REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21875/21

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

10/11/2022

In the matter between:

TRANSNET SECOND DEFINED BENEFIT FUND **Applicant**

And

ERIC ANTHONY WOOD **Respondent**

JUDGMENT

MANOIM J:

Introduction

[1] This is an application brought by the Transnet Second Defined Benefit Fund ("Fund")[1] to provisionally sequestrate the respondent, Eric Anthony Wood ("Wood").[2]

[1] The Fund is a retirement Fund established in terms of section 14B of the Transnet Pension Fund Act, 62 of 1990.

The application is based on two claims. They involve the actions of certain entities that Wood allegedly controlled, or together with others, influenced to the detriment of the Fund, with whom they enjoyed a fiduciary relationship. The claims are substantial and amount to over R 110 million. These amounts are alleged to have been paid out to Wood personally or to entities he controls, from two groups of companies he worked for, the Regiments Group and later, the Trillian Group.

[2] The first claim is in respect of certain bond transactions that Wood's entity Regiments Fund Managers, had performed on behalf of the Fund. The second claim is in respect of the payment of fees that were paid out from an account of the Fund controlled by Regiments, despite the fact that the payment was owed by Transnet. It is important at this early stage to emphasise that the Fund and Transnet despite their common name are separate legal entities, governed separately.

[3] This is not the only action featuring the Fund and Wood. In a separate and related action, the Fund seeks payment of these claims as well as other claims. From now on I will refer to this action as the parties have as the "*pending action.*"[3]

The parties

[4] The Fund is a defined benefit Fund.[4] In simple terms it is responsible for the payment of retirement benefits to erstwhile employees of Transnet. As part of its activities, it invests moneys for its members to get a return. But because it has to meet future payments to its members it has to ensure that it is protected against future risk and has the resources to meet its future payments. For this reason, it is prudent for it to have as part of its assets financial instruments that limit its future risk.

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[2] The application is deposed to by Peet Maritz the principal officer of the Fund. His authority to do so is not placed in dispute. See answering affidavit paragraph 24.1. Rather Wood takes issue as to whether all the allegations made are within his own personal knowledge. I deal with the allegations of hearsay later in these reasons.

[3] See Founding affidavit paragraph 14.

[4] The Fund has more than 40 000 members and their widows, or widowers or dependents, who receive pensions from the Fund. They have an average age of 79 and receive on average a pension of R 4000 from the Fund.(Founding Affidavit paragraph 112).

[5] This is where Wood comes into the picture. Wood is a specialist bond trader. He has a PhD in Management and Finance. He has worked in this industry for many years and has held several prestigious positions in his career, including at Investec Bank, where he headed up their fixed income and fixed income derivative trading business. He was also at some stage appointed to the board of the Bond Exchange of South African and was the Chairman of the Primary Dealers Association. Part of his career has focussed on the bond trading needs of public sector clients including Transnet. He explains in his answering affidavit, by way of background, how the fixed income derivative business subsequently expanded to include trading and interest rate swaps and swap options. These financial instruments become relevant to this case.

[6] In August 2004 Wood became a director of a company known as Regiments Capital Pty Ltd ("Regiments Capital"). Regiments Capital had two subsidiaries which are relevant to this matter. Regiments Fund Managers Pty Ltd ("Regiments Fund Managers") and Regiments Securities Limited ("Regiments Securities"). The three companies together constitute the Regiments Group. At the material times for this matter, Wood was a director of all three of these companies. His family trust known as the Zara W trust had, and apparently still has, a 32% shareholding in Regiments Capital. In February 2016 Wood left Regiments to join a company known as Trillian Capital. But he remained a director of Regiments until October 2016 although he claims he was then forced to resign. This departure to Trillian becomes relevant to his defence in this matter.

Requirements for a provisional sequestration order

[7] In terms of section 10 of the Insolvency Act, 24 of 1936 ("the Act"), a court may make an order to provisionally sequestrate the estate of a debtor if it is of the opinion that prima facie:

a. That the creditor has a liquidated claim;[5]

[5] Section 10(a) read with section 9(1).

b. That debtor has committed an act of insolvency or is insolvent; [6] and

c. There is reason to believe that it will be to the advantage of creditors if the estate of the debtor is sequestrated.

Fund's relationship with Regiment.

[8] The Fund commenced its relationship with Regiments Fund Managers when the latter won a tender to become its advisor. Regiments Fund Managers set out all the members of its team together with a description of their expertise in its bid document. From this it is clear that Wood was the most qualified member of team.[7] The appointment process was not a smooth one. Initially the appointment of Regiments Fund Managers was turned down as its fee structure was higher than originally provided for in its bid document.[8]

[9] Eventually in July 2015, Regiments Fund Managers was appointed to manage the Liability Driven Investment ("LDI") portion of the Fund, for a three-year period. But despite the fact that the Fund decided to appoint Regiments in July 2015, the parties only entered into a management agreement to govern their relationship in October 2015. I will refer to this agreement from now on as the mandate. Why the Fund changed its mind to appoint Regiments is the subject of some speculation by the Fund's deponent, but it is not something relevant for me to consider in the present matter. It suffices to say that at a meeting of the Fund's board on 1 October 2015 the Chairman of the Fund's Board, Mr. Shane made the following observation:

"The Chairman confirmed that all previous challenges with Regiments had been resolved and advised the Board that Mr E Wood from Regiments would be

[6] In the papers the Fund had also relied on certain alleged acts of insolvency by Wood. However, these were not pursued in the heads of argument or in the oral submissions made on behalf of the Fund, so I need not consider them further.

