REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 06/15260

DATE:28/08/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

DORBYL LIMITED Plaintiff

and

EDWIN JUAN VORSTER Defendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff has instituted action against the defendant, its ex-employee, based on three claims. In Claim 1, the plaintiff claims for the disgorgement of secret profits in breach of fiduciary duty on the part of the defendant in the sum of R36 896 428,00. In Claim 2, the plaintiff seeks from the defendant payment of the sum of R316 016,79 being an amount disbursed by the plaintiff at the instance of the defendant in breach of the defendant's duty of good faith, contract of employment, and fiduciary duty. As will be seen later, this claim is not seriously in dispute. In Claim 3, the plaintiff claims the amount of R4 510 000,00, which represents payments made by the plaintiff based on a management participation scheme agreement ("*the MPS*").

[2] The defendant has filed a plea, a special plea of prescription in regard to Claims 1, 2 and 3, as well as a counterclaim, which is related to the plaintiff's Claim 3.

[3] Some background, which reveals that most of the issues are not seriously in dispute, is necessary. The plaintiff is a listed company on the Johannesburg Stock Exchange. The overview of the plaintiff shows that the founding of Dorbyl Heavy Engineering in 1946 was to provide a much-needed service to the fast growing Heavy Engineering Industry in South Africa. Through the continuous and constant expansion and development of new businesses and new markets, new divisions were incorporated over the years to form self-sustainable business units. With the purchase of the Dorbyl Engineering Division from Dorbyl Limited, the self-sustainable business units

have been incorporated into what is presently the DCD-Dorbyl Group of Companies. It is a black economic empowered company operating both nationally and internationally under the division of the majority shareholder, namely a management Consortium. The DCD-Dorbyl Group is a multi-faceted company serving its diverse clientele throughout the Mining, Rail, Marine and Metallurgical Industries.

[4] It is common cause on the pleadings that at all material times the defendant was a duly appointed director of the plaintiff. He held the position of Group Executive Director. In the plea, the defendant confirms that he was a member of the Board of the plaintiff from about 1999, and that the scope of his responsibilities and authority included from 2001 an active role in what the defendant terms the unbundling of the Dorbyl Group. As will be seen later hereunder, the plaintiff holds a contrary view on the latter assertion. It is also not in dispute that the defendant's contract of employment provided that the defendant was an officer of the plaintiff and exercised supervising control related to the general administration of the plaintiff. The general conditions of employment of the defendant by the plaintiff came into effect on 1 January 1998 and were updated with effect from 1 July 2002. Clause 8 of the conditions precluded the defendant from engaging himself in work for remuneration outside his scope of employment, without the written permission of the plaintiff. It is common cause that no such written permission was given. It is further common cause that by the nature of his employment, the defendant owed the plaintiff a duty of good faith which included the duty to serve the plaintiff faithfully and honestly. It is also not in dispute that the

defendant owed the duty to avoid a conflict of duty and self-interest, as well as a duty to avoid obtaining for himself either secretly or without approval of the plaintiff any benefit arising out of his employment. Finally, and of significance in this matter, the defendant does not dispute that he owed the plaintiff a fiduciary duty. The defendant, however, contends that he obtained the benefits in question whilst acting as a consultant to the entities concerned, as indicated later herein.

[5] Consequently, the issue whether or not the defendant owed the plaintiff a fiduciary duty is not to be determined in this trial. It is rather the consequences and implications of such fiduciary duty that needs to be examined. The Court is also called upon to determine whether the defendant in fact acquired the benefits in question with the approval of the plaintiff, particularly in regard to Claim 1.

[6] In 2000 to early 2001, and by means of the MPS, it was agreed between major shareholders and management of the plaintiff that the future strategy of the group had to be changed. The main objective, and since the plaintiff was at that stage too diversified in nature, to improve the rating of the Dorbyl share. It was generally agreed that the number of operations were either not providing an adequate return or alternatively had declining prospects for the future. The evidence of Mr W W Cooper, the Chief Executive Officer of the plaintiff ("*Cooper*"), was to the effect that the MPS envisaged the unlocking of inherent value, as opposed to what the defendant labels the complete and secret unbundling of the plaintiff. In the final analysis, nothing

truly turns on this divergence of use or interpretations and the finding of the Court in this regard is dealt with later in this judgment. The end result was that for strategic reasons, the plaintiff resolved to sell off certain of its group operations, in which the defendant participated on behalf of the plaintiff, and which forms the subject-matter of the instant litigation. The MPS also provided as follows:

