

## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

1/4/2016

01/04/2016

DATE

SIGNATURE

In the matter between:

CASE NO: 11780/2011

**TRAVEL TODAY (PTY) LTD****PLAINTIFF**

and

**CONCORDE TRAVEL (PTY) LTD****1<sup>ST</sup> DEFENDANT**

(Registration number: 1973/016449/07)

**CONCORDE TRAVEL (PTY) LTD****2<sup>ND</sup> DEFENDANT**

(Registration number: 1999/005902/07)

**BID TRAVEL (PTY) LTD****3<sup>RD</sup> DEFENDANT**

(Registration number: 1999/020026/07)

## **JUDGMENT**

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**SIKHWARI, AJ**

[1] The plaintiff in this action is Travel Today (Pty) Ltd, a company duly registered in terms of company laws of the Republic of South Africa with its main place of business at House 45 at Ferreira Street in the city of Mbombela ("Nelspruit") in the province of Mpumalanga. The plaintiff has approached this court for an order in terms of the prayers stated in the amended particulars of claim. The first defendant is Concorde Travel (Pty) Ltd, a company duly registered under registration number 1973/016449/07. The second defendant is Concorde Travel (Pty) Ltd, a company duly registered under registration number 1999/005902/07. The third defendant is Bid Travel (Pty) Ltd, a company duly registered under registration number 1999/020026/07.

[2] The plaintiff is a travel agent based in Mbombela (Nelspruit) in Mpumalanga province and is an affiliate of Concorde (Pty) Ltd, second defendant, in terms of the agreement in Bundle 1 at pages 1 – 62. Therefore, the plaintiff is a member of Concorde Group of Companies. The dispute herein is for the period from the 1<sup>st</sup> day of April 2006 to the 31<sup>st</sup> day of March 2010.

[3] At this stage the trial is about an order compelling the defendants, particularly second defendant, to render to the plaintiff the account of for the period from the 1<sup>st</sup> of April 2006 to the 31<sup>st</sup> of March 2010 which flows from the contract between the third defendant and Galileo Southern Africa [a division of South African Airways (Pty) Ltd] ("Galileo") which is in Bundle 2 at pages 116 - 133. This contract was concluded in or during July 2006.

[4] At this stage of the trial there will be no attempt to quantify the amount claimed by the plaintiff or owed to the plaintiff, if any. Parties have agreed that that dispute will be postponed *sine die* pending the decision of the court on the rendering of the account.

[5] The plaintiff called two witnesses. The first witness of the plaintiff was Mr Clive Highway who was brought to court on the strength of a subpoena. He testified that he was the employee of Galileo as a national key account manager dealing with travel trade. The contract between Galileo and third defendant was within his scope of work as part of his work. He presented the Exhibit A document which included several tax invoices. He testified further that the contract between third defendant and Galileo was for business purposes. It began on the 1<sup>st</sup> of April 2006. The essence of the said contract was that Galileo will provide to the defendant certain computer software such as laptops, desktop, programs, etc. Galileo will subsidize the third defendant in terms of the provisions in clause 5 of the contract (page 125 of Bundle 2). The subsidy money will become payable dependant on the thresholds

achieved by the third defendant. Third defendant will in turn pay the subsidies to the second defendant for distribution to companies in the Concorde Group of Companies. He agreed that Exhibit A shows a series of payments which were made by Galileo to third defendant.

[6] The second witness of the plaintiff was Mrs Magda Pretorius. She testified that she is the shareholder and director of the plaintiff since 1993. She confirmed the contract between plaintiff and Concorde Group. At all material times she was not aware of the contract between third defendant and Galileo. The plaintiff is still purchasing the computer software from Galileo but at no subsidy benefits from the defendants. She testified that she did raise her complaints to the second and third defendant but she was not assisted.

[7] Under cross-examination she was asked to direct the court to any agreement or clause of the agreement which allow plaintiff to have a share on the subsidy refund in the three agreements involved in the dispute herein. She replied that her understanding is that all the agreements taken as a whole they provide for same. She testified that plaintiff was qualified to receive compensation for segments sold flowing from the Galileo deal. She stated that plaintiff intended to enjoy the advantages of being part of a chain of similar travel agencies and to benefit from the reputation and goodwill of the second defendant when plaintiff became a member of the Concorde Group of Companies. Briefly, that was the plaintiff's case.