[7] The bid document contained what was termed a "Team Skills Matrix". This awarded points to the members of the team in terms of the skills listed. Wood scored highest for most of the skills listed and in particular, highest for "Portfolio management" (See PM 16 Annexure to the Founding affidavit in particular on Case Lines 001-366)

[8] See PM 18, minute of Fund board meeting dated 2 December 2014. Case lines001-379 .

overseeing the Fund's mandate as Principal Strategist. He confirmed that Mr Wood is considered the most experienced bond and fixed interest strategist in the South African market."[9]

[10] A reservation that the Funds' actuaries, Towers Watson, had about the fee structure with Regiments, was noted by the Fund's board but not accepted. Towers Watson had recommended that the fee structure be changed to create a *"better alignment of interest between the parties*."[10]

The issues to be determined

[11] There is no dispute that the nature of Regiments Fund Management's relationship to the Fund was a fiduciary one. The Fund's case is that Regiments Fund Management acted in breach of this fiduciary and hence any profits it made pursuant thereto can be disgorged. Since Wood had acted on behalf of the Fund in respect of the relevant acts for which it claims, and he can be shown to have personally benefited from these unlawful acts, the Fund is entitled to have these moneys disgorged. Since according to the Fund, he will be unable to repay these amounts because he is insolvent, it is in the interests of creditors that his estate is provisionally liquidated. But Wood contends there was no breach of this duty because Regiments always operated in terms of the mandate. This means he contends that the Fund had consented to the actions performed. He also contends, contrary to what is alleged by the Fund, that it in fact benefitted from the actions taken on its behalf.

[12] The Fund disputes whether the terms of the mandate that give prior consent to Regiments apply to the type of actions subsequently taken by it. Also controversial is whether the individuals who worked for Regiment's on Fund investments, owed it fiduciary obligations. The argument here being that it was Regiments which owed this duty. The Fund alleges that the fiduciary obligations extends to the individuals as well, hence this application against Wood. Wood for his part disputes this. He contends that

[9] Annexure PM 24, Case Lines 001-403.
[10] PM 24, supra 001-404.

without going behind the corporate veil, which the Fund has not sought to do, it cannot hold him liable for claims it might have against Regiments. I deal with this aspect later. Finally, Wood contends that much of the material that the Fund relies on its papers is hearsay and falls to be struck out.

How the claims have come about

[13] In around 2014, Transnet had entered into an agreement to purchase 1064 locomotives from two Chinese manufacturers. Regiments claims to have advised Transnet on this transaction.[11] To partly finance this purchase Transnet raised a loan of R 12 billion from several banks, referred to as the "club loan". The size of this club loan exposed Transnet to future financial risk if interest rates rose.

[14] In May 2015 Regiments Capital drafted a proposal to Transnet recommending that it enter into what it termed a financial risk management strategy. Wood states that the advice given to Transnet was done on "*an arm's length basis*" and "*in the client's best interest*." Here by the client, he means Transnet. Pursuant to this advice Transnet decided on 3 December 2015 to hedge the club loan by engaging in interest rate swaps.

[15] As was explained in a memorandum dated 3 December 2015 from Transnet's then Group Treasurer, Phetolo Ramosebudi:

> *"As part of the progression to relieve pressure on the CIC ratio, thereby managing the cost of interest expense and short to medium term liquidity, a conversion of R15 billion fixed rate debt (bonds) need be swapped to CPI linked debt early in the new year. This should be in line with the appropriate accounting treatment."*[12]

[16] There is a dispute of fact around how Transnet was persuaded to follow this advice. This revolves around the views of a Transnet official Smit who initially advised

[11] See EW 5 009-195 where Regiments states it was the transaction advisor for the procurement and that it also advised on capital raising and acted as the "Risk Management advisor".
[12] Annexure PM 1 to the Founding affidavit.

the company against these transactions.[13] Later he changed his mind and approved the scheme. On the Fund's version this was because undue influence was put on him. On Wood's version, Smit came around to the view that this was a good investment. In other words, it was a subsequent appreciation of the logic of the deal, not undue influence from others, that led to his change of mind. I need not go into which version is correct. The significance of the change for the purpose of the present matter is that Wood was central to interacting with Smit on this aspect as the correspondence which Wood himself puts up shows.

[17] Thus far the narrative has to do with Transnet and not the Fund. Recall that the Fund and Transnet are separate entities. The reason the Fund enters the picture is that it was advised to purchase interest rate swaps pursuant to the transactions Transnet was being advised to enter into to reduce the latter's risk. I will deal with these interest rate swaps first as they are the subject matter of the fees claim.

Fees claim

[18] The peculiar feature of the transactions was how Regiments charged Transnet its fees for its services in performing these transactions. There is no dispute about the amount of the fees (R 229 million) nor is there any dispute that this was a fee due for payment by Transnet to Regiments Capital, not the Fund. But through its control over the Fund's investment account, Regiments Fund Manager was able to pay out this fee to its associate company Regiments Capital. The Fund thus ended up paying a fee for services rendered to Transnet and meant to be paid by it.