> "*The scheme recognises management's ability to improve the group share price during this refocusing exercise and incentives would be paid accordingly, both during and on finalisation of the exercise as determined by the board. In view of the difficulty interdicting the course and eventual outcome of the refocusing exercise, the attached Schedules have been prepared in totality to assist in the determination of the final value that is unlocked … In addition, bonuses for divisional executives need to be determined against targeted values that may be realised for their divisions.*"

Under the management structure, the MPS, which was also co-signed by the defendant, listed, amongst others, "*Messrs W W Cooper, CEO, E J Vorster, Group Executive Director and D Orwin, Group Financial Director (category 1 executives) to manage the refocusing process to its final conclusion …*". For the sake of convenience, the various operations disposed of by the plaintiff based on the MPS, shall be termed the entities with specific names, where applicable. The entities, as well as the joining fees received by the defendant, his initial shareholding therein, the shares subsequently sold, the proceeds of the shares sold and dividends, are contained in Annexure "A" to the particulars of claim, which is, for convenience reproduced hereunder as follows:

"*ANNEXURE 'A'*

	Joining Fee Rands	Initial S/Holding	Shares Sold	Share Sale Proceeds Rands	Dividends and Other Rands
Dynamic Fluid Control	332'500	4.90%	-4.25%	2'858'980	441'133
Kulungile Metals	930'000	2.70%	-2.70%	1'233'000	
Midas Group	780'000	3.60%	-3.60%	1'980'000	
DCD-Dorbyl	1'350'000	3.00%	---	---	
Global Roofing Solutions	860'000	2.50%	-2.50%	250'000	
Other TFS' Transactions					1'150'000
	4'252'500			6'321'980	1'591'133

"

[7] On the pleadings, and with reference to Annexure "A" above, it is not in dispute that the defendant, from July 2001, participated in transactions to purchase from the plaintiff the entities. The transactions were concluded through the agency of IFS Consulting (Pty) Ltd ("*IFS*"). It is also not in dispute that arising out of the transactions whereat the defendant participated, and concerning the purchase of the entities, in each case the defendant received certain benefits. The latter consisted of a joining fee from the IFS or the purchasing entity; and initial beneficial shareholding in the entity which acquired the plaintiff's entity; proceeds from the sale of some or all of the shares so acquired, and dividends in respect of certain of the shares so acquired, as contained in Annexure "A". The quantification of the amount claimed in Claim 1 is therefore not in dispute. However, in the plea and further particulars for trial, the defendant asserts that his scope of participation in the transactions was limited to an advisory role, on behalf of the plaintiff for the purposes of facilitating the conclusion of the sale transactions. In addition,

the defendant contends that after the conclusion of the transactions, he assumed a role of a consultant to the independent entities. Furthermore, the defendant says that the plaintiff is not entitled to seek to recover the amounts claimed as a consequence of the affairs of an entity called Dealco, *ex turpi causa non oritatur* action. In the end, the defendant denies that his participation in the transactions constituted a breach of his contract of employment or of the fiduciary duty he owed to the plaintiff.

[8] For the plaintiff, three witnesses testified. They are Mr B D Bhika ("*Bhika*"), the current company secretary of the plaintiff; Mr H O B Smith ("*Smith*"), the present managing director D D Fluid Control (Pty) Ltd (previously a division of plaintiff); and Mr Cooper. Bhika testified that he had been in the employ of the plaintiff for the past 23 odd years. The plaintiff was still in existence and listed on the Johannesburg Stock Exchange. He confirmed the defendant's remuneration for the financial years ending 31 March 2002 until 31 March 2006. The current corporate Head Office of the plaintiff consisted of the chief executive officer, Mr R Ross, the Financial Director, Mr Bernard Wood, and himself, as company secretary. The plaintiff currently has a castings and machinery factory in Benoni which was fully functional. The plaintiff was independent from the company Remgro. The possible delisting of the plaintiff was not discussed by the Board. Between 2001 and 2006, the plaintiff downgraded considerably resulting in the disposal of several divisions such as Global Roofing Solutions, Alpine Engineering Products (USA subsidiary), Smith Wheels and Water Solutions Business. In July 2005 the only operation left was Automotive Technology. As a

consequence, the turnover of the plaintiff dropped from R4,6 odd billion in 2000 to about R500 m in March 2010. In 2000 the plaintiff was unquestionably a major engineering conglomerate in South Africa and was dominant in the engineering industry. Bhika was not familiar with the workings of the entity called Dealco, which was overseeing the transactions under discussion in the present matter. However, he had sight of the agreements pertaining to the various transactions, as well as the Board's minutes.

