

A REFLECTION ON CONFLICT OF INTEREST AND MISAPPROPRIATION OF CORPORATE OPPORTUNITY UNDER MODERN COMPANY LAW IN SOUTH AFRICA

Introduction

According to South African company law, a director has a fiduciary duty to act in good faith and the best interests of the company. Several other duties flow from this duty, such as the duty to avoid a conflict of interests. The duty of a director not to appropriate a corporate opportunity belonging to the company of which he or she is a director also flows from the obligation to avoid a conflict of interests.

A conflict of interest arises where a director is in a situation where he or she has a personal interest. Such interest competes against that of the company at which he or she is a director.

In South Africa, we refer to statutory and common law directors' duties. The Companies Act 71 of 2008 as amended (the "Act") has codified these duties. Therefore the question arises whether the common law test applied in determining whether, in the specific circumstances, an opportunity should be classified as a corporate opportunity. Or if the now codified duties under the Act are sufficient in dealing with or preventing these instances.

Unpacking Modise and Another v Tladi Holdings (Pty) Ltd¹

Facts of the case:

Mr Sandler and Mr Modise first met as board members of a listed company, Johnnic Holdings Ltd (Johnnic), some two decades ago. Sandler met Robertson and Neasham from ARB in May 2004 where he learnt that ARB was negotiating a BEE transaction with Umbani. He concluded from the meeting that this transaction would ultimately unravel and present a potential opportunity for him when this happened. In September 2004 he made a presentation of his vision to create an electrical conglomerate to Jonah. He identified four opportunities to be pursued by the conglomerate, one of

¹ (Case no 307/19) [2020] ZASCA 112 (29 September 2020)

which was the ARB opportunity. They formed Empalane and contributed R5 million each to it. The conglomerate born out of this vision was Tladi.

Sandler believed that Modise would be interested in this vision. He invited him home and made the same presentation to him. It was clear to Modise then, and from further discussions between them that the ARB opportunity was one that Sandler wished to pursue through Tladi. In December 2004 a shareholders' agreement, was signed and Modise became a director and chairman of Tladi, the holding company. The shareholders' agreement permitted the shareholders to pursue their interests in the understanding that the four opportunities would be pursued through Tladi. In February 2005, where Tladi's business strategy was deliberated upon, the ARB opportunity was discussed again. More strategy meetings took place after this, where Modise was mandated to pursue it when it became available.

In May 2005, at ARB's invitation, Modise met with Burke and Robertson, where he was personally offered the ARB opportunity because the ARB-Umbani deal was about to unravel. Modise did not disclose this meeting to Tladi. About a month later Sandler enquired from Modise what had happened with the ARB opportunity. Modise reported to him that Burke was not interested in having any business relationship with Sandler. It appeared to Sandler that Burke was misinformed about Tladi's BEE credentials. He asked Modise to arrange a meeting with Burke to clarify this, which he agreed to do, but never did. In December 2005 Modise, through Batsomi Power concluded his deal with ARB. He never disclosed this to Tladi either.

On 3 January 2006, Tladi held its board meeting and concluded that Modise had misappropriated the ARB opportunity in favour of his own company. It resolved to take legal action to ensure that it suffered no commercial prejudice because of this.

The ambit of the fiduciary duty

Finding and the Law:

According to the SCA, at common law directors have an overarching and paramount fiduciary duty to exercise their powers in good faith and in the best interests of the company. Section 76(3)(c) of the Act codifies this duty, but its content is still informed by the common law. The duty encompasses at least three rules:

1. directors may not place themselves in positions of conflicts of interest or duty (the no-conflict rule);
2. make secret profits (the no-profit rule); or

3. acquire economic opportunities for themselves (the corporate opportunity rule) that properly belong to the company.

The rules are distinct but are mutually reinforcing and usually overlap.

According to the court, in *Da Silva and Others v CH Chemicals (Pty) Ltd*:²

"A consequence of the rule is that a director is ... 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 ... [or 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.

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. But the opportunity in question must be one which can properly be categorised as a "corporate opportunity". While any attempt at an all-embracing definition is likely to prove a fruitless task, a corporate opportunity has been variously described as one which the company was "actively pursuing"; or one which can be said can be said to fall within "the company's existing or prospective business activities; or which related to the operations of the company within the scope of its business" or which falls within its "line of business"."

The no-conflict rule does not require an actual conflict to be established. The only requirement is that a reasonable person would think that there was a real sensible possibility of conflict. Similarly, the corporate opportunity rule as demonstrated in the *da Silva* case aforementioned, is not confined to assets or property only. Still, it extends to confidential information that directors use for their gain.

Conclusion

Conflicts of interests should therefore be avoided, and boards should guard against the threats it poses. Also, business opportunities discussed and pursued by a company should not be exploited

² *Da Silva and Others v CH Chemicals (Pty) Ltd* [2008] ZASCA 110

by Directors. When these incidents happen, it would lead to costly litigation against the Director concerned. Contact an expert at SchoemanLaw for all your commercial law needs.