[19] Wood justifies this payment in two ways. Firstly, Regiments Fund Manager was entitled in terms of its mandate from the Fund, to deduct fees from an account it controlled on its behalf to make payment for its services. Second, and more importantly, he argues the Fund has been compensated for this payment by receiving in turn bonds, whose value in the long term will equal if not exceed the transferred amount. The

[13] Annexure PM3 read with Paragraph 22 of the Founding affidavit

suggestion was that these bonds gave an additional benefit of 20 basis points.[14] In effect what he argues is that when the two transactions are viewed together there has been no theft. The net position of the Fund is that it has at worst, over the long term, been compensated and at best been more than compensated. I discuss later the implications of this explanation.

[20] The explanation given for this 20 basis point advantage is both obscure and arcane. For this reason, I must quote certain portions of Wood's explanation verbatim:

[21] He states in the answering affidavit that Transnet had agreed to pay Regiments Capital *"a fee equal to 20 bp to be added to the yield of the interest rates swaps and paid by Transnet over the life of the interest rate swaps"*[15]

[22] How this came to the Fund is explained as follows:

> *"The Applicant ["the Fund"] accordingly trading certain interest rate swaps with Transnet, and in addition the fund purchased a financial instrument being the present value of the future 20 bp fees which Transnet owed and agreed to pay its advisors ("Regiments Capital").*[16] (I note that the sentence does not make sense grammatically. presumably a word or words are missing.)

[23] He then makes the claim that in fact the Fund not only was repaid in kind in this way but obtained a net benefit:

> *"In addition to purchasing this amortising instrument (the present value of the 20 bp cash flows), the fund made approximately R 490 million profit from having traded the interest rate swaps."*[17]

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[14] See letter dated 29 July 2016 from Gary Pita the Group CFO of Transnet to Shane, the Chairperson of the Fund where the twenty basis points is mentioned. Case Lines 009-114
[15] Answering affidavit paragraph 69.3.
[16] Ibid, paragraph 69.4.
[17] Ibid, paragraph 69.8.

[24] As support for this last contention, he attaches to his affidavit a presentation made by Regiments (seemingly in 2016) in which a graph of various scenarios is presented, followed by rows of figures of three financial quarters; there are also three columns; the first contains figures of returns for what is termed the previous strategy, the second the new strategy, and the third contains a conclusion comparing both outcomes. According to the author of the slide, his conclusion is that at that point in time: *"Net of fees the fund is R 490 million rand better off"*.[18]

[25] Put in less technical language what is being contended for is that the Fund paid Regiments Capital fees, which were owed to Transnet - an amount of R 229 million but in return received a financial instrument whose present value exceeded the fees deducted and gave it a handsome future benefit as well.

[26] But what was in fact happening was that one Regiments entity ("Fund management") was using its power over the bank account of its client ("the Fund") to pay the fees that were owed by another client ("Transnet") for work done by another Regiments entity ("Capital"). The quid pro quo is that the Fund whose account was debited in a determined cash amount received in return a financial instrument of variable value, repayable over time, that allegedly compensated for and exceeded the value of the fees debited. It is not hard to see without a necessary appreciation of high finance that there was something very wrong about this arrangement. It was as the Fund's counsel put it *"manufactured*". The Regiments entities had procured a situation where the Fund's certain money was bartered for uncertain financial paper. The Fund has also gone into the motives that Regiments had for extracting this fee from the Fund to serve another purpose. It is not necessary for me to go into this issue which is collateral to what I have to consider in this matter.

[27] Wood goes on to state that apart from the fact that on his version the Fund suffered no loss from this arrangement, that it had in any event consented to it. As evidence of this, he attaches to his affidavit a letter from Gary Pita, who at that time was

[18] Ibid, Annexure EW 8A.

the Group Financial Officer of Transnet. The letter is dated 29 July 2016 and is addressed to the Chairman of the Fund. According to Wood the purpose of the letter was to *"… record that due process had been observed and followed"*. First Pita refers to a meeting held in May 2016 between Transnet, the Fund, and the latter's attorneys, ENS Africa. Pita says he is writing the letter *to "… give due consideration to the questions raised by the [Fund] at the meeting."* He goes on to state:

> *"During the process of approving TSDBF as a trading counterparty, Transnet considered the position of TSBDF as a pension fund as counterparty and the potential conflict of interest concerns that this may raise. After due consideration of all the information available to us we concluded that the transactions would not give rise to a conflict of interest (…)"*[19]

[28] But if anything, this letter, and the meeting it refers to, shows that the Fund was indeed concerned about the conflict of interest and had raised this. The fact that Pita did not see it that way is no indication that this was accepted by the Fund. Again, it is worth repeating that Transnet and the Fund are separate entities with separate interests. Wood also claims that Roger Rudolph, a lawyer from ENS Africa who represented the Fund, was aware of the fee arrangement. In an affidavit attached to the Fund's replying affidavit Rudolph denies knowing about the arrangement.[20]

[29] There is thus no direct evidence from Wood that the Fund had consented to the fee payment being deducted from its account and hence nothing to contradict the version of the Fund that it had not consented. The evidence put up by Wood far from furthering his own case rather supports the probabilities that the Fund's version on this point is correct.

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[19] Pita letter, supra.

[20] Rudolph in his confirmatory affidavit states that he first got to know of the payments from the Fund's bank account (i.e., the fees payment) on 10 May 2016 when he was told of this by Andrea Taylor from Willis Towers Watson, who said she had identified the payments to Regiments Securities when studying the Fund's bank statements. Rudolph says ENS was not consulted at any time about the swap payments prior to them being made. He says the bond churning transactions only came to light after press report in 2018 in conjunction with the dismissal of former Finance Minister Nene. Case Lines 010-15.