[9] Smith testified. The company of which he is presently managing director, was previously a division of the plaintiff. It was known as Dorbyl Water Solutions ("*DWS*"). He knew the defendant as Executive Director of the plaintiff. Smith was aware of the offer made by New Adventure Investments 262 (Pty) Ltd ("*NAI*") to acquire from the plaintiff the entire DWS in August 2001. The offer was made by Mr C J Ransom on behalf of NAI, and the offer was addressed to the plaintiff for the attention of the defendant. The offer was eventually accepted. NAI, which was previously a shelf company became known as Dynamic Fluid Control (Pty) Ltd ("*DFC*"). It is not in dispute, as appears from Annexure "A" to the particulars of claim, that the defendant took out and ended with 4,9% of equity in DFC. At the time, Smith testified that he was unaware of this shareholding of the defendant until about 2004. Smith disputed that the defendant ever acted as a consultant of DFC. Neither did he render any services to DFC. Smith also testified about three subsequent transactions as contained in Defendant's Trial Bundle "DB282", and entitled "*IFS transactions*". The first transaction on the schedule was the sale of 21% of the share capital of DFC to an entity called Kagiso. The

second transaction was the sale of shares totalling 13,5% of the issued share capital of DFC to Madeira Industrial Holdings ("*MIH*"). The last transaction occurred in May 2007 where 100% of his company's shares were sold to a new shelf company when Standard Bank became a shareholder in the business. The schedule shows details of the total shares sold, the value in Rands, percentage and per share and proceeds in Rand value in respect of the last three transactions. For example, the schedule shows that in the transaction to Kagiso IFS sold 4% or 20 000 shares out of a total of 500 000 shares in the business. The total value of that transaction, including interest, was R15 050 148,00. The Rand per share value and the proceeds of IFS in that transaction was about R2,8 m. In the second transaction to MIH where 13,5% of the total issued shares, IFS sold 8,75% and the total of proceeds was R9 560 185,19. In the last transaction, involving Standard Bank, IFS sold 5,93% of their shares and the total value was R155 m, and the proceeds received by IFS was R9 188 144,33. The defendant's shares of the 4,9%, as on Annexure "A" was some 500 000 shares. In cross-examination, the calculations of Smith as reflected on the schedule were not seriously disputed. He denied that he made incorrect assumptions about the relationship between the defendant's shareholding and that of IFS. His own shareholding was in two trusts. The defendant's interest was through IFS by the trust into the company. However, Smith did not know that the defendant had an interest in IFS at the time. He visited Mr Ransom on several occasions and they discussed the transactions. Smith was aware of IFS's involvement in several other disposals, and also that Absa Bank was engaged to provide the necessary capital.

[10] Cooper, the former chief executive officer of the plaintiff testified. He joined the plaintiff in September 1994 until September 2006. He was headhunted into the company. In his tenure, he restructured the management structure. The day-to-day management of people at Head Office consisted of Mr Orwin, the defendant, and himself. In 1998 the company also acquired an equity called Alpine in the US which he also restructured. It became a highly profitable company until 9 November when the Twin Towers fell. From February 2003 Cooper, and at the recommendation of his Board, spent more time in the US.

[11] In regard to Annexure "A" to the particulars of claim, the basis of Claim 1, Cooper testified that the document was handed to him at a meeting of 12 September 2005. It was the first time that Cooper had seen the document. All the transactions and disposals reflected on Annexure "A" were essentially first investigated by the executive management and thereafter approved by the Board. Cooper was present at all such board meetings. The defendant at no stage revealed his interests in any of the transactions. The plaintiff retained no further interest in the disposed entities except to ensure that the purchase price was paid. In terms of the General Conditions of Employment, which applied with equal force to the defendant, no employee was allowed without written permission of the plaintiff, to engage in extramural work for remuneration. Cooper testified that no such permission was granted to the defendant, particularly during the period 2001 and 2005 when the defendant was plaintiff's Executive Director. According to Cooper, all the benefits, whether shares or cash received by the defendant as reflected on Annexure

"A", were obtained contrary to his contract of employment, and without any disclosure to the plaintiff. He said that even if such request to perform services to outside entities was made, it would not have been granted since that would have interfered with the defendant's day-to-day responsibilities towards the plaintiff. Moreover, that any benefit accruing from such outside work would have been for the benefit of the plaintiff. Cooper denied that he ever encouraged or directed the defendant to engage himself in the management of the selling of businesses. At the time the benefits were paid to the defendant, the plaintiff was unaware of the receipt thereof.

