁸ *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712. Quoted with approval in *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) para 25.

⁹ *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others* [2014] ZASCA 2; [2014] 2 All SA 493 (SCA) para 25.

¹⁰ *Gilbey Distillers & Vintners (Pty) Ltd and others v Morris NO and another* 1990 (2) SA 217 (SE) at 226A.

¹¹ *Absa Bank Ltd v Moore and Another* [2016] ZACC 34; 2017 (1) SA 255 (CC) para 39.

¹² *Ibid.*

'Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties'.

[36] The plaintiff, being the victim, seeks the unravelling of the contract concluded with the first defendant. The existence of the contract was put an end to by the first defendant when he tendered his second resignation on 29 November 2016. The contract has accordingly been rescinded. The plaintiff now seeks the restoration of the situation prior to the contract being concluded. It holds the view that the contract concluded with the first defendant is void and not merely voidable. Indeed, in his heads of argument, Mr de Wet stated that any contract induced by fraud is void *ab initio*. I cannot share that view.

[37] In my understanding, different consequences may occur from contracts induced by fraud. The contract may either be void *ab initio* or it may be voidable at the instance of the aggrieved party. In *Dalrymple, Frank and Feinstein v Friedman (2)*,¹³ the position was explained thus:

'Transactions induced by fraudulent misrepresentation may be void *ab initio*, or they may be voidable only. This distinction is well known in the sphere of contract, and is illustrated in the case of *Cundy v Lindsay*, L.R.3 App Ca 459. Where, as in that case, there is no consent on the part of the owner to the passing of the property to the person who obtained it by fraud, the transaction is void *ab initio* and the ownership of the property remains in the person defrauded. But if the owner consents to the passing of the property, although his consent was obtained by means of a fraudulent misrepresentation, the transaction is voidable only. In such cases, ownership passes to the fraudulent party. Where the fraud is such that the transaction is void *ab initio*, ownership of the property fraudulently taken or obtained remains in the owner who can vindicate it in the hands of an innocent third party. Here the transaction is voidable only, an innocent third party can acquire good title.'

[38] In determining whether a transaction induced by fraud is void or merely voidable, the test is whether the person seeking to have it set aside:

'... entered into the transaction wilfully and knowingly, with the intention to bring about the legal consequences which it entailed, or not. If so, then it is a valid

¹³ *Dalrymple, Frank and Feinstein v Friedman (2)* 19654 (4) SA 649 (W) 664A-D.

transaction until it is declared invalid, although it may be voidable at his instance on the ground that he was induced to enter into it in an unlawful manner. If, however, it was not his intention to enter into the transaction (indien egter sy wil nie met die handeling bepaard gegaan het nie), then the transaction (apart from whatever effect estoppel might have) has no legal consequences.’¹⁴

[39] In this instance, the victim, the plaintiff, intended to contract with the first defendant on the basis that it believed that he had the required degree from the University. It turned out that he did not have that degree. Had the plaintiff known this, it would never have contracted with the first defendant or appointed him to any position. In other words, had the truth been known to it in 2008, no relationship with the first defendant would have been countenanced or developed and no money would consequently have been paid by the plaintiff to him. On the other hand, had the first defendant possessed the qualification that he professed to have, the plaintiff would have been content. It seems to me in those circumstances that the plaintiff had intended to contract with the first defendant until the truth was revealed to it. In my view, the contract was thus not void ab initio but was voidable at the instance of the plaintiff.¹⁵

[40] The plaintiff claims restitutio in integrum and seeks the return of all that it paid the first defendant. Where restitution is claimed, the party claiming it is ordinarily required to tender that which it had received during the impugned relationship. The plaintiff has not pleaded this. That is, however, not always a requirement. In *Radiotronics (Pty) Ltd v Scott, Lindberg & Co. Ltd*,¹⁶ van Zyl J stated as follows when considering contracts of service and contracts for work and labour:

‘... from the very nature of things upon the cancellation of such a contract there can, in the true sense of the word, never be any question of both parties

¹⁴ *Preller and others v Jordaan* 1956 (1) SA 483 (A).

¹⁵ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) para 14; *Sim Road Investments CC v Morgan Air Cargo (Pty) Ltd* [2011] ZASCA 81 para 22; and *Pepkor Holdings Ltd and others v AJVH Holdings (Pty) Ltd and others and related matters* [2020] ZASCA 134; [2021] 1 All SA 42 (SCA) para 32.

¹⁶ *Radiotronics (Pty) Ltd v Scott, Lindberg & Co. Ltd* 1951 (1) SA 312 (C) at 335H.

returning what they have received under the contract. The wages can be returned but how are the services, the labour and the time to be returned?’

[41] Henning J in *Hall-Thermotank Natal (Pty) Ltd v Hardman*,¹⁷ approved of this statement and went on to state, with reference thereto that:

‘With respect, the learned Judge posed the question correctly. The short answer seems to me that work and labour need not be “returned”.’

[42] Henning J went on to state the following:

‘One might well pose the further question: why should an innocent party be deprived of his right to rescind on the ground of fraud or material breach of contract and to be paid back with what he has parted because he is unable through no fault of his to restore the work and labour rendered by the party at fault? Which one of the two should be the loser? As *Voet*, 4.1.1 says *restitutio in integrum* is based on sheer common fairness. It does not seem to me unjust that the party who committed the fraud or the breach should bear the loss rather than that the aggrieved party should forfeit his remedy to rescind and be confined to a claim for damages.’¹⁸

The learned judge concluded by saying that the obligation by a claimant to restore that which he received:

‘... is not necessarily a *sine qua non* to his right of rescission, so that his own inability to make restitution is excused if it is not due to his own fault, for example, where the fruits of the labour have perished *casu fortuito*, or where the restitution of work and labour which were of no benefit to him is not possible.’¹⁹

[43] In his work, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg*,²⁰ Professor W de Vos states that where *restitutio in integrum* is claimed, the claimant need not make such a tender where what he received was a *factum* (a service).²¹ In this case, it is not possible for the plaintiff to tender restitution of any benefit that it derived from the contract with the first defendant,

¹⁷ *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) at 831A.

