THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 307/19

In the matter between:

JACOB RESETLHAKE DANIEL MODISE **FIRST APPELLANT**

BATSOMI POWER (PTY) LTD **SECOND APPELLANT**

and

TLADI HOLDINGS (PTY) LTD **RESPONDENT**

Neutral citation: *Modise and Another v Tladi Holdings (Pty) Ltd* (Case no 307/19) [2020] ZASCA 112 (29 September 2020)

Coram: CACHALIA, WALLIS and NICHOLLS JJA and LEDWABA and MATOJANE AJJA

Heard: 31 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 September 2020.

Summary: Misappropriation of corporate opportunity by director of company – principles of fiduciary duty restated and considered – Prescription – whether amended claim for disgorgement of profits effected after prescription has run substantially the same claim as one for damages.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Weiner J sitting as court of first instance):

1 The appeal by the first appellant (Mr Jacob Resetlhake Daniel Modise) is dismissed with costs, including the costs of two counsel.

2 The appeal by Batsomi Power (Pty) Ltd is upheld with costs, including the costs of two counsel.

3 The order of the court a quo is amended by deleting the reference to Batsomi Power (Pty) Ltd and the phrase 'jointly and severally' in paras 1-3 of the order, and also by adding the following para 4:

'The claim against Batsomi Power (Pty) Ltd is dismissed with costs including the costs of two counsel.'

JUDGMENT

Cachalia JA (Wallis and Nicholls JJA and Ledwaba and Matojane AJJA) concurring)

Introduction

[1] To promote economic transformation and increased participation of black people in the economy, the Broad-Based Black Economic

Empowerment Act was enacted in 2003 (the BEE Act).[1] Businesses complying with the BEE Act benefit by being afforded preference in the adjudication of their bids to offer goods and services to government and large corporates. It is a controversial law because it has had some unintended but predictable consequences. One of these is that relationships between individuals and entities brought together to pursue the objectives of the BEE Act are often skin-deep and not sustainable. They frequently disintegrate and lead to acrimonious disputes. This appeal epitomises this hard truth.

[2] The Gauteng Division of the High Court, Johannesburg (Weiner J), found that the appellants, Jacob Modise and Batsomi Power (Pty) Ltd, of which Modise was a director, had misappropriated a corporate opportunity to buy shares in a company – ARB Electrical Wholesalers (Pty) Ltd (ARB) – that properly belonged to the respondent, Tladi Holdings (Pty) Ltd (Tladi). Modise was the chairman and a director of Tladi at the time. The appellants take issue with this finding. They also challenge the dismissal of their special plea of prescription concerning the claim against Batsomi Power.

The facts

[3] The *dramatis personae* in this tale are Jonathan Sandler and Modise, who were the main witnesses for Tladi and Batsomi Power respectively. They first met as board members of a listed company, Johnnic Holdings Ltd (Johnnic), some two decades ago. Sandler left Johnnic around 2000 in order to pursue other business opportunities. In December 2003 he acquired a 68 percent shareholding in Muvoni Contracting Services (Pty) Ltd (Muvoni),

[1] Broad-Based Black Economic Empowerment Act 53 of 2003.

a small electrical company, through his family trust. Sandler was keen to explore the economic benefits that would accrue from doing business with state-owned entities and municipalities in the energy sector. Muvoni was the ideal vehicle for this purpose. But first, it had to comply with BEE requirements to become eligible to exploit whatever opportunities might become available.

[4] This is where ARB became important. ARB was a major supplier of electrical equipment to Muvoni. In early 2004, ARB began negotiating with another entity to conclude a BEE transaction. Craig Robertson and Billy Neasham were ARB's chief executive and chief financial officers respectively. They knew that Sandler had significant experience with structuring BEE deals and sought his advice in this regard. They met with him, according to Sandler, in May 2004. In their testimony they were unable to recall much from the meeting – understandably, as they were testifying 14 years after the event.

[5] Sandler's recollection of the meeting was that ARB had a 30 percent stake allocated to a potential BEE partner, valued at R30 million, which Nedbank would fund. The perception he had after the meeting was that ARB had previously been unsuccessful with its BEE ventures, and that the deal it was negotiating with an entity called Umbani Mentis Electrical (Pty) Ltd (Umbani) would also unravel. If this happened, as he predicted, there would be a potential opportunity for him to exploit with ARB.

