THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 304/2007

In the matter between:

JOSE DUARTE COELHO DA SILVA	1st Appellant
RESINEX PLASTICS (PTY) LTD	2nd Appellant
RESINEX SOUTHERN AFRICA (PTY) LTD	3rd Appellant

and

C H CHEMICALS (PTY LTD	Respondent

Neutral citation: ***Da Silva v C H Chemicals (Pty) Ltd*** **(304/2007) [2008] ZASCA 110 (23 September 2008)**

Coram	:	SCOTT, FARLAM, CAMERON, CACHALIA JJA et LEACH AJA
Date of hearing	:	18TH and 19TH AUGUST 2008
Date of delivery	:	23 SEPTEMBER 2008
Corrected	:	

Summary: Whether there was a breach of a director's fiduciary duty by the exploitation of various corporate opportunities after his resignation – whether there was a breach of the director's fiduciary duty in other respects – whether the second and third appellants engaged in unlawful competition.

ORDER

On appeal from the High Court, Pretoria, (Seriti J sitting as court of first instance).

(1) The appeal succeeds to the extent set out hereunder.

(2) The respondent is to pay the costs of the appellants including, in the case of the second and third appellants, the costs of two counsel.

(3) The order of the court a quo is set aside and the following is substituted in its stead:

(a) The plaintiff's claims, save for those relating to the LLDPE transaction, are dismissed with costs including the costs of two counsel where two counsel were employed.

(b) The first and second defendants are declared to be liable to the plaintiff for such damages as may be proved to have been suffered by the plaintiff arising out of the LLDPE transaction. In the event of either the first defendant or the second defendant paying any portion of such damages once determined, the other shall be liable for the balance only.

(c) The issue of the costs in respect of the claims arising out of the LLDPE transaction is to stand over for determination by the court when the issue of quantum is determined.

JUDGMENT

SCOTT JA (Farlam, Cameron, Cachalia JJA et Leach AJA concurring):

[1] The appellants were the defendants in an action instituted by the respondent in the Pretoria High Court for the disgorgement of profits, alternatively for the payment of damages arising from alleged breaches of the first appellant's fiduciary duties as the respondent's managing director, and, in the case of the second and third appellants, for damages arising from their alleged unlawful competition with the respondent. The respondent's claims, as they ultimately unfolded following several amendments to its particulars of claim, were founded on a number of separate but closely related causes of action. Broadly stated, some related to the exploitation by the first appellant of two business opportunities which it was alleged were corporate opportunities and should have been exploited for the respondent's benefit and others related to alleged conduct on the part of the first appellant while still the respondent's managing director which in other respects was aimed at furthering his own interests and those of the second and third appellants to the detriment of the respondent. The court a quo (Seriti J) found for the respondent on all its claims but in terms of an agreement between the parties ordered that the issue of their quantification should stand over for later adjudication. The appeal is with the leave of the court a quo. For the sake of convenience I shall refer to the parties as in the court below.

[2] Before attempting to outline the claims in greater detail or to consider the issues to which they give rise it is necessary first to summarize, as briefly as the circumstances permit, the facts which form the background to the dispute between the parties. They are largely common cause.

[3] The Dow group of companies is a large international group which distributes chemicals, plastics and various other related substances. It had a local branch in South Africa until it disinvested in 1987. Its business was then purchased by the plaintiff company. The latter's shareholders were Mr Peter Columbine and Mr Dennis Hellmann who had both been local managers of Dow. Hellmann became the chairman of the plaintiff and Columbine its managing director. The plaintiff proceeded to serve as the local distributor of Dow products. The first defendant, Mr Jose Da Silva, joined the plaintiff in 1987 and in 1989 became its managing director. Columbine remained active in the business until 1997 when his share in the business was bought out by Hellmann.

[4] After the advent of democracy Dow re-entered the South African market in 1995. It incorporated a South African subsidiary and opened an office in Johannesburg. Mr Joaquin Schoch, who had joined the Dow group in 1976, became its managing director. It was the policy of Dow to deal directly with its larger customers, ie those who purchased their products in large quantities, and to permit other distributors to serve those customers whose purchases were in smaller quantities. In pursuance of this policy, Dow South Africa entered into a distribution contract with the plaintiff on 1 April 1995 which entitled the plaintiff to distribute a number of specified Dow products in South Africa. The contract was for a period of five years subject to extension of a further period of five years and thereafter indefinitely subject to one year's notice of termination. In terms of clause 3 Dow was entitled to delete any of the listed products on six months' notice to the plaintiff.

[5] In 1996 the Du Pont group, which had its base in the USA and which was described as a giant in the chemical industry, entered into a joint venture agreement with the Dow group for the marketing of thermo-plastic elastomers in the international market. They did so through a Swiss based company, Du Pont Dow Elastomers SA. I shall refer to it simply as DDE. On 1 April 1996 DDE entered into a distribution contract with the plaintiff in terms of which the plaintiff was to distribute a single DDE product called tyrin. The contract could

be terminated on 90 days' notice. DDE entered into a similar contract with another South African company, Chemserve, for the distribution of some four DDE products.

[6] Resinex NV, the European holding company of the second and third defendants, is in turn a member of a larger group of companies ultimately controlled by Ravago SA. The latter is a substantial multi-national conglomerate based in Belgium. The main business of Resinex is the international distribution of chemical and plastic products. Dow's relationship with the Ravago group is of long standing and goes back to the late 1970's. By the end of 1996 Resinex was Dow's largest distributor and distributed the latter's products in a number of countries. On 1 January 1998 Distriflex, a subsidiary of Resinex, entered into a distribution contract with DDE. In pursuance of this contract Resinex distributed DDE products in Eastern Europe, the Middle East and Africa with the exception of South Africa, Nigeria, Morocco, Tunisia and Egypt.

[7] In the mid 1990's Resinex took a decision to enter the South African market. Its decision to do so was well known in the industry and was known to Hellmann and Columbine of the plaintiff. It was obvious that if Resinex were to enter the South African market it would do so in competition with the plaintiff and would pose a significant threat to the latter's Dow and DDE business. Resinex was a multi-national group that dwarfed the plaintiff and had extensive personal and business ties with Dow and DDE. When DDE was established it immediately embarked upon a policy of limiting the number of entities distributing its products. This was common knowledge in the industry.

[8] Negotiations between Resinex and the plaintiff with a view to a joint venture or some other form of collaboration in South Africa commenced in 1996. Dow was aware of Resinex's intended expansion and it was Dow that instigated the talks. It would have been obvious that Dow wished to avoid having to choose between Resinex and the plaintiff as its distributor in South Africa. The negotiations were initially conducted on the plaintiff's behalf by Columbine, its then managing director. I shall describe these negotiations in

greater detail later in this judgment. It suffices at this stage to record that the negotiations culminated in an offer being made by Resinex in February 1997. In essence it was that Resinex would immediately purchase 50% of plaintiff's chemical performance products department and its plastics department and would acquire the remaining 50% over a period of five years, by which time it would have total control. The offer was rejected in April 1997. There was no counter offer.