[30] What is evident from the papers is that part of the payment of the fees found its way into accounts controlled by Wood. The Fund has engaged in the equivalent of a treasure hunt as it has followed the payments made into Regiments bank account until they found their way into the accounts of what it terms Wood controlled entities (family trusts) and then some of it into his personal bank account.

[31] In relation to the fees the trail goes in this way. R 229 million rand was taken out of the Fund's Nedbank account by Regiments Fund Managers and paid to Regiments Securities.[21] In turn, some of this money was paid to other entities and according the Fund was eventually used to secure a loan from the Bank of Baroda to purchase the Optimum Coal Company. That transaction is not pertinent to the present application. What is pertinent is the amount paid out from the R 229 million that eventually landed up in accounts of Wood and his entities.

[32] The Fund states that it can trace that R20 881 240.21 that went to two of Wood's entity accounts known as Zara W and Tantacode.[22] These payments made from a Trillion account reflect in emails from Trillion, as Wood's share of the fee. The first payment of R6 389 469.21 was made to an account called Numibrite on 15 March 2016. Numibrite was the previous name of Zara W. This is an entity controlled by Wood.

[33] On 7 April 2016, a second amount of R14 491 771.00 was also recorded as Wood's share of the fee. This amount was then broken up as follows: R 10 million of was transferred to the same Numibrite / Zara W account, whilst the remaining R 4 million was credited to Wood's loan account with Trillian. This is evident from an email dated 7 April 2016, from Tebogo Leballo who was then the Chief Financial Officer of the Regiments (later moving to the same position at the Trillian Group) to one Marc Chipkin of the Trillian Group, where he makes the following request:

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[21] On August 2017, the Fund instituted action against Regiments, Trillian, and their directors, inter alia Wood for misappropriation of the R 229 million. The Fund and Regiments entered into a settlement in which it received partial payment of this money. It still holds Wood liable for R 123 402 437.54, plus interest on that amount since 21 November 2019. (See Founding affidavit paragraph 57.5)

[22] Founding affidavit paragraph 17.2 read with paragraphs 51.3 and 51.9 Wood is a trustee of the Zara Trust. See his affidavit in the related proceeding Case Lines 010-124.

"Hi Marc from Eric (sic) portion of the swap money, please transfer out R10 491 771 instead of R14 491 711. Please note Trillian is keeping R 4 million as working capital loan from Eric. Please transfer R10 491 771 to the following account".[23] The account details are then given. The account name is described as "*Numibrite Pty Ltd Trading as Zara W".* Leballo has filed a confirmatory affidavit in this matter.[24]

[34] Regiments itself entered into a settlement agreement for the Fund in which it accepted liability of for repayment of part of the R 229 million. The fund holds Wood liable for the balance which it says amounts to R123,402,437.54, with interest on it running from November 2019. However, the disgorgement sought in the present case is confined to the R20 881 240.21.

[35] Wood has not seriously contested the trail of payments. For this reason, I have not gone into greater detail on the money trail all of which are included in the founding papers. The Fund's legal team at my request have prepared a schedule of the payment trail and where these are referred to the in the papers. I have attached this schedule to these reasons as an annexure. (It refers in the schedule to the fees appropriation as theft).

[36] Wood then says on the breakup between Regiments and himself (i.e., leading to his departure to Trillian) he became entitled to payment of his past fees. Whatever may have been the arrangements between the two firms, the issue is whether there was an entitlement to the fees charged in the first place. On this issue the Fund has set up at the least a prima facie case that there was no such entitlement for it to be paid by the Fund. I deal with Wood's other defences once I have dealt with the bond churning allegations as some of these defences overlap.

Bond Churning

[23] Case Lines 001-434.
[24] Numibrite was the previous name of Zara W Pty Ltd. (Founding affidavit paragraph 5.4).

[37] As mentioned earlier Regiments Fund Managers advised the Fund to enter into extensive bond trading transactions. The Fund instructed a financial expert, Tanja Tippet, an adjunct professor from the University of Cape Town, whose expertise lies in liability driven portfolio management (LDP) to review these trades. She described them as "bond churning". She does so advisedly. Bond churning is not a neutral term to describe trading. According to a definition on the United States Security Exchange Website:

> *"When a broker engages in excessive buying and selling (*i.e.. *trading) of securities in a customer's account without considering the customer's investment goals and primarily to generate commissions that benefit the broker, the broker may be engaged in an illegal practice known as churning."*[25]

[38] According to the Investopedia website:

> *"Churning is the illegal and unethical practice by a broker of excessively trading assets in a client's account in order to generate commissions".*

[39] It goes on to state:

> *"While there is no quantitative measure for churning, frequent buying and selling of stocks or any assets that do little to meet the client's investment objectives may be evidence of churning."*[26]

[40] Wood was the Fund's key advisor in respect of the bond transactions. He does not dispute that this advice was given but defends his position by saying that the bond trading was done to the advantage of the Fund. Regiments through Regiments Capital had advised Transnet on the need to hedge the club loan. This had created the context for the need for Transnet to enter into bond swaps. Regiments other subsidiary, Regiments Fund Manager, was in the fortunate position of being the Funds' advisor.

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[25] See investor.gov website of the United States Security Exchange Commission.
[26] https://www.investopedia.com/terms/c/churning.asp.

Using this position, it had advised the Fund to become a counter party to Transnet's trades.