[8] The defendant called one witness, Mr Dawood Tagari. He testified that from 1993 to 2007 he was the employee of the second defendant as IT Officer and managing director. Presently, he is the IT Director at Bid Travel (Pty) Ltd, third defendant. He admitted the agreement between plaintiff and second defendant. He was part of the negotiating team for the Galileo contract. He testified that the Harvey Travel deal was not similar to the plaintiff's deal. There was no agreement which compels the defendants to share equipment subsidies with plaintiff.

[9] Under cross-examination he had no logical answers when it was shown to him that in page 243 of the bundle, the Concorde Group of Companies has contribute R49 980 in the determination of the amount of R34 349 571 paid by Galileo to third defendant. In page 247, the Concorde Group contributed R43 394 to the total of R33 742 872 which was paid by Galileo to third defendant. He conceded that third defendant is not a holding company. He testified further that the productivity bonus is not a sector because plaintiff is not trading in the software or IT industry but the plaintiff's normal trade is travel agency. Briefly, that was the case of the defendant.

[10] In *Doyle And Another v Fleet Motors P.E. (Pty) Ltd* 1971 (3) 760 (A) at page 762F-H the court stated that:

"In the absence of Rules, the following general observations might be helpful:

1. The plaintiff should aver--

- (a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;
- (b) any contractual terms or circumstances having a bearing on the account sought;
- (c) the defendant's failure to render an account.

2. On proof of the foregoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree of amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account."

[11] In this case the plaintiff is relying on the existence of a contract between the plaintiff and the second defendant. The fact that the relationship between plaintiff and second defendant is contractual does not oust the fiduciary nature of the relationship. Each case is determined on its own merits.

[12] In *Phillips v Fieldstone Africa (Pty) Ltd And Another* 2004 (3) SA 465 (SCA) at page 478H-479C, the SCA stated that:

"The fullest exposition in our law remains that of Innes CJ in *Robinson v Randfontein Estates Gold Mining Co Ltd* (*supra* at 177-80). It is, no doubt, a tribute

to its adequacy and a reflection of the importance of the principles which it sets out that it has stood unchallenged for 80 years and undergone so little refinement.

'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, affords examples of persons occupying such a position. As was pointed out in *The Aberdeen Railway Company v Blaikie Bros* (1 Macq 461 at 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. It prevents an agent from 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...

"Whether a fiduciary relationship is established will depend upon the circumstances of each case... But, so far as I am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases.

"The principle so stated remain true, not only for this country, but also in many Commonwealth (and United States) jurisprudence."

[13] The "*Shorter Oxford English Dictionary*", 5<sup>th</sup> Ed , 2002, defines 'fiduciary' as "something that secures trust" or "a person who holds a position of trust with respect to someone else; a trustee..."

[14] It is the view of this court that the contractual relationship between the plaintiff and the second defendant was based on trust. It has all the material elements of fiduciary relationship.

[15] The next leg of the dispute is the interpretation of the contract between plaintiff and first and second defendant(s) as well as the contract between second defendant and third defendant and the contract between third defendant and Galileo. The dispute is whether these contracts should also benefit the plaintiff in so far as subsidies flowing from the Galileo deal are concerned.

[16] The court must take into account the context of the contract when interpreting the contract. In *List v Jungers* 1979 (3) SA 106 (A) at page 664H, Schreiner JA stated that "the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene".

[17] AJ Kerr, in his work entitled "*The Principles of the Law of Contract*", Butterworths, 6<sup>th</sup> Ed at page 389 has stated that "the standard approach to ascertaining the common intention of the parties who disagree on the



meaning of an express provision of their contract is to consider the nature, purpose and context of the contract.... The words cannot be cut out, pasted on a clean sheet of paper, and then considered with a view to determining their meaning; ie if they "must not be interpreted in the abstract and out of context". It should be noted that 'evidence of mutually known facts may be admitted to identify the meaning of a descriptive term'.

[18] In *Engelbrecht v Senwes Ltd* 2007 (3) SA 29 (SCA), Malan AJA stated that "the intention of the parties is ascertained from the language used in its contextual setting and in the light of admissible evidence. Evidence of background fact is always admissible. Those facts, matters probably present in the minds of the parties when they contracted, are part of the context and explain the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the Court 'in the armchair of the author(s) of the document. Evidence of 'surrounding circumstances' is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during negotiations that preceded the conclusion of the contract is admissible only in the case where evidence of the surrounding circumstances does not provide 'sufficient certainty'."