[6] A few months later, in August 2004, ARB concluded its BEE transaction with Umbani. Sandler was unaware of this development. In the

meantime, keen to develop Muvoni's potential, he began researching opportunities in the electrical field. One was ARB, another Cullinan Industrial Porcelain (Pty) Ltd (Cullinan), which manufactured ceramic insulators, and a third, Weltex, which did boring underneath roads. Weltex was not a tangible opportunity and was not explored further.

[7] In September 2004, Sandler approached Sir Sam Jonah to discuss these opportunities. Jonah was a Ghanaian businessman with whom Sandler had a previous business relationship. Sandler made a written presentation to him regarding an idea to create an electrical conglomerate. Its core assets would include Muvoni, ARB (after the Umbani deal unravelled) and three other entities: Aberdare, Altech and Cullinan, all also operating in the electrical field. Jonah liked the idea. The two men agreed to form Empalane Investments (Pty) Ltd and to invest R5 million each to exploit these opportunities. Empalane ultimately became a shareholder in the soon to be formed Tladi.

[8] Having done this groundwork Sandler identified Modise as a key player in the envisaged structure: Modise was a well thought of businessman. And black, which Sandler needed for BEE compliance. Sandler invited him home on 7 November 2004, and made the same presentation to him that he had made to Jonah earlier. In addition to the synopsis of the various electrical opportunities, including the potential ARB one, the presentation showed that the 68 percent Muvoni shareholding would be held by an 'Electrical Holding Company', which would be Tladi.

[9] This meeting became a bone of contention in the court a quo. Modise disputed that there had been a discussion on the ARB opportunity. The

presentation, under the heading 'Electrical Opportunities, said the following in relation to ARB:

'30% Available currently negotiations with consortium @ R30 Million Nedbank'

Sandler linked this to the discussion he had in May with Robertson and Neasham and the probabilities were overwhelming that he could only have obtained this detail from that source. This was unaffected by his suggestion in evidence that the deal with Umbani had already unravelled, which was factually incorrect. Instead Modise sought to suggest that the words '30 percent available [current] negotiations with [Umbani]' with reference to the ARB opportunity as it had appeared in the written presentation was not an opportunity at all because the negotiations between ARB and Umbani, as far as Sandler was aware, were ongoing and had not been concluded. There could therefore not, he insisted, have been any available opportunity to consider. But in his notes discovered for trial upon which he was cross-examined he had to accept that he had drawn a circle around the words '*ARB opportunity*' and had written the word '*potential*' twice next to them on his copy of the presentation. When asked to explain why he had done this, he floundered by first suggesting that Sandler had stated categorically that this opportunity was not available and secondly – quite implausibly – that '*potential*' referred to past, not future, potential. He was also unable to explain his counsel's failure to put this far-fetched version, which lay at the heart of his defence, to Sandler. The evidence therefore established, as the court a quo correctly found, that Sandler had drawn the potential ARB opportunity to Modise's attention at their meeting, and that Modise had noted it.

[10] In the days following the presentation, Sandler and Modise met on numerous occasions to consider each opportunity, the strategy to pursue it, the

appropriate structure and the agreements that were required to give effect to it. At Sandler's request Modise also met with the other potential BEE partners, Jonah and his son. The Jonahs' attorney prepared the agreements thereafter.

[11] The initial draft agreements had a general and widely crafted 'non-compete clause' prohibiting the parties from competing with one another. The clause was removed from the final agreement because, as Sandler explained, both he and Modise already had similar ventures of their own. But, he elaborated, they also understood unmistakeably how the venture would proceed in regard to the available opportunities. He explained it graphically with reference to three boxes, one for each of them, in which they would continue pursuing their own interests, and a third common box in which they, through Tladi, the holding company, would pursue mutual opportunities. The opportunities described in the presentation, including the ARB opportunity, fell into the third box.

[12] The appellants sought to suggest that this three-box theory was a 'legal construct' put up by Sandler to avoid the consequences of the removal of the no-competition clause. But there was nothing implausible about Sandler's evidence in this regard. Modise did not controvert the three-box construct, nor did he plead that it was understood that the parties could compete with each other – even in relation to the four opportunities. Modise would have us accept that despite Sandler's vision of Tladi being an electrical conglomerate of which he, Modise, would become both the chairman and a director, he could still pursue his own interests and compete freely against it in respect of any or all electrical opportunities of which he became aware. This proposition only needs to be stated to expose its fallacy.