[12] Cooper was cross-examined on the details of the MPS and the purpose thereof. The MPS was signed on 10 September 2001. It will be recalled that the MPS forms the basis of plaintiff's Claim 3, as well as the defendant's counterclaim. In the light of the several common cause issues, and the defendant's version, it is necessary to repeat all the evidence. The purpose of the MPS was to refocus the plaintiff's Group as opposed to the complete dismantling thereof. In terms of the MPS, the defendant, Mr D Orwin and Cooper were classified as category 1 executives. The MPS was not only aimed at retaining executive management until the end of the refocusing process to award certain benefits to them, but also to maintain interest in the plaintiff as employer. After the transactions disposing off the entities, and if there remained a surplus, there would be a pool from which management would be rewarded financially. The refocusing of the plaintiff was ongoing. The plaintiff was still listed although with a somewhat truncated operating division. In terms of the MPS, and the category 1 executives, and in

the event of a nett surplus after the successful disposal of the entities, Cooper would have received half thereof, Mr D Orwin and the defendant would have received a quarter, respectively.

[13] In the period when Cooper was spending most of his time in the US with plaintiff's Alpine Division, Mr D Orwin as Financial Director and the defendant as Group Executive Director essentially carried out the preliminary in negotiations in regard to the disposal of the entities. IFS was the vehicle used for the disposal of the entities. The entity called Dealco was like a committee initiated by Cooper. Dealco regulated and monitored the MPS in regard to the viability of the various disposals. Some of the disposals took an inordinately long time to put together. Not all the members of the Board sat on Dealco. It was essentially Remgro and Allan Gray representatives, and Cooper, D Orwin and the defendant. At the time that Cooper left the plaintiff in 2006, the proceeds of the various disposals was in the region of R2 billion. Mr C J Ransom negotiated on behalf of the consortium of the deals that he was involved with and indicated the question what price the consortium was prepared to pay in each case. The defendant was involved in the early stages of the negotiations. Cooper had the last say on the question of the price. Although most of the potential disposal deals involving the entities were taken to the plaintiff's Board for approval, the disposal of the US based Alpine Division occurred as a result of a direct instruction Cooper received from his Board. Cooper testified that the entities which were sold off had to be clean deals with no later comebacks or outstanding issues since purchasers invariably required numerous guarantees or warranties from the plaintiff. The

entities were also sold as complete entities, and there was no subsequent and further involvement in the operation sold, managerially or financially once the purchase price was paid. Although the defendant, as Executive Director, held the Human Resource brief at the plaintiff, Cooper testified that there were no comebacks which required the involvement of the defendant in entities which were disposed off. The involvement of the plaintiff in the disposed off entities was through its Financial Director, Mr D Orwin, in issues where the purchase price was outstanding. The payments to the three category 1 executives, including the defendant, in terms of the MPS, were made progressively as disposals were made.

[14] Cooper further testified in cross-examination that there was no specific time-table for the disposals of the various entities. However, all the shareholders in the plaintiff, including Remgro and Allan Gray were informed that there was the refocusing process which was ongoing. It was aimed at unlocking shareholder value. The share value in fact increased from about R14/15, progressively to about R70 nett. In the process, there was compliance with the Companies Act and the JSE rules and regulations.

[15] Cooper testified that the deal between the plaintiff (represented by the defendant and Cooper) and Public Investment Commissioners-Isibaya Fund ("*PIC*") in December 2004 fell through. PIC were not prepared to proceed with their initial tentative offer at the price that was acceptable to the plaintiff's Board. Similarly, the transaction, which was in fact a reverse take-over between the plaintiff and Calchelf ("*NEWCO*") Investments 108 (Pty) Limited

in August 2005 fell through. It was a proposal by C J Ransom on behalf of NEWCO. Cooper testified that he was not involved in this deal. In the end, there was a dispute between the category 1 executives and Mr Emile Buhrmann regarding the interpretation of the MPS in 2005. Mr Buhrmann was the offer of the MPS. During the whole process of disposing the entities, the category 1 executives (including the defendant) were being paid their salary and benefits in terms of the contracts of employment with the plaintiff. The three category 1 executes were members of Dealco whilst Messrs Phillips and Buhrmann represented the shareholders in plaintiff. Phillips was a non-executive chairman of the plaintiff and was not a Remgro representative. On the other hand, Buhrmann who was on Dealco, was a Remgro representative. All the members of Dealco were in any event also main board directors of the plaintiff. The executive directors on the plaintiff's board were specifically excluded from Dealco. They could not sit on Dealco and have a general discussion about either the timing of the disposals of the entities or the potential value that was anticipated in that disposal when they were also part of the potential purchasing team on the other side. Cooper said this would have been a complete conflict of interest to act on behalf of both purchaser and the seller. The defendant was not excluded from Dealco. He did not disclose his interests in the disposed entities. This was essentially the complaint against the defendant in the present proceedings. Cooper testified that although he spent most of his time in the US at that stage, the defendant and Mr D Orwin performed the initial investigations regarding the disposal of the entities. The defendant communicated continuously with Cooper about the negotiations. He relied on the defendant. Cooper said that had he known

of the defendant's interests in the transactions disposing the various entities, the defendant would have had to recuse himself, and in fact not conduct any further dealings. Cooper himself, did so recuse himself during the Alpine deal.