[9] At about this time Columbine sold his shares to Hellmann and withdrew from the plaintiff company. Thereafter Da Silva assumed responsibility for the talks with Resinex. Various meetings were held and letters written. From the correspondence it would appear that the driving force behind the attempt to establish some form of collaboration came from Da Silva. Although enthusiastic, his letters lacked what the managing director of Resinex, Mr Benoit De Keyser, described in evidence as 'specifics'. His letters were in most instances simply left unanswered.

[10] Resinex had made it clear at an early stage that it would be coming to South Africa, whether with or without the plaintiff. In 1998 Resinex took the decision not to enter the South African market via an interest in the plaintiff's business or otherwise in collaboration with the plaintiff but to establish its own business in competition with the plaintiff. Just when that decision was taken and when it was conveyed to Da Silva was the subject of some debate in this court. However, both De Keyser and Da Silva testified that the decision was communicated to Da Silva for the first time in December 1998 when De Keyser invited Da Silva to join Resinex and head-up the business which Resinex had decided to establish in South Africa. Da Silva was reluctant to take a decision and stalled for time. According to De Keyser, Da Silva was still intent on achieving some form of collaboration between the plaintiff and Resinex.

[11] In the following months De Keyser pressed Da Silva for an answer. Da Silva eventually agreed in principle in May 1998 and asked De Keyser to come to South Africa to discuss the details of the offer. De Keyser did so and

an agreement was reached in the course of discussions from 8 to 10 June 1999. Da Silva wanted it in writing and De Keyser left it to Da Silva to draft the contract. The latter did so, using a precedent. He gave it the heading: 'Heads of Agreement'. It was subsequently signed by both parties on 16 July 1999. I shall return to this document in due course. At this stage it is enough to say that it provided for the establishment of two South African subsidiaries of Resinex, a holding company and a trading company. Da Silva would get a 25 percent interest in the holding company and would be the managing director of both. All of the Resinex (and Ravago) business would be done through these subsidiaries.

[12] On 11 June, being the day after the agreement was reached, Da Silva told Hellmann about it. They discussed the date of Da Silva's departure. Initially they agreed that he would stay until the end of October 1999 but later agreed that he would leave at the end of August 1999.

[13] During his notice period Da Silva acquired two shelf companies which became the second and third defendants. Their names were changed to Resinex Plastics (Pty) Ltd and Resinex Southern Africa (Pty) Ltd respectively. Da Silva was appointed a director of both on 19 August 1999. He hired premises for them from 1 September 1999 on which date they commenced business. While still with the plaintiff, but acting for and on behalf of the second defendant, being the trading company, he also purchased three containers of a substance called linear low density polyethylene ('LLDPE') which was subsequently on-sold by the second defendant to a local South African company.

[14] Meanwhile, in the latter part of 1997 Dow had made a bid to acquire Sentrachem, a large South African company and participant in the chemical and plastics industry. It was generally known in the industry and to the plaintiff that should Dow obtain control of Sentrachem and its subsidiaries it was likely, in pursuance of its policy of dealing directly only with customers who purchased in large quantities, to pass on to another distributor that part of the business which related to the sale of its products in smaller quantities. One

subsidiary of Sentrachem was Plastomark (Pty) Ltd which distributed chemical and plastic products and whose business the plaintiff would have had an interest in acquiring. Dow's bid was successful and it ultimately gained control over Plastomark, but only in March 1999 after it had acquired the shares in that company which had been held by a German partner. In accordance with its policy Dow in due course took the decision to sell off that part of Plastomark's business which related to the sale of products to customers who purchased in quantities of less than 'a full truck load per order'. Notwithstanding Dow's link with the plaintiff in South Africa this part of Plastomark's business was sold to the third defendant and not to the plaintiff. The sale was in writing and dated 20 December 1999.

[15] Subsequent to the second defendant commencing operations in South Africa and on 3 December 1999 Schoch (the managing director of Dow SA) gave the plaintiff six months' notice of the deletion of a list of products from their distribution contract concluded in April 1995. It will be recalled that Dow was entitled to do so in terms of clause 3. The deletion triggered a dispute between Dow and the plaintiff. It was ultimately settled by agreement on 1 November 2000. In terms of the settlement the distribution agreement was renewed but subject to the deletion of the products referred to in the 3 December 1999 notice. Dow did not enter into a formal distribution agreement with Resinex or its South African subsidiaries, ie the second and third defendants. In fact it had always been the custom of Dow and Resinex internationally to do business without a formal distribution contract. In due course Dow SA gave to the second defendant the business it had deleted from the plaintiff's contract.

[16] On 7 September 1999 Hellmann was told by DDE that it proposed to give the plaintiff three months' notice of the cancellation of its distribution contract. The notice was formally given on 13 September 1999. On the same day notice was given to Chemserve, the other South African company that had distributed DDE products. On 25 October 1999 DDE and Distriflex (a subsidiary of Resinex) signed an agreement in terms of which the existing distribution contract was extended to include South Africa. Following the

expiry of the notice period DDE's products which had formerly been distributed by the plaintiff and Chemserve were distributed by the second defendant.

[17] The plaintiff's claims are founded primarily on alleged breaches of Da Silva's fiduciary duty which he owed to the plaintiff as its managing director. The claims against the second and third defendants are for damages and are founded either on the latter's alleged dishonest complicity in Da Silva's breaches or on unlawful competition. The grounds on which the plaintiff relied for the allegation that Da Silva breached his fiduciary duties are briefly the following: (a) the exploitation for his own benefit or for that of the second and third defendants of the opportunity which the plaintiff had of establishing a joint venture or some other form of collaboration with Resinex ('the Resinex opportunity'); (b) the exploitation for his own benefit, or for that of the second and third defendants, of the plaintiff's opportunity to acquire the Plastomark business ('the Plastomark opportunity'); (c) the procurement for his own benefit or for that of the second and third defendants of the existing business which the plaintiff had with Dow ('the Dow contract'); (d) the procurement for his own benefit or for that of the second and third defendants of the existing business which the plaintiff had with DDE ('the DDE contract'); and finally the purchase and sale for his own benefit and for that of the second and third defendants of the LLDPE (the 'LLDPE transaction'). I shall deal with each in turn. Before doing so, however it is necessary to say something of the legal principles applicable to claims of this kind.