[13] Also in November 2004, Sandler's family trust made a presentation to Nedbank to obtain funding for BEE transactions. Among these were the electrical opportunities of Muvoni, Arbedare, Cullinan and, importantly, ARB. Tladi would be the holding company. Regarding the ARB opportunity, what stands out as a golden thread was that since his meeting with ARB's representatives (Robertson and Neasham) early in 2004, where the idea of a potential ARB opportunity began to germinate, and continuing through his presentations to Jonah, Modise and Nedbank, the ARB opportunity had consistently been one of the electrical opportunities that Sandler had envisaged would become part of the new electrical conglomerate. And that Modise's inclusion and role was integral to its success.

[14] Modise joined Muvoni's Board on 1 December 2004 and was appointed Director and Chairman of Tladi on 14 December 2004. On the same day a shareholders' agreement was concluded. The parties to the agreement were Empalane, Batsomi Investment Holdings (BIH), Hapang Business Solutions, Lukhele, Bounomano and Boomerang Trading 4 (Pty) Limited, which was renamed Tladi. Hapang later withdrew from the agreement and on 22 February 2005 a new agreement, effective from 14 December 2004, was signed. The shareholding in Tladi was as follows: Empalane 26 percent, Buonomano 14.5 percent, Kukhele 12 percent and Batsomi Power 47.5 percent of which 21.5 percent was held as nominee to be allocated to a 'previously disadvantaged shareholder'. On 20 December 2004, a consultancy service agreement was concluded between Empalane, Batsomi Management Services (Pty) Limited and Tladi, then Boomerang. The parties had earlier also signed an administration services agreement.

[15] Sandler testified that after the agreements had been concluded, he communicated with Robertson to inform him that Modise was 'on board' – something he was very proud of because it underlined the importance of their BEE credentials. Sandler invited both Roberson and Neasham to Muvoni's Christmas party in December 2014, shortly after these agreements were concluded. Robertson did not attend, but Neasham did and Sandler used the occasion to introduce him to Modise. The fact that Modise was now chairman of Tladi and on the board of Muvoni, which had a business relationship with ARB, would not have been lost on either of them.

[16] It bears mentioning that in Modise's written representations of 27 October 2006 in terms of s 220(3) of the Companies Act 61 of 1973, which was a response to Tladi's resolution that he be removed from the board for breaching his fiduciary duties, he denied that Sandler had introduced him to any member of ARB's management team. But in his testimony many years later he conceded that he may have met Neasham at Muvoni's Christmas Party. In his representations he was responding to an allegation that he had diverted the ARB opportunity to Batsomi Power. It seems likely that he was attempting to distance himself from the fact that he had been introduced to Neasham, an encounter he would probably have remembered less than two years after he had denied it.

[17] In February 2005 Tladi and Muvoni held a strategic planning meeting at which their directors and shareholders were present. The Muvoni transaction took up most of the meeting. Once the shareholders had left, those remaining, including Sandler and Modise, briefly discussed Tladi's business strategy and related matters. Sandler testified that they flagged the ARB

opportunity because they were unsure whether the ARB-Umbani deal had yet unwound. He also recalled discussing Cullinan and some other matters. The Cullinan opportunity was more advanced and the ARB opportunity would be pursued by Modise as and when it became available. Sandler was however not able to find any notes for this part of the session. Modise denied that there had been any discussion regarding the ARB opportunity. However the court a quo found that the probabilities supported Sandler's version. I find no reason to interfere with this finding.

[18] Thereafter, Sandler and Modise continued to execute Tladi's strategy. In March 2005 they made a presentation to Cullinan, one of the entities earmarked as an opportunity, on behalf of Tladi. The presentation set out the proposed structure with future acquisitions, including Cullinan becoming a subsidiary. In April 2005 Modise made a presentation to Nedbank, at which Sandler was present, on the proposed Cullinan transaction. The presentation reflected the proposed structure showing Batsomi Power, Empalane, Buonomano and Lukhele as shareholders in Tladi, which in turn would hold shares in Cullinan. The Cullinan transaction was not finalised for reasons not germane to this appeal.

[19] As Sandler had presciently predicted, in May 2005, nine months after ARB had concluded its BEE transaction with Umbani, it became apparent that their relationship was not working. ARB realised that it would need to terminate its relationship with Umbani and find a new BEE partner. Modise was again identified as the ideal candidate. Robertson called to invite him to a meeting with Alan Burke, ARB's chairman.

