

HC 6474/01
Ref: HC 5959/01

POSTS AND TELECOMMUNICATIONS CORPORATION
versus
WINFREDA NDAKAITEYI MHAKA

HIGH COURT OF ZIMBABWE
NDOU J
HARARE, 25 July 2002 and 27 August 2003

Opposed Application

Adv. P. Nherere, for the applicant
Mr J. Tomana, for the respondent

NDOU J: These are two matters involving the same parties whose cause of action arises from the same agreement of employment. On the one hand, in case HC 5959/2001 the respondent, Winfreda Ndakaiteyi Mhaka (hereinafter referred to as "Ms Mhaka") sued the applicant, Posts and Telecommunication Corporation (hereinafter referred to as "PTC") for reinstatement to the post of Manager Commercial Services (Postal) with effect from the order without loss of benefits for the period that Ms Mhaka was on suspension. In addition Ms Mhaka seeks an order declaring her suspension unlawful. She also seeks that the PTC pays the costs of suit. On the other hand, in case No. HC 6474/2001, PTC seeks that the contract of employment between PTC and Ms Mhaka be declared null and void with Ms Mhaka being ordered to pay back to the PTC all salary and benefits received from PTC in terms of agreement. PTC also seeks that Ms Mhaka pays the costs of suit. In other words, the PTC's cause of action in case No. HC 6474/2001 is its defence in case No. HC 5959/2001. It seems to me that if the PTC succeeds in case No. HC 6474/2001, Ms Mhaka's application in case No. HC 5959/2001 must necessarily be dismissed. However, even if the PTC's application in case No. HC 6474/2001 is dismissed, it does not follow that Ms Mhaka is entitled to the reinstatement she seeks, as it seems that damages would be a more appropriate remedy - *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S) at 349. Most facts in this matter are either common cause or beyond dispute. The salient facts are that on or about 1

May 2000, PTC engaged Ms Mhaka as Manager, Commercial Services (Postals). Ms Mhaka had applied for the post in response to an advertisement in the media. The advertisement read, *inter alia*, -

“Applications are invited from suitably qualified and experienced persons to fill the below-mentioned position in the Postal Business Unit”

Qualifications/Experience

- A degree in Social Studies or any other business related disciplines and/or an internationally recognised professional marketing qualification.
- A postgraduate qualification in Marketing, MBA, etc will be an added advantage.

Plus

- 5 years relevant experience

Applications accompanied by a detailed curriculum vitae, CV should be submitted to ...”

Together with her application, Ms Mhaka submitted her Curriculum Vitae and also attended an interview.

The requisite qualifications for the post were, *inter alia*, a post-graduate qualification in marketing, and, five years relevant experience. To make up for the “five years experience” Ms Mhaka stated, in her CV, that she had been employed as a Marketing Manager for Progress Trading Association from 1995 to 1997, and, as a marketing executive for the Institute of Marketing Management from 1 January 1998. It is common cause that she had, in fact, been employed by the Institute of Marketing Management from 1 April; 1998, and not 1 January as stated in her CV. Without this misrepresentation her relevant experience amounts to four years and nine months i.e. three months short of the required or stipulated five years.

Progress Trading Association, of which Ms Mhaka claims to have been Marketing Manager, has, as its Managing Director, Ms Mhaka’s husband. In Ms Mhaka’s CV, the name of the Managing Director of Progress Trading Association is given as “Dennis Chibaro” and not Dennis Mhaka”. It is common cause that both these names refer to the same person i.e. Ms Mhaka’s husband. Ms Mhaka did not disclose to PTC that Dennis Chibaro was, in fact her husband.

Progress Trading Association’s operation consists of a wholesale outlet in Mount Darwin. The Harare Wholesale outlet having closed

before, or some time in 1995 according to Arthur Nyarota's affidavit. As this part of Nyarota's affidavit is not denied by Ms Mhaka, it must be taken to have been admitted. Ms Mhaka presented her responsibilities at Progress Trading Association as having been - "Developing customer service standards; monitoring market share as well as competition; cost control and brands management; advertising and promotional campaigns."

It is PTC's case that Ms Mhaka was never employed as the Marketing Manager for Progress Trading Association. In saying that she was so employed, Ms Mhaka was making, and is still maintaining an intentional falsehood. PTC is relying on misrepresentation in three aspects in seeking the rescission of the agreement, viz,

- (a) that it is false that she was employed as Marketing Manager of Progress Trading Association;
- (b) that she has five years relevant experience; and
- (c) non-disclosure that one of her referees referred to her in her CV was, in fact, her own husband.