[19] The plaintiff joined the Concorde of Companies for the sole purpose of making profit and benefiting from the advantage of being part of a chain of similar travel agency and access goodwill and expertise. The third defendant also entered into a contract with Galileo for the sole purpose of making profit for both companies; being the Concorde Group of Companies and the Galileo. Galileo had great interest in the effective running of the travel agencies using its technology and the agencies

were also benefitting from the subsidy in the software technology for the sole purpose of rendering effective and profit-making travel agency business. This relationship of Galileo and the third defendant was intended to achieve the same business objectives which were intended between plaintiff and defendants.

[20] This background information which is common cause between the parties creates a picture in the mind of the court that the plaintiff has entered into the contract with second defendant for the sole purpose of maximising profit out of the above stated advantages. It is unfortunate that the defendants now want to cash money alone by entering into the Galileo deal without inviting the plaintiff and went on to keep it away from her.

[21] When the plaintiff discovered the deal and made enquiries, she was pushed from pillar to post with no reasonable explanation given for excluding her save to tell her that her contract is not similar to that of Harvey World Travel. No details of the differences were ever explained to the plaintiff.

[22] In page 126 of the Bundle which is a contract between the third defendant and Galileo the second defendant is listed as one of the companies which will benefit from the deal. It is common cause that at the material times in question the plaintiff was part of the second defendant; and therefore, was entitled to benefit.

[23] When Concorde Group's productivity contributions were calculated and paid to the third defendant by Galileo, they included the contributions by the plaintiff. Concorde and the third defendant received millions of rands in financial benefits flowing from the Galileo deal. The evidence by Mr Tagari to the extent that their contracts are not secretive is not persuasive if one takes into account the fact that the plaintiff did not know about the Galileo deal for a very long time after it has come into existence.

[24] The interpretation of the three contracts involved herein favours the version of the plaintiff, and therefore the plaintiff has made a case that she entitled to receive the account based on the contractual relationship between the parties and / or on the fiduciary relationship which was created in the circumstances of this case.

[25] The defendants' refusal to render the account is well documented on the letters written to the plaintiff by the defendant insisting that the plaintiff is not entitled to the subsidies. It will not make business sense for the plaintiff to join the Concorde Group of Companies but be excluded from Galileo deal or any other lucrative deal. This will defeat the very same purpose for which the plaintiff has joined up forces with other travel agency in the same industry under the banner of Concorde Group of Companies. This interpretation of the contract which excludes the plaintiff in the Galileo deal is absurd, and this court rejects it.

[26] In the premises, I make the following order:

1. That the second defendant is ordered to render to the plaintiff within 15 (fifteen) days from the date of the court order hereof an account, supported by documentations, in respect of the period from the 1<sup>st</sup> day of April 2006 to the 31<sup>st</sup> day of March 2010 setting out:

1.1. The amounts paid by:

1.1.1. Galileo [a division of South African Airways (Pty) Ltd] to the Concorde Group of Companies and / or the second defendant.

1.1.2. Third defendant (from money received from Galileo) to the Concorde Group of Companies and / or second defendant.

1.2. The *pro rata* share of the productivity of the plaintiff, measured as sectors, in respect of the amounts paid to the Concorde Group of Companies and / or second defendant, as set out in 1.1 above.

2. That the third defendant is ordered to render an account to the plaintiff for the period from the 1<sup>st</sup> day of April 2006 to the 31<sup>st</sup>

day of March 2010, duly supported by documentations setting out:

- 2.1. All accounts paid by Galileo flowing from the agreement between the third defendant and Galileo, dated July 2006.
- 2.2. All amounts paid by the third defendant to the second defendant flowing from the agreement between the third defendant and Galileo, dated July 2006.
3. That the debatement of the accounts rendered by the second and third defendants is postponed *sine die*.
4. That payment of the amount found to be owing by the second and / or third defendants(s) to the plaintiff is postponed *sine die*.
5. That costs are reserved; to be determined at the finalisation of the trial on issues referred to at paragraphs 3 and 4 above which are postponed *sine die*.

**DATED IN PRETORIA ON THIS THE 1<sup>ST</sup> DAY OF APRIL 2016**



**SIKHWARI, AJ**

**ACTING JUDGE OF THE HIGH COURT, PRETORIA**