[20] The meeting took place on 9 May 2005 in Umhlanga, near Durban. Robertson also attended. It is common ground that with the ARB-Umbani transaction having unravelled, Burke offered Modise and his company, Batsomi Power, a deal – the same one that Sandler had identified as the ARB opportunity for Tladi – which Modise ultimately accepted. A few days later ARB and Batsomi Power concluded a confidentiality agreement pertaining to the scrutiny of their records for the purpose of assessing the efficacy of the deal.

[21] One of the issues in this appeal is whether this deal was a corporate opportunity available to Tladi at all. So, it is of some significance whether the meeting traversed this issue. Robertson could not remember whether Sandler's name came up during the meeting, but it an interview with a business program on radio 'Moneyweb' two years later, after the deal was concluded, he said that both Burke and he had made it clear that they were only interested in doing a deal with Batsomi Power, and no one else. This suggests that it did.

[22] However, in his testimony Modise maintained that there had been no discussion about Sandler and Tladi at the meeting. The court a quo, once again, rejected his evidence, for good reason. It had been put to Sandler that Modise's evidence would be that Burke had made it clear at the meeting that ARB did not wish to sell shares to Sandler or the companies with which he was associated because he is 'white' and Burke wanted to deal only with black persons. But in his testimony, Modise was unable to give a plausible explanation for how the topic of the sale of ARB shares to Sandler arose at the meeting. And the probabilities point to the fact that it would have arisen

precisely because they were aware that Sandler was also interested in pursuing the opportunity.

[23] Against the background of how the ARB opportunity had arisen, as well as Modise's position, the Tladi issue must have arisen at the meeting, as the court a quo correctly found. It's conclusion in this regard was fortified having regard to Burke's position. Given Robertson's inability to recall whether the issue had been discussed, and the unreliability of Modise's evidence, it was incumbent upon the appellants to have called Burke to clarify the issue. They elected not to do so and the court a quo was justified in drawing an adverse inference from their decision not to call him.

[24] In the final analysis, as I will show with reference to the discussion on the fiduciary duties of a director, it matters not whether the issue was pertinently raised in the meeting, or even whether the ARB opportunity was available to Tladi. Once it is accepted, as it must be, that Sandler had identified the ARB opportunity as one that Tladi could potentially exploit, and of which on the evidence Modise was aware, he had a duty to disclose this to Tladi and obtain its consent to do the transaction through Batsomi Power. Instead, as the evidence demonstrated, he withheld the information from Tladi and secured his own deal with ARB.

[25] The process of unwinding the ARB-Umbani transaction began in about July 2005. Sandler testified that one of the members of Muvoni's management team, who had close contact with ARB had informed him of this development. He then telephoned Modise and told him to pursue the ARB opportunity for

Tladi. Modise denied this, but the call must have taken place because Modise reported back to Sandler on what Burke had said to him.

[26] Sandler was taken aback by what Modise had told him was Burke's view of doing a deal with Tladi. It was that he was not prepared to 'empower another Jew', referring to Sandler, who is Jewish. As offensive as this obviously was, Sandler thought that this was not an anti-semitic remark; he subsequently ascertained that Burke was also Jewish and probably uninformed as to Tladi's BEE credentials. So, he asked Modise to arrange a meeting with Burke, Jonah and himself to clarify matters, which Modise agreed to do, but never did. Significantly Modise made no mention of his 9 May meeting with Burke nor of the confidentiality agreement he had concluded with ARB.

[27] Sandler's enquiries to Modise thereafter were met with the refrain that the ARB-Umbani deal had not yet unwound. Sandler accepted this in good faith, accepting at the time that it was perhaps not quite right for the approach to be made. However, on 1 December 2005, and unbeknownst to Sandler, Batsomi Power concluded an agreement in terms of which it acquired a 26 percent shareholding in ARB.

[28] In the meantime Sandler became increasingly concerned that Tladi had not yet appointed a chief executive officer and believed that Modise was avoiding him. He therefore sought to arrange a meeting with him at Muvoni's Christmas party in December 2005. Mr Dumisani Muhlwa, a co-director of Batsomi Power, was present and informed Sandler, after the latter had enquired about Modise's whereabouts, that he would arrive soon. According

to Sandler, he asked Muhlwa what was happening with the ARB transaction. Muhlwa responded by saying that they were still talking to them, which was untrue. Sandler understood this to mean that this interaction was on behalf of Tladi. Modise never arrived at the party.

[29] On 23 December 2005 Sandler received a newspaper report of ARB's transaction with Batsomi Power. This was the first time that he became aware that Modise had pursued the ARB opportunity for Batsomi Power. He tried, unsuccessfully, to contact Modise. He also sent a letter to him inviting him to a Tladi board meeting, but to no avail. Modise had apparently gone to ground. 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.