[18] It is a well-established rule of company law that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company. They may not make a secret profit or otherwise place themselves in a position where their fiduciary duties conflict with their personal interests (*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177). A consequence of the rule is that a director is in certain circumstances obliged to acquire an economic opportunity for the company, if

it is acquired at all. Such an opportunity is said to be a 'corporate opportunity' or one which is the 'property' of the company. If it is acquired by the director, not for the company but for himself, the law will refuse to give effect to the director's intention and will treat the acquisition as having been made for the company. The opportunity may then be claimed by the company from the delinquent director. Where such a claim is no longer possible, the company may in the alternative claim any profits which the director may have made as a result of the breach or damages in respect of any loss it may have suffered thereby (See Blackman, Jooste and Everingham, *Commentary on the Companies Act* Vol 2 p 8-161 to 8-162).

[19] It is of no consequence that in the particular circumstances of the case the opportunity would not or even could not have been taken up by the company (*Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL) at 389D, 392H-393A; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) para 31). But the opportunity in question must be one which can properly be categorized as a 'corporate opportunity'. While any attempt at an all-embracing definition is likely to prove a fruitless task, a corporate opportunity has been variously described as one which the company was 'actively pursuing' (*Canadian Aero Service v O'Malley* (1973) 40 DLR (3d) 371 SCC at 382) or one which can be said to fall within 'the company's existing or prospective business activities' (Davies, *Gower and Davies' Principles of Modern Company Law* 7ed at 422) or which 'related to the operations of the Company within the scope of its business' (*Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1132H) or which falls within its 'line of business' (*Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291 (C) at 308b; 313d-e). Ultimately, the inquiry will involve in each case a close and careful examination of all the relevant circumstances, including in particular the opportunity in question, to determine whether the exploitation of the opportunity by the director, whether for the director's own benefit or for that of another, gave rise to a conflict between the director's personal interests and

those of the company which the director was then duty-bound to protect and advance.

[20] A director will not escape liability by first resigning before seeking to exploit an opportunity which the company was actively pursuing (*Canadian Aero Service v O'Malley* supra) or one within the scope of the company's business activities of which the director became aware in the performance of the latter's duties as a director and which he or she deliberately concealed from the company (*Industrial Developments Consultants v Cooley* [1972] 1 WLR 443 (Birmingham Assizes)). The opportunity remains that of the company and the director will remain accountable. But if the opportunity is not of such a kind or if it is an opportunity which, although within the scope of the company's business activities, only arose after his resignation or was one of which he was unaware prior to his resignation, he is at liberty in the absence of explicit contractual restraints to exploit it to the full. It must be emphasized that the expertise and experience acquired by a director during his period of employment with the company and in general even the personal relationships established by him during that period belong to him and not to the company. It is a well-established principle of the common law, now enshrined in s 22 of the Bill of Rights, that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or their professions. (See eg *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 15.) The general policy of the courts is accordingly not to impose undue restraints on post-resignation activities.

[21] Thus far, I have been dealing with corporate opportunities in the sense in which they are generally understood. But what has been said applies equally to the case of a director who in competition with the company and in breach of his fiduciary duty procures for his own benefit or for that of another, not a corporate opportunity as such, but some part of the existing business of the company. In that event the remedies available to the company will be the

same and the director will be liable even if he first resigns before exploiting the business so procured. But in the absence of such conduct and provided there are no contractual restraints a director is free to resign and set up business in competition with his former company or obtain employment with a competing company. In that event, he is at liberty to compete with his former company even to the extent of enticing away existing customers.

The Resinex opportunity

[22] The plaintiff's contention, in short, was that the contract entered into between Da Silva and Resinex NV in terms of which Da Silva was to establish and head-up Resinex's local office in South Africa was a corporate opportunity which Da Silva was obliged to obtain and exploit for the plaintiff's benefit. The contention was founded on the premise that the contract was in truth no more than a variant of the transaction with Resinex which the plaintiff had sought to achieve since 1996. It was also contended that the probabilities favoured the inference that Da Silva and De Keyser had connived as early as May 1998 to procure the opportunity for Da Silva rather than for the plaintiff. The defendants, on the other hand, argued that the contract between Da Silva and Resinex was fundamentally different from, and was the very antithesis of, the transaction which the plaintiff had pursued and was accordingly not a corporate opportunity, ie a business opportunity which Da Silva was obliged to obtain and exploit for the plaintiff. It was further argued that there was no basis for the inference sought to be drawn by the plaintiff with regard to the events of May 1998.

[23] Before considering these issues it is necessary to examine in somewhat more detail the events preceding the conclusion of the contract between Da Silva and Resinex NV. As previously indicated, the talks between the plaintiff and Resinex were instigated by Dow in 1996 after the latter

became aware that Resinex, one of its major distributors, was contemplating coming to South Africa. Following the exchange of correspondence and several meetings, Columbine wrote in July 1996 to Mr Theo Roussis, the chief executive officer of Ravago, recording by way of a summary what had been discussed thus far.

'Resinex is interested in acquiring 50% of the [Plaintiff's] Chemicals/Performance Products . . . and Plastics businesses as a first step with a second step resulting in total control. The second step would be accomplished over an agreed time period on a basis similar to that being used with Primoplast in Switzerland. A suitable PE ratio should be agreed.'

The offer subsequently made by Resinex by letter dated 10 February 1997 embodied what had been discussed. In short, it was that Resinex would immediately purchase a 50 percent interest in the two departments in question, ie the Chemical Performance Product department and the Plastics department, and would acquire the other 50 percent over a period of five years. The proposal was that Da Silva would be the general manager of the new company to be established to operate the two departments. The purchase price offered was DM 3 million. The effect would be that Resinex and the plaintiff would be partners in the business for the interim period until Resinex took it over altogether. Columbine referred the offer to Hellmann and noted in his accompanying memorandum that he was disinclined to accept it 'even if Resinex sets up an operation here and competes in this market'. The risk of such an eventuality was accordingly known to Hellmann at that early stage. After some delay the proposal was rejected by the plaintiff in a letter dated 17 April 1997. It was written by Da Silva but its substance was determined by Hellmann. The letter did not say that the price was too low or raise some other objection. It rejected the very concept of the proposal. The second paragraph reads:

'After careful consideration, we must advise that your offer to purchase our C & PP and Plastics businesses is unfortunately not of interest to us. The offer is thus not accepted.'

In the penultimate paragraph it was suggested that the plaintiff could start marketing some of Resinex's brands and 'some form of representations agreement' could be reached. In the event nothing ever came of this for the reason that the involvement of more than one distributor resulted in a non-competitive price. According to De Keyser, who testified on behalf of the defendants, he was persuaded by the letter that a joint venture or other form of business alliance with the plaintiff was no longer a viable prospect. He testified, too, that shortly before the offer was made a final decision was taken by Resinex to extend its operations to South Africa. What was not finalized was whether it would do so by collaborating in some way with the plaintiff or by establishing its own business in competition with the plaintiff.