[16] Mr C J Ransom ("*Ransom*"), a chartered accountant, testified for the defendant. He founded IFS Consulting ("*IFS*"). It is a boutique private equity and investment banking firm, and an owner-managed business. It was in the business of making money.

[17] In the light of the fact that a large chunk of the issues became common cause, it is unnecessary to detail the evidence of Ransom. He became acquainted with the plaintiff's senior management in or about January 2001. He later met Cooper, and studied the plaintiff's business. He made business transaction offers to the plaintiff such as the Leverage Buy-Out and the unbundling proposals ("*LBO*") in February 2001. He discussed the proposal with certain management of the plaintiff, including the defendant and Cooper. The transactions were sponsored by Absa Bank. The proposal was also communicated to Mr Visser, the chief executive officer of Remgro as well as Mr Emile Buhrmann, also of Remgro. The LBO came to nothing in about July 2001. In August 2001, Ransom also made an offer to secure plaintiff's Dorbyl Water Solutions Business ("*DWS*") for some R50 m. The offer was signed. The transaction was implemented in September/October 2001. Ransom through IFS, also made proposals to the plaintiff for the purchase of other

entities concerned in these proceedings. Joining fees were paid to every single one of the participants in a trust, including the defendant.

[18] Ransom testified that in the newly acquired entities from the plaintiff, he utilised the skills of the various management who came with the company. In the case of the defendant, as Human Resources Director of the plaintiff, his expertise in this regard were used. After all, the defendant knew the management teams now assumed by Ransom. The defendant also knew the HR issues relating to some 5 000 employees that Ransom acquired as a result of the successful transaction involving the entities. The defendant was known as a general "*fix it*", as he had intimate knowledge of the entities disposed off by the plaintiff. In the process of acquiring the various entities from the plaintiff, Ransom understood that the plaintiff would stop operating completely in about two year's time. That Mr Cooper would join Alpine in the US, Mr Daniel Orwin would retire, whilst the defendant would be retrenched. All the entities acquired by Ransom through IFS subsequently proved their worth in profitability.

[19] In regard to the profits, consisting of joining fees, shareholding and cash from subsequent sales of the shares, received by the defendant from IFS, Ransom confirmed the figures as testified by Smith. These figures are reflected on the schedule prepared by Smith, Annexure "DB282", incorporating the handwritten figures. These figures also accord with the figures in the defendant's bundle page 179, which tables the extent of the benefits received by the defendant from his participation and involvement in

the five entities which acquired various businesses from the plaintiff. In regard to the defendant's disclosure of his profits, Ransom testified that a schedule of such profits, prepared by IFS at the instance of the defendant, was presented to Mr Phillips and Cooper at a meeting in September 2005.

[20] In cross-examination, Ransom conceded readily that he was aware of the MPS, namely that *inter alia* the category 1 executives of the plaintiff would be reimbursed for their efforts in refocusing or unbundling process. In addition, that the defendant was not only reimbursed, but was still receiving his monthly salary from the plaintiff. He did not or could not dispute that the defendant received the profits as contained in Annexure "A" to the particulars of claim. The profits consisted of *inter alia*, joining fees and a share allocation in IFS in each of the five transactions in question. The joining fees were in the region of R4 m. In addition, the defendant received a further R14 m odd in the form of shares that were later sold, and received the proceeds thereof. The R4 m odd paid to the defendant was in fact in anticipation of services to be rendered which were not defined, apart from the HR issues. The joining fees were paid to the defendant into an account nominated by him. Ransom testified that it was not his responsibility to ensure that the defendant disclosed his interests in the entities disposed off to the plaintiff or revenue authorities. All he saw in the defendant was a resource which he required. He also believed that the defendant would be retrenched by the plaintiff in the near future and would thereafter probably join IFS on a full-time basis.