[41] Tippet's evidence is that these trades constituted bond churning and hence an abuse. Before I consider Tippet's evidence, I must consider an objection to using it raised by Wood's counsel. He argued that the Tippet affidavit could not be relied on in this matter as it had been used in a separate proceeding. It is correct that her affidavit, which was an annexure to the founding affidavit, had been used in another matter involving the Fund and Wood. However, in the replying papers Tippet provides a further affidavit in which she confirms that the information in the affidavit is equally pertinent to this matter and then she responds to the criticisms raised by Wood in his answering affidavit. I am satisfied that I can rely on it for the purpose of this matter.

[42] Tippet examined transactions that Regiments Fund Manager had undertaken on the Fund's behalf on the following dates:

a. On 4 December 2015 there were five transactions for the sale by the Fund of an aggregate of 3 800000000 R186 bonds and a purchase by the Fund of an aggregate of 2 720 000 000 R186 bonds (all of which settled on 9 December 2015).[27]

b. On 7 March 20016 Regiments Fund managers entered into similar multiple transactions amounting to the sale by the Fund of an aggregate of 6 377 500 000 R186 bonds and the purchase by the Fund of an aggregate of 7000000000 R186 bonds (all of which settled on 10 March 2016);

c. On 30 March 2016 the following transactions were entered into (both of which settled on 4 April 2016):

i. the purchase of 3 080 000 000 R186 bonds from Regiments Securities at a price of R109.99 per bond; and

ii. the sale of 4 700 000 000 R186 bonds to Regiments Securities at a price of R106.80 per bond.

[27] Tippet affidavit paragraphs 13-14 Case lines 001-451 to 001-453.

d. During April 2016 the following transactions were entered into both of which settled on the same date, 13 April 2016:

i. 8 April 2016 the sale of 2 815 000 000 R186 bonds to Regiments Securities at a price of R107.07 per bond; and

ii. 11 April 2016 the purchase of 1 715 000000 R186 bonds from Regiments Securities at a price of R109.62 per bond.

[43] In all the transactions that Tippet analysed referred to above, Regiments Fund Managers bought or sold the bonds with Regiments Securities as the counterparty, and in each of the transactions which she attempts to pair, the Fund bought the bonds at a higher price from Regiments Securities than it sold back to them. Put simply, in each of the trades with Regiments Securities, the Fund bought and sold at a loss while Regiments Securities gained.

[44] She concludes that the aggregate net cost to the Fund, and thus the corresponding profit made by Regiments Securities in consequence of these trades, was an amount of R348 577 524.77 made up as follows:

a. R58 639 395.66 for the 5 December trades;
b. R101 596 960.50 for the 7 March trades;
c. R132 593 418.00 for the 30 March trades; and
d. R55 747 750.50 for the April trades.

[45] Tippet explains that in her view;

a. There was no sound portfolio management reason for the Fund to have concluded the transactions which involved buying and selling large volumes of R186 bonds in trades on the same day; and

b. The bid offer spreads were excessively wide and would have resulted in wasted costs for the Fund which would have been realised costs to the Fund at the time of the trades.[28]

[46] Her conclusion is then *that "(…) based on the available information, it is reasonable to assume that the costs/losses incurred by the Fund due to the excessive bond trading by Regiments Fund Managers would have resulted in a profit for Regiments Securities Limited on the day*."[29]

[47] Wood does not dispute that these trades took place at the time and prices described by Tippet. What he does do, is dispute her conclusion and he offers his own explanation to justify the trades. His starting point is that the Fund needs to adopt a liability driven investment or LDI strategy. This is what he says he was implementing when he conducted the trades. I will refer to this as the LDI defence. Wood explains that a portfolio such as the Fund has to take measures to protect itself against future liabilities. It has to be able to pay out pension benefits when they fall due. If interest rates were to fall the Fund may have insufficient assets to meet future pension liabilities. This is referred to technically as a fund's 'delta risk' i.e., *"sensitivity of the portfolio (assets and liabilities to shifts in interest rates."* In short Wood says the trades were made to protect the Fund from its delta risk.

[48] He explains that when the Fund was given what he refers to as the opportunity to quote on the Transnet swaps, it had to balance its delta by engaging in the trades that it then did.

[49] Tippet accepts that LDI is an appropriate strategy for a fund to adopt to reduce its delta risk; so, she has no dispute with Wood on this point on strategy. However, she does not accept his rationale on how this was implemented. In her replying affidavit she responds to Wood's justification in forthright terms:

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[28] Tippet affidavit supra, paragraph 17.
[29] Tippet affidavit, supra, paragraph 17.5.

“I accept that an R186 bond transaction (whether it is a buy transaction or a sell transaction for a Fund) would have an effect on the "delta risk" in the portfolio. I do not, however, accept that Regiments Fund Managers was transacting in order to address the "delta risk" arising from the interest rate swaps. Had they been doing so they would have calculated the delta risk in the portfolio taking into account the impact of the anticipated swap transactions, and then worked out:

- *whether to buy or sell R186 bonds; and*
- *what number of R186 bonds to buy or sell; and*
- *how best to execute the required buy transaction or the required sell transaction.*

But that is not what they did. What they did was both to buy and sell on the same day very large volumes of R186 bonds at prices that were prejudicial to the Fund and caused Regiments Securities to make a corresponding amount of revenue.”