[24] It appears that in June 1997 Da Silva had a meeting with De Keyser in Brussels at which some form of joint venture was discussed. On 11 September 1997 Da Silva wrote to De Keyser reporting that their June discussions 'are still very much on track' and that he had discussed with Hellmann the idea that Resinex take a stake in the plaintiff of 50 percent or more and that the former was 'quite positive and open to suggestions'. In the same letter Da Silva mentioned that Dow was attempting to acquire Sentrachem and that 'this could be of interest when Dow starts selling off what it does not want'. Significantly, the purchase of a 50 percent interest or more in the plaintiff was not dissimilar to the offer Resinex had made in February 1997, yet that offer had been rejected without a counter offer.

[25] In the meantime in August 1997, Hellmann had met with Mr Jean-Louis Raynaud, the president for Europe of DDE, and the latter had insisted that Hellmann approach Roussis of Ravago with a view to establishing a joint venture with the Ravago group in South Africa. In October 1997 Hellmann

wrote to Roussis to say that he and Da Silva would be in Europe in December and that he would like to use the opportunity to meet Roussis. In February 1998 Hellmann wrote to Raynaud to report that he had met Roussis and De Keyser in December 1997 and that he had found Roussis to be 'a fine upstanding person as is Benoit de Keyser'.

[26] On 23 December 1997, being the day after the meeting, Da Silva wrote an enthusiastic letter to Roussis and De Keyser which commenced: 'We agreed to immediately start with establishing a joint venture partnership with yourselves'. It was clear, however, that what was agreed was no more than that they should attempt to agree. The letter proceeded to propose that each party should pool components of their respective businesses which they would run in partnership with each other. This was a shift from what had previously been proposed. Nonetheless, despite Da Silva's enthusiasm, the letter elicited no response and nothing came of it. A further meeting was held in February 1998 and on 26 February 1998 Da Silva wrote: 'As discussed, we will start by purchasing on open account at 60 days end of month'. This in effect was a reversal to what had been proposed in Da Silva's letter of 17 April 1997 refusing Resinex's offer. Da Silva explained that Hellmann had told him rather to focus on getting some trade going with Resinex. This would account for the absence of any reference to the proposal made in his letter of 23 December 1997.

[27] There was a further meeting between Da Silva and De Keyser in May 1998. Da Silva testified that he had been invited by Dow to attend a World Cup football match and that he had used the opportunity to see De Keyser. He said that although a business meeting may have been scheduled his recollection was that they had only met socially for dinner. De Keyser said he had no recollection of the meeting. Da Silva was cross-examined at some length as to what passed between the two. He said he did recall De Keyser telling him that Resinex was definitely coming to South Africa, whether with or

without the plaintiff. But other than that he could not remember what was said about a joint venture which, he said, was by then on the 'back burner'.

[28] In this court counsel for the plaintiff argued that the circumstances justified the inference that De Keyser had told Da Silva at this meeting that Resinex was establishing a local office in South Africa in competition with the plaintiff and had invited Da Silva to join Resinex. Building on this inference it was contended, admittedly somewhat tentatively, that it could also be inferred that De Keyser and Da Silva from then on conspired to procure the Resinex opportunity for Da Silva. In support of the inferences sought to be drawn, counsel relied first on the fact that from then on no further negotiations took place, second on a somewhat ambiguous statement by De Keyser in his evidence as to when the decision was taken to abandon some form of collaboration with the plaintiff, and third on the fact Da Silva failed to inform Hellmann of Resinex's decision to establish an office in South Africa in competition with the plaintiff. In my view the inferences contended for are speculative, unjustified and lack any proper factual basis. De Keyser was adamant that he informed Da Silva of Resinex's decision for the first time in December 1998 when he made Da Silva the job offer. This was also the evidence of Da Silva. The evidence of neither was challenged in cross-examination and nor was the inference sought to be drawn by counsel put to either of the witnesses. The fact that the negotiations came to a standstill in the first half of 1998 is hardly surprising having regard to the letter of 26 February 1998 which in effect put the clock back to April 1997.

[29] In view of the criticism by the trial court of Da Silva's evidence it is necessary at this juncture to comment briefly on the evidence of De Keyser which largely corroborated that of Da Silva in relation to the Resinex opportunity. Apart from the ambiguous statement to which I have referred – mainly as a result of incorrect dates being put to him by counsel – De Keyser's evidence, although in English and not his home language of French,

was clear and unequivocal and he emerged unscathed from cross-examination. The only comment the court a quo made regarding his credibility was to label as ‘false’ his evidence that the ‘Heads of Agreement’ contract constituted an employment contract. This was a misdirection. First, it was not a statement of fact but an opinion by a layman as to the categorization of a contract and, second, as I shall demonstrate later, the contract, if not in substance a contract of employment, was at least analogous to one. No reason was advanced in this court for rejecting De Keyser’s evidence.

[30] To continue the narrative, in September 1998 Da Silva wrote to Roussis enclosing two press reports that Dow had bought out the other shareholder in Sentrachem’s subsidiary, Plastomark. Da Silva explained that the purpose of the letter was no more than an attempt to resurrect the talks. This is how De Keyser understood the letter when it was redirected to him. Some attempt was made by plaintiff's counsel to suggest that Da Silva wrote the letter in pursuance of a conspiracy between De Keyser and Da Silva to obtain for Resinex any business of Plastomark that Dow may not wish to retain, but once again there was no factual basis for such a far-reaching inference.

[31] In December 1998 Da Silva and Hellmann travelled to Flimms, Switzerland, to attend a distributors' conference organised by Dow. While there, De Keyser invited Da Silva to his hotel room and told him that nothing had come of their talks over a period of more than two years and that Resinex had decided to come to South Africa in competition with the plaintiff. De Keyser offered Da Silva a position as head of Resinex’s operations in South Africa and they proceeded to discuss the kind of remuneration package Da Silva could expect to receive, which De Keyser said would include a shareholding in the local company that would be formed. De Keyser’s attitude was that Da Silva could virtually have whatever he wanted. However, even at that late stage, according to De Keyser, Da Silva attempted yet again to

explore the possibility of some form of collaboration with the plaintiff. But by then, as far as Resinex was concerned, it was too late; a final decision had been taken to set up an operation in South Africa.

[32] As previously indicated, Da Silva stalled for time and after being pressed by De Keyser agreed in principle in May 1999 to the terms offered. He asked De Keyser to come to South Africa to discuss the details of the proposal and the latter did so from 8 to 10 June 1999. Da Silva drafted a contract headed 'Heads of Agreement' which, as I have said, was subsequently signed by the parties on 16 July 1999. Da Silva testified that he had told Hellmann of the job offer in February 1999. This was denied by Hellmann. But the dispute is of little consequence. It is common cause that on 11 June 1999 Da Silva tendered his resignation to Hellmann and told him that he had accepted Resinex's offer to head-up the latter's operation in South Africa. Da Silva's resignation and decision to join Resinex was accepted by Hellmann without animosity and when Da Silva finally left at the end of August a party was held in his honour and he was given a handsome present. After Da Silva's departure a copy of the Heads of Agreement came into the possession of Hellmann in circumstances which need not be considered. It was on the strength of this document that the plaintiff contended that Da Silva had usurped for himself a business opportunity which as a director of the plaintiff he had been duty-bound to obtain and exploit for the company.