Whilst there is a dispute of fact on (a), *supra*, the parties are in agreement that it can be resolved on the papers by taking a robust common sense view of the probabilities - *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (SC). In support of its case in this regard PTC relies on the evidence of Nyarota who carried out investigations against Ms Mhaka. The relevant parts of Nyarota's evidence are that all the time Ms Mhaka alleged to have worked for Progress Trading Association, the Harare outlet was no longer operational. This leaves one outlet under the umbrella of Progress Trading Association, i.e. the one in Mount Darwin. Ms Mhaka could not have working for the latter from Harare. I take notice of the notorious fact that Mount Darwin is around 160 kilometres north of Harare. Ms Mhaka was unknown to Mr Mademutsa, the person who managed the Mount Darwin outlet between 1995 and 2000. Neither NSSA nor the Commissioner of Taxes had any record of Ms Mhaka being employed by Progress Trading Association. While it is true that the absence of the relevant records from both the Tax Office and NSSA does not, necessarily, mean that Ms Mhaka was not employed by progress Trading Association at the relevant time, I hold the view that the absence of the relevant records from both offices does

establish a *prima facie* case for Ms Mhaka's husband was the managing director of Progress trading Association at all material times, it would not have been difficult for the relevant company records to be found and documentary proof submitted to this court. The nature of Ms Mhaka's responsibilities at Progress Trading Association (*supra*) are such that it is improbable that she would have carried them out without being known by Mr Mademutsa or without visiting the Mount Darwin outlet regularly. Taking a common sense and robust view of all circumstances I find that Ms Mhaka was not being truthful when she stated that she was employed by Progress Trading Association to discharge the responsibilities enumerated in her CV.

I therefore, find that she made the misrepresentations articulated in (a), (b) and (c) above. The only issue left is whether PTC is entitled to rescind the agreement on account of the said misrepresentation.

It is trite that unless a misrepresentation is material, or in respect of a material fact, it will not justify the rescission of the contract. A party who has been induced to enter into a contract by misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce him to enter into the contract and did so induce him. A contract induced by fraud can obviously not be treated as binding on the innocent party. *Claremont, Mowbray and Rondebosch Councils v Smith* (1909) 26 SC 681 at 700-1; *Karoo and Eastern Board of Executors and Trust Co v Farr* 1921 AD 413 at 415; *Novick v Comair Holdings* 1979 (2) SA 116 (W) at 149-50. In the latter case COLMAN J said that a party seeking to avoid a contract on the ground of misrepresentation must prove the following elements of his case (a) that the misrepresentation relied upon was made; (b) that it was a representation as to a fact as opposed to a promise, prediction, opinion or estimate; (c) that the presentation was false; (d) that it was material in the sense that it was such as would have influenced a reasonable man to enter into the contract in issue; (e) that it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided, and, (f) that the representation did induce the contract. That does not mean that the misrepresentation must have been the only inducing cause of the contract, it suffices if it was one of the operative causes which induced the representee to contract as he did.

I agree with the Learned Judge's statement of the Law of Contract in this regard. In *casu*, it is beyond dispute that Ms Mhaka made the representations relied upon by PTC in avoiding the contract of employment entered into between the parties. She represented

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that she had the requisite five years experience. She represented that she was previously employed as a Marketing Manager of Progress Trading Association. These are factual representations which, as highlighted above, are false. In the circumstances the elements in (a), (b) and (c) were proved by PTC.

In my view, these false representations are material, and are intended to induce PTC to giving her the employment. They are intended to ensure that Ms Mhaka's application meets the minimum requirements as set out in the advertisement. The representation did reasonably induce PTC into entering into an employment agreement with Ms Mhaka. PTC was under the impression that she had the requisite experience in terms of both relevant previous employment and length of that employment. The false representations are some of the operative causes which induced PTC to employ Ms Mhaka. In such circumstances, PTC, as the innocent party is entitled to rescind the contract of employment whether Mss Mhaka's misrepresentation was fraudulent or innocent - *Pretorius & Anor v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 (W) at 415H. Advocate *Nherere* also submitted that there was non-disclosure by Ms Mhaka that one of her referees is in fact her husband. Not only that, but that the employment as Marketing Manager relates to working for her husband's business. In *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co. (Pty) & Ors* 1978 (1) SA 914 (A) at 924B it was stated:

"A man cannot be said to conceal what he is not bound to reveal, suppress what he is under no duty to express, or keep back what he is not required to put forward."

