REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

CASE NO: 40449/2008

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

9/9/15
DATE

SIGNATURE

In the matter between

TLADI HOLDINGS (PTY)	**Plaintiff**
Alternatively EMPALANE INVESTMENTS (PTY) LTD	
and	
MODISE, JACOB RESTLHAKE DANIEL	**First Defendant**
MUHLWA, DUMISANI FRANCIS	**Second Defendant**
BATSOMI POWER (PTY) LTD	**Third Defendant**
TLADI HOLDINGS (PTY) LTD	**Fourth Defendant**

J U D G M E N T

VICTOR J:

[1] The plaintiff seeks an amendment to its particulars of claim. The issues are whether the amendment would result in the pleadings being excipiable and whether such amendment introduces a claim which has already prescribed.

Present Claim

[2] It is necessary to analyse the claim as it is presently formulated. The plaintiff claims as against the first and second defendants an order directing them to account to the plaintiff for all the benefits derived by them directly and indirectly, including, but not limited to, gains, dividends and profits arising from a corporate opportunity and certain confidential information belonging to the plaintiff. The assertion being that the first and second defendants acted in breach of their fiduciary duties as directors of the plaintiff. It is also alleged that the first and second defendants diverted the corporate opportunity to the third defendant. The plaintiff also seeks a debatement of such account and the disgorgement and payment to the plaintiff of all such benefits.

Intended Amendment

[3] The proposed amendment seeks to introduce the following: that the third defendant is owned and controlled by the first and second defendants. The third defendant was used as a conduit by the first and second defendants for the purposes of misappropriating the corporate opportunity. It was also averred that the third defendant is the alter-ego of the first and second defendants for the purposes of receiving the corporate opportunity referred to. The amendment seeks that the third defendant must account to the plaintiff for the benefits received.

Relevant background facts

[4] Prior to this amendment now sought, the particulars of claim did not seek relief against the third defendant directly. There were two attempts at an amendment, one dated 18 December 2014 which was not proceeded with and this amendment dated 4 February 2015. The plaintiff seeks to introduce the allegation that the first and/or the second defendants directly owns, or owns and controls the third defendant. The defendants have objected to the notice of amendment.

[5] It is the defendants' case that the amendment now sought cannot be granted as there were insufficient facts pleaded in the original particulars of claim to foreshadow the kind of relief now sought.

[6] In the original particulars of claim the plaintiff contended that the first and second defendants acted in concert and breached one or all of their fiduciary duties that they owed to the plaintiff.

[7] The relevant background facts pleaded include the fact that 47.5% of the issued shares in the plaintiff were held by the third defendant and in 2005 21.5% of the said shareholding was sold to the second plaintiff. The third defendant through its shareholding in the plaintiff and in terms of the shareholders agreement directly and indirectly controls the voting in the plaintiff at shareholder and director level.

[8] The plaintiff has a 68% shareholding in Muvoni Contracting Services Pty Ltd (MCS). The first defendant was a director of the

plaintiff and MCS and was chairman of both. The first defendant is also a director of the third defendant. The second defendant was a director of the plaintiff and MCS and was a director of the third defendant and acted as Chief Executive Officer of both. The third defendant has a 26% shareholding in the plaintiff.

[9] MCS and ARB Holdings Limited and or its main operating subsidiary ARB Electrical conducted business with one another. During the material time being November 2004 in the course of negotiations pertaining to a potential investment by the third defendant in the plaintiff a comprehensive presentation was made by the plaintiff to the first defendant who was representing the third defendant.

[10] The plaintiff conveyed to the first defendant that ARB had engaged a BEE partner and shareholder with whom it was experiencing difficulty and it was expected to separate from within the near future. A key-business strategy of the plaintiff and/or MCS was to realise the opportunity by the procurement of a BEE shareholding in ARB as and when it became available. This information was conveyed to the first and second defendants and was confidential to the plaintiff. Thereafter the third defendant acquired its shareholding in the plaintiff.