[33] It is necessary to quote the contract in full:

'HEADS OF AGREEMENT

Made and entered into by and between:

Jose Duarte Coelho da Silva

(hereinafter referred to as JDS)

and

Resinex NV, represented by Theo Roussis and Benoit De Keyser

(hereinafter referred to as RNV)

Whereas JDS and RNV desire to enter an agreement to start an operation in South Africa with the objective of carrying on a business in the distribution of plastic raw materials and other products represented by the Resinex / Ravago Group.

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. The Holding Company will be formed called Resinex Holdings (Pty) Limited, with the share capital being 75% RNV and 25% JDS.

2. A subsidiary company will be formed called Resinex Plastics (Pty) Limited with the share capital being 90% owned by Resinex Holdings (Pty) Limited and 10% by Leon van der Merwe.

3. All products sold by the Resinex Group companies including Distribution products of Ravago will be sold exclusively through Resinex Plastics (Pty) Limited for the following territories.

- South Africa
- Namibia
- Botswana
- Zambia
- Mozambique
- Swaziland
- Zimbabwe

4. Any sales done direct (indent) to customers for the above territories by Resinex and Ravago companies will attract commission of between 3% - 5% depending on products and profit margins obtained.

5. Any future acquisitions, with particular reference to Mobil or Plastomark, will be done through Resinex Holdings (Pty) Limited and any new agencies obtained in future by either Resinex Holdings (Pty) Limited, Resinex Plastics (Pty) Limited or any subsidiaries or Group Companies of Resinex/Ravago where markets exist in the listed territories will form part of the Resinex Holdings Group and such sales recorded into the appropriate Group Companies.

6. Sales of share capital in future by any of the shareholders of the Resinex Group in South Africa will form part of the Global policy, namely, the average profits of the last two trading years and the year in operation multiplied by a price earnings ratio of 4 plus the share of the selling Shareholders Capital Employed.

7. All companies will have 5% of profits before tax available for distribution to key staff decided by the Managing Director of Resinex Holdings (Pty) Limited.

8. In the initial start of Resinex Plastics (Pty) Limited, JDS will, for the first 2 years, not receive a profit share of less than R120 000 00 p a.

9. Any dividends distributed will be in accordance with Group policy, namely, that the companies must return 20% returns before tax on shareholders capital (including retained earnings). Any excess return is available as dividend provided the capitalisation ratio of the companies remain between 25% - 33 1/3% shareholders capital to 75% - 66 2/3% external finance.

10. Share capital into the Resinex companies are interest free and initial start-up capital will be determined later for operations of Resinex Plastics (Pty) Limited. Share capital will in principle represent the value of stock holding.

11. JDS will be the Managing Director of Resinex Holdings (Pty) Limited and Resinex Plastics (Pty) Limited. His remuneration package will be:

Cash salary	R416 000.00 per annum
Car allowance	R 84 000.00 per annum
Total	R500 000.00

Leon van der Merwe will be the Business Manager for Thermoplastics and Olefins. His remuneration package will be:

Cash salary	R338 000.00 per annum
Car allowance	R 66 000.00 per annum
Total	R404 000.00

12. Medical aid will be provided by Momentum Discovery, the cost to be borne 50% by employees – 50% by the company in line with SA standards and in existence with CHC today.

13. A pension scheme will be set up wherein the employee contributes 6% of earnings and the company 9.12% in line with the CHC scheme in existence.

14. All Fringe Benefits, including golf subscriptions, etc that exist today in their personal employment will apply to JDS and Leon van der Merwe.'

[34] In the course of his judgment Seriti J observed that:

'The language used in the agreement under consideration is simple and understandable. When interpreting it, [the] court must assign ordinary grammatical meaning to the words used, unless absurdity or inconsistency with the rest of the [document] might arise from such an approach.'

After referring to the identity of the parties to the agreement, ie Da Silva and Resinex NV, and the wording of the preamble which he said had 'nothing to do with an employment contract', the learned judge continued:

'Certain clauses, particularly clauses 1 and 2, which deal with the structure of the business operations to be established in South Africa, and the allocation of shares to the [signatory] of the agreement and Mr Leon van der Merwe, and clause 5 which, *inter alia* makes provision for the acquisition of future opportunities, which future opportunities include Plastomark and Mobil, underpin the conclusion that the "Heads of Agreement" under consideration is not an employment contract, but a contract of a joint business venture. It regulates the relationship

between Da Silva and Resinex NV/Ravago NV and not [the] employment of [Da Silva] by second or third defendant, nor Resinex NV/Ravago NV.'

The judge referred to a submission made by Da Silva's counsel and proceeded:

'The main feature of the 'Heads of Agreement' entered into between Resinex NV and the first defendant is that a business relationship between [Da Silva] and Resinex was established. The fact that first defendant was also made the managing director of the second and third defendant does not diminish the fact that a business relationship was established.'

In the result he concluded that:

'[Da Silva] breached his fiduciary duties by negotiating for himself, a business opportunity he should have negotiated on behalf of the plaintiff.'

In this court the reasoning of the trial court was largely adopted by the plaintiff's counsel who placed particular emphasis on the heading, the identity of the parties and the wording of the preamble.

[35] It is necessary for the purposes of the present inquiry to view the agreement between Da Silva and Resinex NV against the background of the events leading up to its conclusion. It is for this reason that I have set out in some detail the sequence of those events and the course of the negotiations between the plaintiff and Resinex. What is readily apparent is that at a relatively early stage Resinex took the decision to extend its operations to South Africa. It had a choice of either entering the market in competition with plaintiff or doing so in collaboration with the plaintiff, whether in the form of a joint venture, a take-over of its chemical and plastics departments or some other form of business alliance. It was either the one or the other and the plaintiff was fully aware of this. The very object of the negotiations and the establishment of some form of business alliance with Resinex was to avoid the consequence of the latter adopting the other course of entering the market in competition with the plaintiff. That other course was the very antithesis of what the plaintiff sought to achieve by negotiating with Resinex. The only

business opportunity which the plaintiff pursued and sought to exploit was therefore a joint venture or other business alliance with Resinex. But that opportunity did not materialize. The negotiations came to nought and Resinex set up business in competition with the plaintiff. Once Resinex took the decision to do so, it put paid to any joint venture or business alliance of the kind the plaintiff had pursued. Da Silva was not precluded by reason of a restraint of trade agreement from joining the opposition, and that is what he did.