[21] The defendant did not testify. As a consequence, and in spite of the evidence of Ransom, most of the issues became increasingly common cause. The evidence of Ransom in fact, corroborated the version of the plaintiff to a large extent. In addition to the common cause facts mentioned earlier in this judgment, and for the sake of completeness, the following facts are also not disputed. In 2001 the plaintiff commenced a process of disposing off some or all of its various entities. The alleged dispute advanced by the defendant that the process was intended to unbundle the plaintiff to complete extinction is capable of easy disposal. The uncontroverted evidence of Bhika was that the plaintiff was still listed on the Johannesburg Stock Exchange at the time of the trial. Cooper also disagreed consistently with the version of the defendant put to him in cross-examination. He explained cogently that the plaintiff had resolved to embark on a journey that it would stop from time to time, following on disposals of the entities, to reassess the situation. He testified that this was in fact also the view of the plaintiff's chairman, the late Mr Phillips. The version put to Cooper regarding the process, could only have been the version of the defendant himself, who as executive director of the plaintiff at all material times, was intrinsically involved in the decision leading to the MPS and the process. However, the defendant chose not to testify. For these reasons, the evidence of both Bhika and Cooper must be accepted on this issue of the process. In this regard, compare *Denissoka NO v Heyns Helicopters* [2003] 4 All SA 74 (C). The contention of the defendant in this regard is clearly inconsequential. What remains common cause was the decision of the plaintiff to sell the five business entities in question and that they were in fact sold.

[22] It is further common cause that the plaintiff and the defendant were parties to the MPS agreement which was to regulate the disposal of the entities and the benefits which the defendant would attain from representing the plaintiff in such disposals, as a category 1 employee. The basis of the MPS was settled by the defendant and Mr Emile Buhrmann in the absence of Cooper. There is no dispute that until his dismissal by the plaintiff in March 2006, following a disciplinary hearing, the defendant continued to be paid his normal remuneration as executive director of plaintiff. This was the situation whilst the disposals of the entities were in process and accomplished. In addition to the normal remuneration, the defendant received from the plaintiff (admittedly), under the MTS, some R4,5 m. This is the basis for plaintiff's Claim 3, as well as the defendant's counterclaim.

[23] As the seller of the business entities, the plaintiff was undisputedly represented by the defendant during the negotiations in respect of each of the five disposals. As a member of Dealco, an informal committee created by Cooper which acted as a sounding board for ideas connected with each of the entities disposed, the defendant played an active and vital role in the success of the MPS. He was aware of the asking price which the plaintiff would be prepared to accept for each entity disposed. The IFS took up shareholding in each of the entities disposed of which would conduct business of such entities. In participating in each disposal on behalf of the purchaser, IFS, the defendant received benefits in the form of cash and shares from the purchaser, as stated earlier in this judgment. The total of such benefits was R36 896 428,00. All these were equally common cause. What is of crucial

importance in this matter, and also not in dispute, is that the defendant failed to disclose his interest in the transactions for a disposal off the entities as required by sections 234 and 235 of the Companies Act 61 of 1973. In the particulars for trial, the defendant contended that the benefits which he received were remuneration for consultancy services rendered by him to the purchasers of the disposed entities. However, he did not contend that he in fact received the written permission from the plaintiff to perform work for reward outside the services of the group as envisaged in the plaintiff's General Conditions of Employment. Cooper, the central figure in these proceedings, and as stated previously, testified that he only became aware of the defendant's involvement with the purchasers of the various disposed entities on 12 September 2005. Furthermore, Ransom testified that not a single document existed which recorded the defendant's involvement with the sold entities or indeed with his consulting company, IFS. Neither did the defendant discover any such documents.

[24] I deal with some applicable legal principles. However, before doing so, reference to the defendant's opening address is rather instructive. Mr Sutherland, for the defendant, put it crisply as follows:

> "*And the defence is quiet straightforward in respect of each of them. On the Regal Hastings claim the defendant's defence is simply that there were no inappropriate profits made from the interest which it took indirectly in the companies which bought the plaintiff's business as going concerns. We say that these benefits never were and could never properly be described as corporate opportunities for the plaintiff.*"

This opening address clearly relates to the plaintiff's Claim 1 and Claim 3 only.

[25] In the case referred to in the defendant's opening address, *Regal (Hastings) Ltd v Gulliver and Others* [1942] 1 All ER 378 (HL), at 386, Lord Russel of the Killowen said:

> "*The rule of equity which insists on those, who by use of a fiduciary position make profit, being liable to account for the profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether profit would or would otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.*"

In *Robinson v Randfontein Estates Gold Mining Company Limited* 1921 (AD) 168, at 175 Innes CJ, said:

> "*When one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in the Aberdeen Railway Company v Blaikie Bros. (1 Macqueen 474), the doctrine is to be found in the civil law (Digest 18.1. 34.7), and must of necessity form part of every civilised system of jurisprudence.*"

In the context of the present matter, it is common cause that the defendant, as a paid executive director of the plaintiff, received the profits, in the form of joining fees, share allocation and proceeds of the resale of the shares, without

the knowledge of the plaintiff in breach of his duty of trust. The plaintiff only came to know of the secret profits in September 2005. The profits must be returned to the plaintiff. It is common cause that the defendant was, at the time, in a fiduciary position.