¹⁸ *Ibid* at 831A-C.

¹⁹ *Ibid* at 833B-C.

²⁰ W De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed.

²¹ *Ibid* at 166-167.

nor has it tendered such restitution. In my view, it was not necessary for it to do so.

[44] Once the plaintiff proved the fraud perpetrated on it and that the contract had been terminated, it became entitled to repayment of the amounts that it paid the first defendant in the absence of any evidence affording a basis for a finding that restitution would be unjust.²² An attempt was made by the first defendant, through the amendment of his plea, to suggest that some value was provided by him to the plaintiff through the services that he allegedly rendered to it that would result in the plaintiff being unduly enriched if restitution was ordered. It may well be questioned what value the services of a person who fraudulently represents his qualifications have. In any event, the value of these services can only have had their source in the evidence of the first defendant. He ought to have explained when he testified what he did, when he rendered such services, the value thereof and the like. He did not do so. He did not even attempt to do so. An amended plea not backed up by any evidence to establish what has been pleaded is valueless.

[45] On the evidence led before me, there was no basis upon which the equitable remedy of restitution should be withheld from the plaintiff. The first defendant must be ordered to disgorge what he received from the plaintiff arising out of the fraud that he perpetrated on it. If the first defendant is of the view that he is entitled to compensation for unjust enrichment from the plaintiff, he is free to establish that claim in appropriate legal proceedings.²³

[46] Relief is sought by the plaintiff in terms of the provisions of section 37D(1)(b) of the Pension Funds Act (the Act),²⁴ that it be entitled to execute against the pension benefits that stand to the first defendant's credit with the second

²² *North West Provincial Government and another v Tswaing Consulting CC and others* [2006] ZASCA 108; 2007 (4) SA 452 (SCA) para 21.

²³ *Ibid* para 22.

²⁴ Pension Funds Act 24 of 1956.

defendant. Those benefits have clearly been retained pending determination of the plaintiff's action.²⁵ The purpose of this section of the Act is to protect the employer's right to pursue the recovery of money due to it arising, inter alia, out of any fraud perpetrated against it by its employee.²⁶

[47] Section 37D(1)(b)(ii) of the Act reads as follows:

'(1) A registered fund may-

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of-

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which-

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court, including a magistrate's court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned;'

[48] In my view, the first defendant's conduct falls fairly into the provisions of the Act just quoted. I received no argument from the first defendant on whether I should uphold the relief claimed by the plaintiff in this regard. I accordingly shall grant it.

[49] On the issue of costs, the cause of the litigation has been the dishonest conduct of the first defendant. He has demonstrated no contrition for his conduct but has continued to falsely assert that he has a degree when it is palpably clear that he does not. He has made no attempt to prove that he has what he claims he has but, at the same time, he has made no real attempt to weaken the plaintiff's case. Given that approach, it is not clear on what basis he opposed the relief sought

²⁵ *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* [2008] ZASCA 164; 2009 (4) SA 1 (SCA).

²⁶ *Twigg v Orion Money Purchase Pension Fund and another* (1) [2001] 12 BPLR 2870 (PFA) para 21; *Charlton and others v Tongaat-Hulett Pension Fund and others* [2006] 2 BPLR 94 (D) at 97-98.

against him. He has had ample time to consider his position as this trial has inched its way through the rolls until it was ready to commence. Costs on the party-party scale have been claimed in the particulars of claim but Mr de Wet called for costs on a punitive scale in his heads of argument.

[50] Costs on an attorney and client scale are not to be awarded lightly. Such orders should be reserved for those cases where a party has been guilty of reprehensible conduct. Such an example of reprehensible conduct may arise where a party has been guilty of dishonesty or fraud.²⁷ In *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*,²⁸ the court expressed itself as follows on the issue:

'[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.'

[51] The issue of costs, and the scale on which they are to be awarded, is a matter for the discretion of a trial court. In *Intercontinental Exports (Pty) Ltd v Fowles*²⁹ the court considered the nature of this discretion:

'The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party's conduct in relation to the litigation.'

[52] Considering the facts of this matter and in the exercise of my discretion, I am of

²⁷ *Matchett v Pretorius and others* [2022] ZAKZPHC 60 para 8.

²⁸ *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607.

²⁹ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) para 25.

the view that a costs order on the scale of attorney and client is justified.

[53] To sum up: the indisputable facts reveal that the first defendant set out to deceive and wove his web accordingly. He achieved his goal. He has now become entangled in a web that he alone devised and cannot now be heard to complain of the consequences that must follow.

[54] I accordingly grant the following order:

1. There shall be judgment in favour of the plaintiff against the first defendant for payment of the amount of R2 203 565.04;
2. Interest shall run on the judgment amount at the prescribed legal rate of interest from date of demand to the date of final payment;
3. It is declared that the plaintiff is entitled to execute this judgment against the first defendant's provident fund administered by the second defendant;
4. The first defendant shall pay the plaintiff's costs on the scale as between attorney and client.

MOSSOP J

APPEARANCES

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Date of Hearing : 28 and 29 November 2022

Date of Judgment : 15 December 2022