[36] Much emphasis was sought to be placed on the format and wording of the agreement, particularly the preamble. But in an enquiry of this nature it is the substance of the agreement that must be looked at, not the form in which it is cast (*Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1130E-F). In this regard, it must also not be overlooked that Da Silva who drafted the agreement had no legal training or expertise in the drafting of contracts. As he explained, the draft was based on a precedent he had managed to obtain. In substance the agreement was for the employment of Da Silva as the managing director of two local subsidiaries of Resinex. (These subsequently became the second and third defendants.) One would be the holding company of the other. Da Silva would have a 25 percent shareholding in the holding company and Mr Leon van der Merwe (a friend of Da Silva who was then employed by Dow and who was to be the business manager for certain products) would have a 10 percent shareholding in the other company, which was presumably intended to be the trading company. The remaining 75 percent of the shares in the holding company would be held by Resinex NV. The agreement contained detailed provisions as to Da Silva's remuneration package which included medical aid, a pension scheme and fringe benefits. It also made provision for a five percent participation in the profit of the companies by the key staff 'as decided by the managing director of [the holding company]', ie Da Silva. It is important to observe at this stage that the structure of Da Silva's employment package with the plaintiff was no different. He earned a salary and received similar medical aid, pension fund and fringe benefits. He was entitled to a 15 percent shareholding in the plaintiff. According to the evidence he had received an initial four percent free and a further four percent which

had been paid for out of dividends, but he had elected not to take up the remaining seven percent to which he would have been entitled. He was also entitled to a two percent share in the profits of the plaintiff. This compared with the five percent of the profits of the second and third defendants but which in his discretion he would have to share with other key staff members. As far as Da Silva's shareholding in the holding company was concerned, De Keyser testified that it was Resinex's policy to make provision for the managing directors of their foreign subsidiaries to have a substantial shareholding in the subsidiary concerned. He said Da Silva would have to pay for his shares but the payment would come from his share of the profits. In the event, Da Silva took up only a 20 percent shareholding.

[37] The agreement also contains various provisions relating to the nature of the business of the trading company. Clause 3, for example, provides that all Resinex group products sold in a number of listed countries, including South Africa, would be sold through the trading company. Da Silva explained that as far as Resinex as an employer was concerned, it was an unknown quantity. He did not want to find himself in a position where Resinex was by-passing him and selling its products through some other company. Similarly, clause 5 made provision for any future acquisitions to be directed through the trading company. In this regard counsel for the plaintiff sought to make something of the reference to Mobil and Plastomark. But the possibility of the Plastomark business becoming available was common knowledge in the industry. Again, once the Resinex operation in South Africa commenced it would have been free to compete with the plaintiff for the Mobil business. In the event, Mobil remained with the plaintiff. The object of these provisions was therefore to define the parameters of the business of the second and third defendants. Given that Da Silva was to be employed as the managing director of those companies, the provisions were analogous to those relating to a job description in a typical contract of employment. It is true that the agreement does not amount to a contract of employment between Resinex NV and Da Silva in the formal sense. It made provision instead for the employment of Da Silva by Resinex's subsidiaries to be established for the purpose of Resinex's operation in South Africa. Da Silva was to contribute nothing more than his

services as managing director. Whether one categorizes the contract as a contract of employment or one which is analogous to or in substance such a contract is of no consequence. The point is, it was not the transaction pursued by the plaintiff; it was the very antithesis of what was pursued and Da Silva was under no duty to obtain and exploit it for the plaintiff. It follows that in my view the plaintiff's claims under the rubric of the Resinex opportunity had to fail and the court a quo's finding to the contrary was wrong.

The Plastomark opportunity

[38] The plaintiff's contention in this regard was that the opportunity to buy that part of the distribution business of Dow's subsidiary, Plastomark (Pty) Ltd, which the former subsequently decided to sell was a corporate opportunity which Da Silva was obliged to have obtained and exploited for the plaintiff's benefit.

[39] It is clear, however, from the evidence of Schoch that although it was generally anticipated that Dow would dispose of part of the Plastomark business, the final decision to do so was taken some while after Da Silva had left the plaintiff and commenced his employment with the second and third defendants. Schoch's evidence to this effect was fully supported by the internal memoranda exchanged between Schoch and other employees of Dow. Schoch explained that it was only in March 1999 that Dow finally gained control of Plastomark after buying out the other shareholder. Dow commenced in May 1999 what was termed a value-based management evaluation in order to determine the extent of Plastomark's business that should be sold. The evaluation was conducted by a team of employees who reported directly to Mr Romeo Kreinberg who was the head of the plastics division of Dow and who operated from Switzerland. The decision to sell the part of the Plastomark business so identified was taken in October 1999. Schoch testified that it was only at this stage that he contacted Da Silva to enter into negotiations for the purchase of the Plastomark business. In the event, the negotiations were conducted in Europe and Schoch was not

involved. They culminated in the third defendant purchasing the Plastomark business in terms of a written contract dated 20 December 1999.

[40] The plaintiff's contention was, however, that Da Silva and Schoch, and for that matter also De Keyser, were party to what was alleged to be a conspiracy to procure the Plastomark business for Resinex's South African subsidiaries. The basis for this assertion was that, as revealed from Da Silva's electronic diary which he had deleted from his computer when he left but was subsequently retrieved, Da Silva had in 1999 arranged various lunch and dinner dates with Schoch, one of which included De Keyser and Mr Gabbard of DDE and had also gone on holiday to Namibia with Schoch in August 1999. But, as Da Silva explained, he and Schoch were on friendly terms. They met socially and also for business reasons. The holiday in August 1999, he said, had been arranged in January and involved four families including the children of each. This was confirmed by Schoch. At best for the plaintiff, the deletion by Da Silva of various folders in his computer and his contact with Schoch may have given rise to some suspicion. But that is a far cry from establishing the conspiracy theory advanced by the plaintiff.

[41] There were, in any event, other sound reasons why Dow should have chosen to sell the Plastomark business to the Resinex group in preference to the plaintiff. By the end of 1996 Resinex was Dow's largest distributor in the international market and their relationship was one of long standing. It will be recalled that it was Dow that had first instigated the talks between the plaintiff and Resinex. The reason would have been Dow's preference to do business in South Africa with its major distributor rather than with a smaller competitor and an alliance between the two would have rendered it unnecessary for Dow to have to take the South African business away from the competitor. The plaintiff, and in particular Hellmann, could hardly have been unaware of this. Indeed, it was inevitable that Resinex's South African subsidiaries would capture some if not all of the Dow business in South Africa. The fact that it did so does not therefore suggest that Da Silva was guilty of any breach of his fiduciary duties to the plaintiff while he was in its employ.