See also *Meskin NO v Anglo-American Corporation of SA Ltd & Anor* 1968 (4) SA 793 (W). When does silence, which, by itself, does not, as a general rule, give rise to a remedy in law, come within the rules on non-disclosure? The answer is: when the circumstances are such that "frank disclosure" is clearly called for - or as it has frequently been said when there is a duty to disclose. The test is one of good faith. As JANSEN J said in *Meskin NO v Anglo-American Corporation (supra)* at 802A -

"It is now accepted that all contracts are *bona fidei* This involves good faith (*bona fides*) as a criterion in interpreting a contract and in evaluating the conduct of the parties both in respect of its performance and in its antecedent negotiation."

And in *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W) at 198A-B STEGMANN J said -

"The proposition that by our law all contracts are *bona fidei* is not confined to matters that arise after consensus has been reached; it

applies to the very process of reaching consensus. A party who adopts an ambivalent posture with a view to manipulating the situation to his own advantage when he can see more clearly where his best advantage lies has a state of mind that falls short of the requirements of *bona fides*." - *The Principles of the Law of Contract* by AJ Kerr, 4e ed at 220-223.

Is what Ms Mhaka failed or neglected to disclose about her husband a material circumstance? If so, then she should have disclosed such association with him and his company as being part of her relevant experience. Did the non-disclosure by Ms Mhaka leave PTC with an incomplete picture of her as suitability for appointment? This incomplete picture must have led PTC to employ Ms Mhaka, a decision which, normally differs from that which PTC would have taken had the situation been fully understood by them. The non-disclosure, *in casu*, is a factor that contributed to the result in question, i.e. the employment of Ms Mhaka. Ms Mhaka designedly concealed her relationship with her husband and her husband's ownership of Progress Trading Association. She was using a surname that is different from her husband and she was aware that it would be difficult, if not improbable that PTC would realise that one of her referees was, in fact, her husband. Having regards to all these circumstances there can be no doubt that it was Ms Mhaka's duty to disclose her close relationship to one of her referees and her erstwhile employer. The former gave her candidacy substantial mileage whereas the latter gave her the required qualification for shortlisting. She concealed the existence of this close relationship and did so craftily. PTC was deceived by this silence. Ms Mhaka's deliberate silence or non-disclosure constitutes a fraud and as such the facts establish a case of fraudulent non-disclosure - *Knight v Trollip* 1948 (3) SA 1009 (N) and *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) at 869G-H.

From the foregoing it is clear that the evidence establish both fraudulent misrepresentation and fraudulent non-disclosure. Individually or cumulatively PTC is entitled to rescind the contract entered into between it and Ms Mhaka on 1 May 2000 as both the fraudulent misrepresentation and non-disclosure were material.

By its very nature, rescission entails *restitutio in integrum* - *Harper v Webster* 1956 (2) SA 495 (FSC) at 499-502; *Feinstein v Niggli and Anor* 1981 (2) SA 684 (A) at 689 and *Uni-Erections v Continental Engineering Co Ltd* 1981 (1) SA 240 (W) at 246-7.

Advocate *Nherere*, rightly conceded that this case is exception to this general rule. PTC abandoned the claim for restitution. This

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concession is well placed because Ms Mhaka performed well on her job. She passed her six months probation period. Her immediate supervisor, Ms Gladys Mutyavaviri, was impressed about her performance. Restitution does not have to be an integral part of rescission, rather, it is a consequence that must necessarily follow from it. In this case it should not follow. It would be unfair for PTC to recover the amounts paid to Ms Mhaka as salary and benefits, yet it also received quality service from her. Ms Mhaka's misdemeanours were not discovered on account of poor performance. She was a victim of whistle-blowing by disgruntled colleagues.

In the circumstances it is ordered:

1. That the contract of employment between the applicant and the respondent be and is hereby declared null and void.
2. That the respondent be and is hereby ordered to retain all salary and benefits received from the applicant in terms of the nullified contract.
3. That the respondent be and is hereby ordered to pay costs of suit.

Coghlan, Welsh & Guest, applicant's legal practitioners.

Muzangaza & Partners, respondent's legal practitioners.