[26] In *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) at para [31] Heher JA said:

> "*The rule is a strict one which allows little room for exceptions … It extends not only to actual conflicts of interest but also to those which are a real sensible possibility … The defence is open to a fiduciary who breaches his trust are very limited: only free consent of the principal after full disclosure will suffice … Because the fiduciary who acquires for himself is deemed to have acquired for the trust, … Once proof of a breach of a fiduciary duty is adduced it is of no relevance that (1) the trust has suffered no loss or damage …; (2) the trust could not itself have made use of the information, opportunity etc ..., or probably would not have done so, …; (3) the trust although it could have used the information, opportunities has refused it or would do so …; (4) there is no privity between the principal and the party with whom the agent or servant is employed to contract business and the money would not have gone into the principal's hands in the first instance …; (5) it was not part of the fudiciary's duty to obtain the benefit for the trust: …; or (6) the fiduciary acted honestly and reasonably: … (although English and Australian Courts make some allowance for equity in calculating the scope of the disgorgement in such cases). The duty may extend beyond the term of the employment …*"

In the present matter, the defendant was employed by the plaintiff until he was dismissed in 2006. There was therefore privity of contract between the plaintiff and the defendant (cf. *Volvo Southern Africa (Pty) Ltd v Gert Yssel* (247/08) (2009) ZASCA 82)).

[27] On the pleadings, the version of the defendant in the instant matter evolved several times until the defence as conveyed in the opening address.

This latest defence is that the benefits are not and could never be corporate opportunities for the plaintiff. The defence has no merit as shown in the legal principles set out above. The plaintiff has argued, convincingly in my view, that the benefits received by the defendant as described in evidence, was a secret profit or bribe in the classical sense. The contention that Ransom was prepared to pay millions of rand by way of training fees alone as a reward for some unspecified services which the defendant might render to him in regard to the entities where the defendant had had no direct involvement is highly improbable. The only real value the defendant could bring to IFS was during the negotiations where he was a member of the plaintiff's negotiating team who had done, at the very least, the initial ground work and he had been a member of Dealco. It was also highly unusual that the defendant, as a full-time Board member of the plaintiff, participated in discussions leading up to the approval or otherwise of a proposed sale, whilst the other members of the Board did not know that the defendant in fact had a very real interest in the purchaser whose transaction was under discussion. It is also strange that whilst in the particulars of claim the plaintiff unambiguously alleged that the benefits received without its consent, in breach of the defendant's fiduciary duty, and constituted secret profits or commissions, the defendant chose not to testify and explain himself.

[28] On the evidence and pleadings, and as argued by the plaintiff, at best for the defendant, his defence suggests that he received about R37 m whilst an executive director of the plaintiff, as well as a category 1 employee under the NPS from the purchaser as remuneration for what he termed consultancy

services. On this basis, the defendant alleged that this was a benefit which could never have been a corporate opportunity for the plaintiff. In *Da Silva and Others v C H Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) at para [19], the Court said:

> "*It is of no consequence that in the particular circumstances of the case the opportunity would not or even could not have been taken up by the company (Regal (Hastings)) Ltd v Gulliver and Others [1942] 1 All ER 378 (HL) at 389D, 392H-393A; Phillips v Fieldstone Africa (Pty) Ltd and Another 2004 (3) SA 465 (SCA) ([2004] 1 All SA 150 at para [31]). But the opportunity in question must be, one which can properly be categorised as a 'corporate opportunity'. While any attempt at an all-embracing definition is likely to prove a fruitless task, a corporate opportunity has been variously described as one which the company was 'actively pursuing' (Canadian Aero Service v O'Malley* [*1973] 40 DLR (3rd edition) 371 (SCC) at 382); or one which can be said to fall within 'the company's existing or prospective business activities … Ultimately, the enquiry will involve in each case a close and careful examination of all the relevant circumstances, including in particular the opportunity in question, to determine whether the exploitation of the opportunity by the director, whether for the director's own personal interest and those of the company which the director was then duty-bound to protect and advance.*"