[42] Another important factor was the ongoing mutual animosity between Hellmann and Schoch. As early as 17 May 1996 Hellman wrote to Schoch's superior, Mr Vincent Sinnott, saying that Schoch was 'unpredictable, deceitful, and quite frankly has erred on the untruthful side on a number of occasions'. On 10 September 1999 Hellmann had a meeting with Sinnott. In his *aide memoir* of their meeting Hellmann recorded that he had told Sinnott 'once again that Schoch is a liar, a crook, a fraud and only after his own agenda'. This was at the very time that the question had arisen as to whether the plaintiff or Resinex should be given the Plastomark business. While the decision was not that of Schoch alone, it is clear from the exchange of emails between Schoch and other senior employees of Dow that Schoch went out of his way to persuade his colleagues not to offer the Plastomark business to the plaintiff. In an email dated 13 September 1999 sent to Sinnott and Dow's legal advisor, Mr Blackhurst, he described Hellmann as someone who 'has "fun" taking people and companies to court and who has "expressed the intention" to take Dow to court in SA'. He concluded by saying: 'I am not interested in working with [the plaintiff]'. Again, in an email dated 20 September 1999 he wrote to Sinnott: 'It is not the first time that we hear that Hellmann is after suing Dow (in the USA, so he can get more money) – whether he will or not, it is a liability to have someone like him as a partner'. When these emails were written the final decision to sell off part of the Plastomark business had not yet been taken. At the time both Hellmann and his son, Mr Neil Hellmann, who had taken over as managing director of the plaintiff, were in contact with Sinnott in an attempt to persuade the latter that in terms of the agreement dated 1 April 1995 Dow was obliged to offer the Plastomark business to the plaintiff and even went so far as to threaten to sue Dow.

[43] From the aforegoing, it is apparent that while Da Silva was with the plaintiff there was a possibility, indeed a strong possibility, that Dow would sell off parts of the Plastomark business. Da Silva knew of the possibility as did everyone else, including Hellmann and his son who actively engaged with Dow to obtain the business. Dow's decision ultimately to sell the Plastomark business to the third defendant is explicable on grounds wholly unrelated to any intervention on the part of Da Silva in breach of his fiduciary duties to the

plaintiff. The plaintiff's conspiracy theory lacked any proper factual basis and was not established. It follows that in my view the plaintiff's claims, in relation to the 'Plastomark opportunity' were similarly unsubstantiated and the court a quo erred in upholding them.

The Dow contract

[44] The essence of the claim under this heading is that while still employed by the plaintiff, Da Silva persuaded Dow, whether directly or indirectly, to delete some of the products from the plaintiff's distribution contract which it was entitled to do on six months written notice in terms of clause 3.

[45] I have previously referred to the close relationship that existed between Dow and Resinex. According to De Keyser he had talks with Dow in Europe at about the time the Resinex subsidiaries commenced business in South Africa with a view to acquiring some of Dow's South African business. The possibility of deleting some of the products distributed by the plaintiff was raised by Sinnott at a meeting with Hellmann on 13 September 1999. At a meeting between Schoch and Hellmann Jnr on 5 November 1999 Schoch informed the latter of Dow's decision to do so. Written notice in terms of clause 3 of the distribution contract was subsequently given on 3 December 1999 and in due course the products so deleted were distributed by the second defendant.

[46] From what has been said previously, it follows that it would have been clear to all that in the event of Resinex establishing a presence in South Africa it was to be expected that it would capture all or some of Dow's business in South Africa. Added to this was the animosity that existed between Hellmann and Schoch. As in the case of the Plastomark opportunity, the mere fact that the plaintiff lost some of Dow's business to the second defendant does not suggest that Da Silva was guilty of any breach of his fiduciary duties while employed by the plaintiff. The loss of that business accordingly adds no credence to the plaintiff's conspiracy theory, which as I have said, lacked a proper factual basis. In my view the court a quo erred in upholding the claims under this heading.

The DDE contract

[47] It will be recalled that on 7 September 1999 Hellmann was informed that DDE proposed to give the plaintiff three months' notice of the cancellation of their distribution contract of April 1996 in terms of which the plaintiff distributed a product called tyrin. The notice was formally given on 13 September 1999. On the same day notice was given to DDE's other South African distributor, Chemserve. On 25 October 1999 DDE and a subsidiary of Resinex NV, Distriflex, signed an agreement extending their distribution contract of 1 January 1998 so as to include South Africa. After the expiry of the notice period tyrin was distributed in South Africa by the second defendant in pursuance of the latter contract. The plaintiff's contention in essence was that while employed by the plaintiff and in breach of his fiduciary duties, Da Silva actively promoted the cancellation of the plaintiff's distribution contract with DDE or at least failed to alert the plaintiff to the risk that it might be cancelled. The claim under this heading was limited to one for damages.

[48] When DDE was established in 1996 there were about 60 international distributors distributing Dow and Du Pont products which in terms of the joint venture agreement were to be dealt with by DDE. DDE immediately embarked upon a policy of rationalisation aimed at reducing the number of its distributors to five. That DDE was reducing the number of its distributors was known to all the distributors and was known to Hellmann. Distriflex was one of the chosen five and in terms of its contract dated 1 January 1998 it distributed DDE's products in a number of countries including several in Africa. Initially DDE's policy posed no threat to the plaintiff's distribution of tyrin because DDE's African distributors, Resinex (acting through its subsidiary Distriflex), did not do business in South Africa. When DDE became aware that Resinex was contemplating moving into South Africa, DDE, it will be recalled, insisted that Hellmann approach Roussis of Ravago with a view to establishing some form of a joint venture with the Ravago group in South Africa. In view of DDE's policy, the likelihood of DDE switching its South African business to Resinex

in the event of the latter's coming to South Africa would therefore have been obvious to all concerned, including Hellmann.

[49] Towards the end of 1998 De Keyser informed DDE of Resinex's decision to move into South Africa on its own and not in collaboration with the plaintiff. Mr Pierre Burelli, the commercial director of DDE for Europe, the Middle East and Africa, who gave evidence on behalf of the defendants at the trial, testified that in about the middle of 1999 DDE decided to switch its business in South Africa to Resinex once the latter commenced its operations there. He explained that the decision was taken at the highest level by a leadership team headed by no lesser a person than Mr Don Faught who by then had replaced Raynaud as the president of DDE for Europe. He said Da Silva played no role in the decision and it was inconceivable that he could have done so as the decision was taken regardless of the persons involved in the distribution companies concerned. He explained that underlying the decision was DDE's experience that distributors operating on a large scale and in a number of countries were able to achieve a greater efficiency and a lower service cost per unit. The decision affected not only the plaintiff but also Chemserve. He confirmed that once the decision had been taken he informed De Keyser.

[50] Burelli's evidence that Da Silva played no role in DDE's decision to give its South African business to the Resinex subsidiaries was not challenged in cross-examination, nor was there any evidence to gainsay it. Nonetheless, the court a quo appears simply to have ignored it. There can be no reason for rejecting Burelli's evidence and it follows that the plaintiff failed to establish its contention that in breach of his fiduciary duty Da Silva had promoted or procured the cancellation of the DDE contract.