[50] To sum up the debate between Wood and Tippet; Wood justifies Regiments Securities buying and selling, by invoking the general policy behind an LDI strategy. But that is to miss the point. It is the excessive number of trades, coupled with the profits made by Regiments Securities that constitute the breach of the fiduciary duty owed to the Fund. Moreover, the fact that the two entities within the Regiments Group, advised both Transnet and the Fund about mitigating their respective risks at the same time created a conflict of interest which caused a loss to the Fund. Nor is it acceptable that the Fund may at some time in the future benefit from these trades. This prospective gain, if there ever is one, does not eliminate the blatant conflict of interest exercised by Regiments Fund Management which had fiduciary obligations to the Fund, its client.

[51] I now turn to the money trail. The Fund alleges that Regiments received R 348 million from it in respect of the profits it generated for itself from the bond churning

transactions.[30] Out of this amount, R90 150 940.00 was paid at Wood's instance, to two of Wood's companies (Tantacode and Zara W). Payments of this amount were broken down as follows; R36 523 404 was paid into the Tantacode account; R33 701 653 into the Zara W account, and a further R19 925 883 was paid into the same Zara W bank account. Subsequently Wood paid himself R 46 523 404 from the Tantacode and Zara W accounts. The breakdown here was that R 36 523 404 was paid from the Tantacode account (thus the same amount that had been paid into it) and R 10 million was paid from the Zara W account. The Fund has attached all the bank statements that support this document trail. Again, these payments are set out in the attached schedule.

Wood's response to the payment trail

[52] Wood's response to the payment trail, both in respect of the fees and the bond churning is brief. First, he offers a bare denial, but he does not make clear what it is that he is denying. The second is that none of the claims are liquidated. The third is that payments were made to corporate entities (by this I understand him to mean Regiments) and that they were made in terms of the agreement. What emerges from this is that apart from the initial bare denial the document trail is not placed in dispute.

[53] I now deal with the remaining defences raised by Wood which are raised in respect of both the claims.

Claims not liquidated claims

[54] In terms of section 9 of the Act read with section 10(a), as I have noted, the claims must be liquidated. Wood contends they are not, although he gives no reasons why they are not. According to Mars a claim is liquidated if it is certain, legal, and valid and has not prescribed.[31] Moreover according to Mars, a theft can constitute a liquidated claim where the evidence shows that it gave rise to a fixed and determined

[30] Founding affidavit, paragraph 5.2.
[31] See Mars, *Law of Insolvency in South Africa,* Tenth Edition, at paragraph 18.21.

claim.[32] The amounts claimed in terms of what the Fund has traced through the respective payments and accounts are fixed and determined and thus constitute liquidated claims.

The Fund consented to the payments.

[55] The Fund's case is that Regiments, as its fund manager, as well as its key individuals, such as Wood, owed it fiduciaries duties. These duties include the duty to act honestly, with due skill, care, and diligence and in the interests of the client, to avoid or at the very least to mitigate, any conflict of interests and to disclose to the client in writing any actual or potential conflict of interest with the Fund. It also includes the obligation not to make secret profits. Regiments and Wood breached these duties which are not only owed to them at common law but also are owed to them in accordance with the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS Act"), and the General Code of Conduct for Authorised Financial Services Providers and their Representatives contained in Regulations promulgated under section 15 of the FAIS Act.

[56] Wood does not dispute that Regiment Fund Managers was the agent of the Fund. Rather his case is that in terms of the mandate between the Fund and Regiments all his actions were authorised. He relies on the following paragraphs in the mandate: Firstly paragraph 7.2 which states:

> *"Regiments shall have the full power and discretion and shall be entitled, without prior approval or consent of the Client, to deal with the portfolio in whatever manner it deems necessary or appropriate to achieve the Client's objectives."*

[57] He also relies on paragraph 16.4 which states:

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[32] Mars, supra.

"Subject to Applicable Law Regiments may, when acting as agent for the Client, or dealing on a fiduciary basis with the Client, deal with or through, or make use of the services of any Regiments' Associates. Regiments Associates shall be entitled to retain any fees, profits or other consideration arising from such dealings or from the use or provision of such services as though Regiments was not acting as such agent or fiduciary" (Note, in the answering affidavit the underlined words are left out of the portion quoted. I regard this omission of the proviso as significant)

[58] I do not interpret either of these clauses, in particular 16.4, which is the more far reaching, to suggest that this means the Fund has consented to Regiments Fund Manager's contracting out of its fiduciary duties which it might otherwise have to it. The mandate was signed in advance of the actions giving rise to the claims. This means, on Wood's version, it must be interpreted to imply that the Fund gave a prior, unrestricted authorisation to its agent to; (i) pay another's fees, in return for payment in kind as a quid pro quo; and (ii) in relation to the bond trading, consent to a conflict of interest that benefited its agent's associated company by accruing profits from trading at the expense of the Fund. On either of these two scenarios, it would require the most extraordinary reading of the agreement to conclude that the Fund had contracted in advance to consent to such actions. Plainly our law which holds fiduciary duties in the highest regard would not lightly come to such a conclusion.