[11] In paragraph 3 of the particulars of claim it is alleged that the first and second defendants, as directors of the plaintiff owed a fiduciary duty to the plaintiff not to use confidential information except for the benefit of the plaintiff, not to compete with the plaintiff and to act at all times in the *bona fide* interests of the plaintiff, to avoid a conflict of interest and duty between their personal interests and their duty to the plaintiff and not to misappropriate a corporate opportunity and make secret profits.

[12] The plaintiff also avers that to the knowledge of the first and second defendants, the corporate opportunity which it took belonged to the plaintiff and what the defendants did was to relocate that opportunity for the benefit of the third defendant when ARB Electrical entered into an agreement with the third defendant.

[13] The plaintiff also contend that the first and second defendants acting in concert breached one or more of the fiduciary duties owed by them to the plaintiff. They used the confidential information belonging to the plaintiff for the benefit of the third defendant. They competed with the plaintiff and they failed to act at all times in the interests of the plaintiff. There was a conflict of interest and duty between their personal interests as directors of the third defendant and their fiduciary duties to the plaintiff. They misappropriated the corporate opportunity and diverted it to the third defendant, to the prejudice of the plaintiff.

[14] The proposed new paragraphs would be inserted as 2.1.5, 3.6 bis, 3.8 and prayers 1 and 2. The defendants contend that in paragraphs 3.6.bis(1) and 3.6.bis (2), the plaintiff makes conclusions or relies on secondary facts without pleading the primary facts on which such conclusions are made, alternatively that the introduction of those paragraphs will result in a contradictory situation and therefore make the amendment excipiable. In *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602 "There is nothing artificial or technical about the notion of primary facts. Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts inferred or secondary facts." The plaintiff has pleaded sufficient primary facts to support its cause of action.

[15] The defendants contend that the particulars of claim as read together with the proposed amendment do not reveal a cause of action giving rise to joint and several liability on the part of the third defendant. The defendants also contend that the allegation that the first and second defendants own or control the third defendant does not lead to the conclusion that it is their alter-ego for purposes of receiving the corporate opportunity and further that the allegation is vague and the defendants do not know what case they have to meet. They further contend that the proposed amendment introduces the claim for the disgorgement of profits as against the third defendant and that this claim has become prescribed.

[16] It is important to analyse the original particulars of claim. Paragraph 3 sets out very detailed primary facts, implicating the first and second defendants as having used the third defendant as a conduit to divert a corporate opportunity. The particulars of claim foreshadowed the conduct of the first and second defendants using the third defendant as a conduit.

[17] In my view the amendment sought by the plaintiff, read together with the original particulars of claim, in particular paragraph 3.6, does not rely exclusively on secondary facts, without the pleading of primary and secondary facts. The primary facts are there and the omission by the plaintiffs in the original particulars of claim not to include the claim against the third defendant for the debatement of the opportunity and the profits that it obtained and for disgorgement of the profits does not result in a completely new claim.

[18] Basically the objection is formulated in a way that is akin to an exception. For that reason the allegations contained in the particulars of

claim read together with those in the proposed amendment must be accepted as being correct for the purposes of determining the objection. In this regard see *Marney v Watson & another* 1978(4) SA 140 (C). I take into account the initial particulars of claim, together with the intended amendment – then clearly those facts do give rise to a cause of action.

Directors Fiduciary Duties

[19] The objection on the part of the defendants is that there is no cause of action and the claim must therefore fail. It is quite clear in our jurisprudence that the fiduciary duty of a director towards a company or board on which he/she may serve is that a fiduciary relationship is necessary immediately and that such a director is obliged to display the utmost good faith towards a company in his dealings with it on its behalf. See *Howard v Herrigel and another* N.O. 1991(2) SA 660 (a) at 68(b-c).

> 'At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. It is a fundamental and inflexible rule and goes back to the 18th century. See *Keech v Sandford* 1726 CAS. T-King at 61. It was again enunciated in the case of *Aberdeen Railway Co. V Blaikie Brothers* 1854 (1) 461 at 471 where a director has to promote the interests of the company'

[20] Therefore reading the particulars of claim together with the amendments and bearing in mind that this is at a stage where there is an objection, if the facts as pleaded by the plaintiff are accepted together with the facts as pleaded in the amendment, are accepted, then there is clearly a breach of duty, bearing in mind that this fact may or may not succeed at trial. But at this stage, those are the facts this court has to accept.