In the present matter the answer to that question is self-evident: apart from anything else the agent's interests on behalf of the purchaser was to reduce the price payable as far as possible; on behalf of the seller it would be to increase that price by the same margin. The distinction was conclusively answered in *Phillips v Fieldstone Africa (Pty) Ltd and Another (supra)* at para [35]:

> "*… The fundamental question is not whether the appellant appropriated an opportunity belonging to the respondents, but whether he stood in a fiduciary relationship to them when the opportunity became available to him; if he did, it 'belonged to the respondents'.*"

In the present matter, it was expressly admitted that the defendant stood in a fiduciary relationship to the plaintiff when the so-called opportunity became available to him. The defendant plainly breached his fiduciary duty to the plaintiff. He failed to inform the plaintiff of the offer to him or even its terms and he took it for himself without plaintiff's consent. On the credible evidence, the suggestion that the defendant in fact deliberately concealed the offer from the plaintiff, is not out of place. Not only was he paid his monthly remuneration at all material times, but he also benefited and stood to benefit further under the MPS.

[29] Based on the above, and as a direct consequence of the defendant's breach of his fiduciary duty and other duties, the plaintiff has argued cogently, that the defendant has forfeited all the benefits, secret or otherwise, that he has received under his contract of employment with the plaintiff and the MPS. To the extent that the bulk of the benefits the defendant had obtained consisted of shares, he is obliged to pay over to the plaintiff either the shares themselves or their value, the value being the highest value he had in his hands. In Amler's *Precedence of Pleadings,* 6th ed p 23, and with reference to *Mallison v Tanner* 1947 (4) SA 681 (T), the following is said:

> "*An agent who accepts, or agrees to accept, a secret commission forfeits the right to remuneration and is liable in damages for any loss sustained by the principal and is, furthermore, liable to account for any profit to the principal.*"

On his version, the defendant has since disposed of his shares and he is accordingly obliged to account to and pay the plaintiff the amount he received.

In as far as Claim 3 in particular is concerned, Cooper's evidence that payment to the defendant under the MPS had been made before the discovery of the defendant's conduct described above, was not challenged and controverted. The defendant is now obliged to repay those payments. It follows logically that the defendant's counterclaim cannot succeed. The same applies to the defendant's special plea of prescription to the effect that the plaintiff's claims, or portions thereof fell due on or before 20 June 2003 prior to the issue of the summons. Very little can be said of the special plea since it is devoid of all merit. It is difficult to fathom how the plaintiff was to know of a state of affairs which the defendant on the face of it set about concealing from it. In my view, the plaintiff has proved Claims 1 and 3 on a preponderance of probabilities. The secret profits amounted to R36 896 428,00. The defendant had chosen not to testify on matters which are material in this trial. The evidence of Ransom did not advance his course at all.

[30] I deal briefly with Claim 2. The details of the various amounts misappropriated by the defendant are not in dispute. The defendant had to justify what appeared to be inordinate disbursements paid by the plaintiff. The defendant pleaded that he has tendered to repay the amounts against the production by the plaintiff off an amount. The defendant has both formally and informally, during his disciplinary proceedings, undertook to repay the amount stolen by him on receipt of an account from the plaintiff. The argument advanced on behalf of the defendant that the plaintiff has not made out a case in evidence in regard to Claim 2, is without merit at all. Instead of justifying the regular disbursements, the defendant elected not to enter the

debate but closed his case without testifying himself. In any event, the fact of the matter is that the plaintiff by instituting this claim against him, effectively rendered the account the defendant sought. It follows that the plaintiff in regard to Claim 2 as well, must succeed.

[31] I deal with the question of costs. There is plainly no reason why the costs should not follow the result. The issues were fairly complex with some ten arch lever files to work through. Both parties engaged the services of two counsel.

[32] For all the aforegoing reasons, the following order is made:

1. In regard to Claim 1, the defendant shall pay to the plaintiff the sum of R36 896 428,00 (Thirty Six Million Eight Hundred and Ninety Six Thousand Four Hundred and Twenty Eight Rand).

2. In regard to Claim 2, the defendant shall pay to the plaintiff the sum of R316 016,79 (Three Hundred and Sixteen Thousand Sixteen Rand and Seventy Nine Cents).

3. In regard to Claim 3, the defendant shall pay to the plaintiff the sum of R4 510 000,00 (Four Million Five Hundred and Ten Thousand Rand).

4. Interest on the above amounts *a tempore morae*.

5. Costs of suit, which are to include the costs occasioned by the employment of two counsel.

6. The defendant's special plea of prescription and counterclaim are dismissed with costs.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

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DATE OF HEARING	24 FEBRUARY 2011 – 4 MARCH 2011
DATE OF JUDGMENT	JULY 2011