[59] In the leading case of *Robinson v Randfontein Estates Gold Mining Co Ltd* [33] Innes J expressed this duty in the following way:

> *"Where 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…. It prevents an agent from*

[33] 1921 AD 168.

properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent."[34]

[60] More recently the Supreme Court of Appeal (SCA) in *Phillips v Fieldstone Africa (Pty) Ltd and Another*[35] confirmed that *Robinson v Randfontein* is still our law. As Heher JA put it:

"The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice (Robinson v Randfontein Estates GM Co Ltd (supra, loc.cit.)"[36]

[61] Thus, from these cases it emerges that while consent can validate what might otherwise be a breach of a fiduciary duty, that consent must be *"free"* and upon "*full disclosure by the agent.*" There is no evidence in this case that the second element of full disclosure, was given in this case in relation to either of the claims. Such was the blatant self-interest of the Regiments entities in this matter that full disclosure required a detailed explanation of the actions, why they were in the Fund's interests and what the nature of the agent's benefit was. From the record it is not apparent beyond the terms of the agreement that such disclosure was ever given. What Wood seeks to do instead is invoke a post facto justification that his and Regiments' actions made the Fund better off than it might otherwise have been.[37] There is no attempt to suggest that properly

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[34] Supra, at 177-178.
[35] 2004 (3) SA 465 (SCA).
[36] Supra at 479.
[37] In *Modise and Another v Tladi Holdings [Pty) Ltd* [2020] ZASCZ 112 the SCA held that: *"The no conflict rule does not require an actual conflict to be established; only that a reasonable person would think that there was a real sensible possibility of conflict. In the same vein the no-profit rule applies even if the company would not itself have made a profit, in other words, even if the director has not profited at the company's expense."* at paragraph 36.

disclosed, the consequences of these actions as the Fund now appreciates them, were disclosed to it at the time the actions being undertaken.

[62] Moreover, in this case, there are a number of factors which made the duty to make full disclosure so compelling. First the nature of the transactions was complex. The Fund's board ought to have been fully appraised of what the risks entailed in the interest rate swaps and bond trading would expose it to. There is no evidence in the record that this was ever done. A perfect example of the opaque nature, is Wood's response to the fees complaint, in this paragraph in the answering affidavit, where he attempts to justify the fact that the Fund would in the long term be better off:

> *"A large portion of the profit has been reserved so that it will accrue over the life of the transaction (CVA of 17 basis points ~R 19 million (and Basis spread of 40 basis points (~R 135 million) as would be the most prudent approach in the circumstances."*[38]

[63] Second the interests of Transnet and the Fund did not coincide. Transnet's risk mitigation strategy did not require exposing the Fund to absorb it. The Regiments Group with its role as advisor to both could never have resulted in a satisfactory discharge of its fiduciary duties to the Fund without at the very least the fullest disclosure of how it operated and how the Group benefited. Nor as I discussed earlier does Transnet's approval of the transactions having any bearing on the matter as the Fund is a separate entity. Transnet cannot consent on behalf of the Fund to validate transactions that breach Regiments Fund Managers fiduciary duties to the Fund.

[64] Lastly the Fund is not a commercial enterprise with an appetite for risk taking. It is a pension fund with a duty to look after the interest of some 40 000 pensioners. It could not adopt a cavalier approach to risk. Those advising it had a fiduciary duty to take the nature of their client into account. This again imposed on them the highest duty to account transparently. Wood as a key figure in these events and the one with the

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[38] Answering affidavit paragraph 28.9.

greatest technical expertise must accept his share of responsibility for this failure. The fact that others in Regiments may also have been involved does not avail him.

No privity of contract between the Fund and Wood.

[65] Wood contends that even if there had been a breach of fiduciary duties, the Fund dealt with the Regiment entities, not himself. He argues that since no attempt had been made by the Fund to lift the corporate veil, the claims, to the extent that they exist, do not lie against him. However, as the Fund's counsel correctly contends both claims are for disgorgement. The basis of the claims are for a breach of a fiduciary duty.

[66] In *Volvo (SA) (Pty) Ltd v Yssel* [39] the court was asked to consider the same issue of privity of contract:

> *"Mr CJ Nel, who appeared on behalf Mr Yssel, submitted that, by virtue of the successive written agreements between Volvo and Highveld, and the lack of any privity of contract between Volvo and Mr Yssel, the relationship between Volvo and Mr Yssel was not susceptible to fiduciary duties. I do not agree. It is clear, in my view, from the authorities cited above, that the absence of contractual privity between two parties does not preclude the existence of a fiduciary relationship between them."*

[67] On appeal to the (SCA) the court a quo's approach was approved. The court explained that:

"Contractual duties owed by one party to another will no doubt often go a long way towards defining whether the relationship is one of trust but contractual privity is not indispensable to such relationships, as correctly observed by the court below." [40]

[68] This defence too must fail.

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[39] [2008] 3 All SA 488 (W).
[40] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] 4 All SA 497 (SCA) at 503.

Wood no longer employed by Regiments when moneys paid out

[69] Wood contends that he was no longer employed by Regiments from 1 March 2016. I will accept for purposes of this application that this is factually correct. The relevance for him of this date is that payment into his or his entities accounts, took place after this date. But as the Fund correctly contends in relation to the disgorgement claims, this fact is irrelevant and does not constitute a defence. This is because the actions that led to these payments (the fees deduction and the advice to engage in bond churning) had all taken place before he left Regiments for Trillian. Nor were there activities without causal connection. The interest rate swaps advice led to the need for the bond churning. All this had occurred whilst he was still at Regiments. Whilst some bond churning transactions had occurred after he had left Regiments for Trillian, this does not detract from the fact that it flowed from advice and a strategy he had advised upon prior to his departure and presumably why he was then rewarded for it by Regiments thereafter.

[70] Put differently the fact that the flow of funds occurred at a later date does not detract from the fact that the basis for which they became payable had been constructed whilst Wood was with Regiments and as a result of his active participation whilst with Regiments.[41] The Fund seeks disgorgement of his earnings. The fact that they were paid to him after he had left Regiments is of no moment. He received the benefit.