[21] The question therefore is whether the first and second defendants have used the third defendant as a conduit. Once those facts are accepted, and if those meetings, referred to in the particulars of claim, do accurately reflect the intentions of the plaintiff in its dealings with ARB, then in my view, certainly a justiciable issue has been set out in the original particulars of claim. The question now is whether by allowing these amendments, this court is allowing an exception to the rule of a separate legal entity in the form of a company which is usually attributed to a company.

[22] A corporate veil may be pierced or lifted where appropriate. It may be necessary in some cases to pierce the corporate veil, but in other cases it is only necessary to lift the corporate veil. In this regard, it has been accepted in our courts that where a corporation is found to be an instrument, or the alter-ego, agent or puppet or mask of its shareholders, then the court may not pierce the corporate veil but simply lift the veil and look to see what the transactions were. The distinction between piercing the veil and lifting the veil, has been traversed by the authors Cassim and others in *Contemporary Company Law* 2nd edition. Our case law has also referred to a number of cases where the court embarks on a fact sensitive enquiry in either lifting the veil or piercing the veil, each case will ultimately depend on its facts.

[23] In this regard there are a number of cases which refer fully to piercing, lifting or looking behind the corporate veil, I refer to the cases of *Amlin SA (Pty) Limited v Van Kooij* 2008(2) SA 558 as well as the Australian cases, Briggs v James Hardie & Co Pty *(1989) 16 NSWLR* 549 at 567 and in *Cape Pacific Ltd V Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 804

> 'Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic

why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability) while giving full effect to it in other respects. In other words, there is no reason why what amounts to a piercing of the veil pro hac vice should not be permitted.'

[24] In *Canadian Aero Service Limited v O'Malley* [1974] S.C.R

'Officers of a company, whether defined as such by the Companies Act or not, who are authorised to act on its behalf stand under the same fiduciary relationship and are subject to the same fiduciary duties as the director of the company.'

[25] This principle was referred to with approval in *Sibex Construction SA (Pty) Limited v Injectaseal CC* 1988 (2) SA 54 (T) at 66D Goldstone J stated:

'An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or which he is associated a maturing business opportunity which his company is actively pursuing: he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity, sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.'

[26] Quite clearly I cannot make a finding as to whether the veil ought to be pierced or lifted at this stage. At this amendment stage I have to accept the facts as pleaded to be true. It follows therefore that there are sufficient primary facts in the original particulars of claim such as diverting a corporate opportunity belonging to the plaintiff to the third defendant to support the cause of action sought to be amended. The material facts as pleaded in the original summons triggers the plaintiff's legal right as claimed. The debt in the intended amendment when compared with the debt as described in the original particulars claim seems the same. It seems *prima facie* that the plaintiff has raised

sufficient facts to trigger the cause of action embodying the lifting or piercing of the corporate veil subject of course to the evidence as maybe produced at the trial. Prima facie the debt appears to be the same in the original particulars of claim and in the amendment; it would not be prudent to disallow the amendment.

Prescription

[27] An important aspect of the defendants' objection is that the cause of action has prescribed. The plaintiff filed further heads of argument on the defendants' prescription argument and the defendants submit that there is a distinction between an accounting of profits and damages. They submit that a claim for profits is restitutory in nature whereas a claim for damages is compensatory in nature. The computation of amounts under an account of profits and a claim for damages will yield different results. As a result a claim for an account or disgorgement of profits as against the third defendant, the defendants submit is a different debt to the claim for damages advanced in the original particulars of claim.

[28] In *CGU Insurance Ltd V Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) Jones AJA found that the meaning of 'debt' must not be overlooked for purposes of ascertaining whether prescription has been interrupted.

> "The Act does not define 'debt' and 'there is . . . a discernible looseness of language' in its use thereof with the result that 'debt' means different things in different contexts. For this reason 'debt' in the context of s 15(1) must bear 'a wide and general meaning'. *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F - G 12 It does not have the technical meaning given to the phrase 'cause of action' when used in the context of pleadings (*Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA) at 826J. In *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F - G Trollip JA made a point of the distinction between 'debt' and 'cause of action', and describes the latter in the following way: "Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal

right of action and, complementarily, the defendant's "debt", the word used in the Prescription Act.'