[51] Da Silva testified that he repeatedly warned Hellmann of the risk of losing DDE's business in South Africa. Hellmann denied this. But whether he was actually warned or not seems to me to be of little consequence. Hellmann knew that Resinex was a major distributor of DDE products in a number of countries. He knew that DDE was drastically reducing the number of its

distributors. He knew that if Resinex came to South Africa it would compete with the plaintiff and he knew that Raynaud of DDE had insisted that he open talks with the Ravago group with a view to establishing some form of a joint venture in South Africa. The reason for Raynaud's insistence could hardly have escaped Hellmann and in all the circumstances he must have been fully aware of the very real danger of losing the DDE business in the event of Resinex coming to South Africa and competing with the plaintiff. I should add that it strikes me as highly unlikely that Da Silva and Hellmann would never have discussed the danger of losing the DDE business.

[52] Finally, some reliance was placed on Da Silva's failure to inform Hellman that DDE had decided to switch its business to Resinex when this information was conveyed to him in June 1999. But by then it was too late, the decision had been taken. The plaintiff's claim under this head is one for damages. Whether Hellmann had been told or not would have made no difference to the loss it suffered by reason of the cancellation of the DDE contract. In any event, after being told of DDE's decision on 7 September 1999 Hellmann Jnr made a considerable effort to persuade DDE to change its mind but without success. DDE was not prepared to depart from the decision it had taken.

[53] It follows that in my view the court a quo similarly erred in finding for the plaintiff on the issue of the DDE contract.

The LLDPE transaction

[54] In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) 173 (T) at 198H-199A Van Dijkhorst J observed:

'[C]ommon sense dictates that the mere creation by a managing director, whose services have been terminated and who is serving his month's notice, of a future alternative means of employment, albeit in competition with his present company, need not necessarily create a conflict of interest greater than that of an ordinary director serving on the boards of two competing companies.'

The learned judge gave two examples of conduct which in the circumstances described would not amount to a breach of a director's fiduciary duty. One was the mere incorporation of a company which was in the future to compete with the director's existing employer; the other was the obtaining of suitable premises for that company's operation. Such conduct, said the judge, could similarly not be regarded as amounting to unfair competition. He explained at 199C:

'The planning of [the director's] future and the preparatory steps taken to enable him to obtain alternative employment and earn a living even if taken during his month of notice cannot be regarded as against public policy and therefore unlawful. It can therefore not be branded as unfair competition.'

These statements of the law have not to my knowledge been departed from and I readily endorse them.

[55] It is common cause that in the present case Da Silva acquired two shelf companies, changed their names, and was appointed a director of both while still employed by the plaintiff and serving out his notice period. He also hired premises so that the companies could commence business on 1 September 1999. Adopting Van Dijkhorst J's 'common sense' approach, this conduct cannot be said to amount to a breach of Da Silva's fiduciary duty or to unfair competition on the part of the second defendant on whose behalf the steps were taken. But Da Silva went further. It will be recalled that while still with the plaintiff, but acting for and on behalf of the second defendant, he purchased three containers of LLDPE, which is a plastic product and which he arranged to be on-sold by the second defendant. He sought to justify his conduct on the basis that it did not amount to competition with the plaintiff because the latter did nor normally deal in 'off specification' products, which the LLDPE was, and that the purchasers were not existing clients of the plaintiff. But Hellmann's evidence was to the effect that any transaction involving the purchase and sale of plastic products, whether off specification or not, fell within the scope of the plaintiff's business and that any purchaser of plastic products in South Africa was a potential customer of the plaintiff.

Given the nature of the plaintiff's business, I think Hellmann must be correct. While it may be difficult in certain circumstances to decide just where to draw the line when adopting a 'common sense' approach, I am satisfied that the transaction in the instant case was one which Da Silva while still the managing director of the plaintiff was obliged to pursue for the benefit of the plaintiff and not for the benefit of the second defendant. In my view, therefore, his conduct amounted to a breach of his fiduciary duty owed to the plaintiff and to unfair competition on the part of the second defendant on whose behalf the transaction was concluded.

[56] Da Silva testified, however, that the second defendant in fact made no profit but a loss on the LLDPE transaction. It was contended on his behalf that the plaintiff could accordingly have no claim for damages. The true inquiry, however, is not whether the second defendant made a loss but whether Da Silva's wrongful conduct caused the plaintiff to suffer a loss. Hellmann testified that the plaintiff could have made a profit from the purchase and sale of the LLDPE and therefore it suffered damage to the extent of the profit it would have made. There was nothing to gainsay this evidence. In my view, therefore, liability for damages arising from Da Silva's breach of his fiduciary duty in relation to the LLDPE transaction was duly established, as was the second defendant's liability for unlawful competition. The quantum of the plaintiff's damages was an issue that was ordered to stand over for later adjudication. The extent of the plaintiff's loss (if any) is therefore an issue which must be decided later.

[57] It follows that the appeal must succeed save in so far as it relates to the claims of the plaintiff against the first and second defendants arising from the LLDPE transaction. These claims are relatively minor in relation to the others and the defendants have achieved substantial success on appeal. The defendants are accordingly entitled to their costs of appeal. The first defendant was represented separately from the second and third defendants and each is entitled to its costs of appeal, including in the case of the second and third defendants the costs of two counsel. The outcome on the issue of costs in respect of the LLDPE claims will depend on the quantum, if any, of

those claims once this has been determined. In the circumstances, the order of the court a quo which I propose to substitute will provide for those costs to stand over for decision by the court that determines the issue of quantum.

[58] The following order is made:

(1) The appeal succeeds to the extent set out hereunder.

(2) The respondent is to pay the costs of the appellants including, in the case of the second and third appellants, the costs of two counsel.

(3) The order of the court a quo is set aside and the following is substituted in its stead:

(a) The plaintiff's claims, save for those relating to the LLDPE transaction, are dismissed with costs including the costs of two counsel where two counsel were employed.

(b) The first and second defendants are declared to be liable to the plaintiff for such damages as may be proved to have been suffered by the plaintiff arising out of the LLDPE transaction. In the event of either the first defendant or the second defendant paying any portion of such damages once determined, the other shall be liable for the balance only.

(c) The issue of the costs in respect of the claims arising out of the LLDPE transaction is to stand over for determination by the court when the issue of quantum is determined.

D G SCOTT

JUDGE OF APPEAL

Appearances:

For Appellant:	1st :	M C Maritz SC
	2nd and 3rd :	W H Trengove SC
		J F Roos SC
Instructed by:	1st :	Phillip Silver Sweidan Inc Pretoria
		c/o Shapiro & Shapiro Inc Pretoria
	2nd and 3rd :	Webber Wentzel Bowens Pretoria
		Symington & De Kok Bloemfontein
For Respondent:		B W Burman SC
		B Leech
Instructed by:		Deneys Reitz
		c/o Savage Jooste & Adams Inc Pretoria
		Webbers Attorneys Bloemfontein