Striking out.

[71] Wood filed a striking out application after having filed his answering affidavit. This is unusual as a matter of practice in itself, but I will accept that the striking out was at least foreshadowed in the answering affidavit. The striking out application relates to facts which Wood contends are hearsay in this matter. More specifically he objects to factual averments in the founding affidavit which advance a conspiracy theory allegedly

[41] See replying affidavit paragraph 39.

between Wood and various other individuals from Regiments, Transnet and some outside of both these organisations. This was advanced to explain how Regiments was able to achieve its objectives because outside parties were able to influence insiders in Transnet, to agree to their plan for self-enrichment. Although these allegations are well-known and in the public domain because, inter alia, of their airing in the Zondo Commission of Inquiry into State Capture, I accept that for the purpose of this case, they constitute hearsay. As can be seen from the analysis of the facts in this matter I have not had regard to them. Nor have I taken into account allegations concerning the funding of the Optimum Mine through a company connected with some of these outside parties. I have confined myself to the fees and bond churning claims. I therefore do not need to consider the striking out application any further because these allegations have not been relied on to the prejudice of Wood in this application.

Summary of the extent of the claims

[72] In summary the disgorgement claims comprise R90 150 940.00 in respect of the bond churning claims, and R20 881 240.21 in respect of the fees claim. The total claimed is thus R111 032 180.21, which the Fund asserts Wood is liable to disgorge, together with interest on that amount of more than five years at the prescribed rate.[42]

Is Wood insolvent

[73] In the founding affidavit the Fund sets out extensive facts as to why Wood is insolvent. The Fund estimates his liabilities exceed R530 million. Most of this amount is accounted for by the Fund's claim against him in the principal action (circa R313 million) and a claim by SARS R 220 million which is the subject of a preservation order.

[74] Wood has dealt with this not by placing these facts in dispute but by deflecting them. He disputes being insolvent because he argues the Fund has no claim against him in law. In his counsel's heads of argument this is the only contention raised in

[42] Founding affidavit paragraph 63. See also the Annexure hereto for the more detailed breakdown.

respect of this question.[43] But once I have found that the Fund has a prima facie case for these claims, this defence falls away. He also placed in dispute whether the Fund's allegation that SARS has a large claim against him had been established. But even if that is placed in doubt, he does not make out a case that if these claims are established, he is able to meet them. In short, this aspect of the case had not been seriously contested.

Advantage to creditors

[75] I now deal with the last requirement of the Insolvency Act namely that sequestration will be of advantage to creditors. This threshold is not set particularly high as the SCA explained in *CSAR v Hawker Air Services (Pty) Ltd:* [44]

> *"The question is whether the Commissioner has established that sequestration would render any benefit to creditors, given that the partnership is now defunct. The answer seems to lie in those decisions that have held that a Court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The Court needs to be satisfied only that there is reason to believe — not necessarily a likelihood, but a prospect not too removed — that as a result of investigation and enquiry assets may be unearthed that will benefit creditors*."[45]

The test for relief

[76] Finally, I turn to the question of whether a provisional sequestration order should be granted. Although there are disputes of facts on certain issues on the papers, the test for granting a provisional sequestration order is the same as for a provisional

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[43] See respondent's heads of argument paragraph 41.
[44] 2006 (4) SA 292 (SCA).
[45] *Hawker Air Services*, supra, paragraph 29.

winding up order. That test has been set out by Corbet JA in *Kalil v Decotex (Pty) Ltd and Another*[46]

> *"Where on the affidavits there is a prima facie case (i.e., a balance of probabilities) in favour of the applicant, then, in my view, a provisional order for winding-up should normally be granted ... This does no lasting injustice to the respondent for he will on the return date generally be given the opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues. "*

[77] While courts have some sympathy with respondents in considering a bona fide defence and giving them the benefit of the doubt, the court still has to be satisfied that defence is raised on bona fide and reasonable grounds.[47] But the approach of courts is not to lightly come to such a conclusion if the facts raised are not bona fide.[48]

[78] I am satisfied that the defences raised are not bona fide and that the Fund has made out a prima facie case, and that the requirements of section 10 of the Act have been established.

ORDER:-

[79] In the result the following order is made:

1. That the estate of ERIC ANTHONY WOOD (Identity number: [....]) be placed under provisional sequestration;

2. That a rule nisi be issued calling upon any interested party to appear before the above Honourable Court on 28 February 2023, to show cause why:

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[46] 1988 (1) SA 943 (A) at 979B-C.
[47] *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C) 119F-H.
[48] See for instance the approach taken in *CSAR v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA) para [18].

a. a final sequestration order should not be granted; and

b. the costs of this application should not be costs in the sequestration of the estate of the respondent.

3. Directing that the order be served on: -

a. the Respondent, at [....] J [....] P [....], S [....], Sandton, Johannesburg;

b. the South African Revenue Service, Johannesburg;

c. the employees of the Respondent, if any; and

d. all registered trade unions representing the employees of the Respondent, if any.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHNANNESBURG

Date of hearing: 25 August 2022

Date of judgment: 10 November 2022

Appearances:

Counsel for the Applicant:	A Bham SC
	M Chaskalson SC
	N Luthuli

Instructed by.	ENSafrica
Counsel for the Respondent:	E L Theron SC
Instructed by:	Fairbridges Wertheim Becker