[29 When a court is called upon to decide whether a summons interrupts prescription it is necessary to compare the allegations and relief claimed in the summons with the allegations and the relief claimed in the amendment to see if the debt is substantially the same. In other words the term debt has a good flexible meaning capable of different context based connotations.

[30] At this stage, this court does not have to assess whether the plaintiff's claim is restitutional in nature or compensatory. In *Rustenburg Platinum Mines Ltd v Industrial Maintenance Painting Surfaces 2009 [1] SCA at* para [19] the original claim was founded on enrichment and the amendment sought to be introduced placed reliance on contract. The Supreme Court of Appeal nonetheless found that the debt remained the same.

[31] A court hearing the trial in due course, will be able to discern more clearly based on the evidence given at the time, whether this claim has indeed prescribed because of the amendments sought.

[32] In this matter the distinction between the claims for damages and the claim for a disgorgement of profits really arises out of the misappropriation of the corporate opportunity which is the "debt" that resulted in a loss to the plaintiff.

[33] In *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) where the question arose as to whether an amendment introducing a claim for

past and future loss that did not appear in the original particulars of claim had prescribed. The court found the debt to be the same and was thus no impediment to permitting the amendment in the face of a prescription objection

[34] The defendants relied on a number of well-known cases in submitting that relief should not be granted. In particular they seek to emphasise that the granting of an amendment in the face of a prescribed claim or where no cause of action is made out should not be granted. See *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Limited and Another* 1967 (3) SA 632 (D). Also *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) where Selikowitz J stated –

> '..Where a proposed amendment will not contribute to the real issues between the parties... it is, I think, clear that an amendment ought not to be granted. To grant such an amendment will simply prolong and complicate the proceedings for all concerned and must, in particular, cause prejudice to the opposing party who will have to devote his energy and expend both time and money in dealing with an issue,..."

[35] It is also a well-recognised principle that if a person has two different rights against another, the institution of an action to enforce only one of those rights will not interrupt prescription in respect of the other. I have dealt in detail with the question of prescription and the sufficiency of pleading in the original summons to justify the amendment.

[36] The right which the plaintiff is seeking to enforce is still the same, the relief sought is substantially the same and the facts on which the claim is based are the same. In *Van Heerden JA in Truter and Another v Deysel* 2006 (4) SA 168 (SCA) at 174 at para 17

> ' In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts: A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault. "

[37] The defendants relied on the principle in *Miller v HL Shippel &Co. (Pty) Ltd* 1969 (3) SA 447(T) at 454 to the effect that where a new cause of action is introduced service of the amendment does not interrupt prescription and that the amendment would simply resuscitate a prescribed claim.

> 'I am consequently of the view that a notice of an application to amend a summons to introduce a new cause of action is not a process whereby action is instituted as is understood by the words in sec. 6 (1) (b) and that the service thereof does not interrupt prescription.'

[38] I have already referred to the defining benchmark of the amendment and that is the question of the primary facts as pleaded giving rise to the debt and begetting the relief sought. The opposition raised by the defendants to the amendment must fail. It is important that all the issues be traversed at trial.

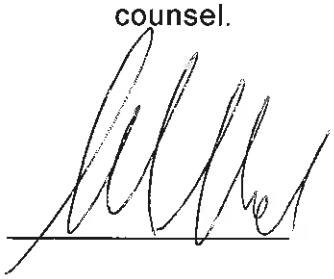
In the result I make the following order:

ORDER:

1. The plaintiff is granted leave to amendment its particulars of claim in the terms set out in the notice of amendment dated 12 December 2014.

2. The plaintiff is to pay the wasted costs of the amendment on the unopposed scale.

3. 1st, 2nd and 3rd defendants are ordered to pay the costs of this opposed application, jointly and severally, the one paying the others to be absolved and such costs to include the costs of two counsel.



M. VICTOR

JUDGE OF THE GAUTENG LOCAL DIVISION

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Date of hearing:	2015-04-13
Date of judgment:	2015-05-25