[30] In his testimony Modise denied all of this, insisting that he had informed Sandler about his acquisition of the ARB shares long before the transaction was concluded. Modise would have had the court believe that Sandler was kept abreast of the process throughout. And what is more, he incredulously testified, that when Sandler heard of this he accepted it magnanimously and told him to go and speak to ARB on behalf of Batsomi Power. When it was pointed out to him that such disclosures as he would have made to Sandler would have breached his confidentiality agreement with ARB, he adjusted his version. He then said that he had told him of this before 9 May 2005. This was false, as the meeting of 9 May with ARB was an exploratory meeting; there had been no talk of any acquisition of shares before this. None of this was put to Sandler when he testified.

[31] The appellants' other factual defence was that Tladi's object was to hold shares in Muvoni, not to pursue its own opportunities. This defence was also correctly rejected by the trial court. In contrast to his original plea filed in April 2013, where it was common cause that Sandler's presentation on 7 November 2004 was to entice him to become a BEE partner in Tladi, it was only in an amendment on the eve of the trial that Modise introduced the assertion that Sandler's presentation was aimed at enticing him to invest in Muvoni, to support his newly pleaded case. Modise's own evidence was however inconsistent with this suggestion. He accepted that the presentation covered all four opportunities and said he had formed the opinion that three out of the four were 'pie in the sky'. There would have been no need for Sandler to discuss all the opportunities, much less for Modise to have marked 'potential opportunities' if he was to have had no interest in them. In any event it is also common cause that Modise did pursue the Cullinan opportunity on behalf of Tladi, which also shows that the envisaged Tladi structure would have included more than Muvoni. His notes on the various business opportunities mentioned in the presentation showed that he took them seriously.

[32] The court a quo was therefore entirely justified in rejecting his evidence as not only improbable, but evasive, contradictory and untruthful.

Summary of factual findings

[33] In summary the following facts, as found by the court a quo, were established:

(a) 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;

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

(c) 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;

(d) 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 own interests on the understanding that the four opportunities would be pursued through Tladi;

(e) 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;

(f) 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;

(g) 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;

(h) In December 2005 Modise, through Batsomi Power concluded his own deal with ARB. He never disclosed this to Tladi either.

Modise's Case

[34] Modise contended that he owed no fiduciary duty to procure the ARB opportunity for Tladi and, either personally or through Batsomi Power, to profit therefrom. This is because, so the argument proceeded, the opportunity did not accrue to him by virtue of his association with Tladi, but despite it. Furthermore, he contended that the opportunity was not available to Tladi because ARB had made clear that it did not want to do a BEE deal with Sandler, because he was white. Moreover, he continued, he did not use any confidential information in which either Sandler or Tladi had a proprietary interest. Before I consider these submissions, it is necessary to set out the law as it pertains to the fiduciary duty of directors to their companies.

The ambit of the fiduciary duty

[35] 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.[2] Section 76(3)*(c)* of the Companies Act 71 of 2008 codifies this

[2] *Da Silva and Others v CH Chemicals (Pty) Ltd* [2008] ZASCA 110*;* 2008 (6) SA 620 (SCA) para 18.

duty, but its content is still informed by the common law. The basic duty is one of loyalty, which is 'unbending and inflexible' so as to ensure that it is not abused.[3] The duty encompasses at least three rules: Directors may not place themselves in positions of conflicts of interest or duty (the no-conflict rule); make secret profits (the no-profit rule); or 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.[4]

[36] The no conflict rule does not require an actual conflict to be established; only that a reasonable person would think that there was a real sensible possibility of conflict.[5] In the same vein the no-profit rule applies even if the company would not itself have made a profit, in other words, even if the director has not profited at the company's expense. Profit in this context is not confined to money but includes every advantage or gain obtained by the offending director.[6] Similarly, the corporate opportunity rule is not confined to assets or property only, but extends to confidential information that directors use for their personal gain.[7]

[37] With reference to the prohibition on the acquisition of economic opportunities with which we are primarily though not exclusively concerned

[3] F H I Cassim 'The duties and the liability of directors' in F H I Cassim (ed) *Contemporary Company Law* 2 ed (2012) at 513 and 534.
[4] Ibid at 536 and 547.
[5] Ibid at 535 and the cases cited there.
[6] Ibid at 536 and the cases cited there.
[7] Ibid at 539 and the cases cited there.

in this appeal this court said the following in *Da Silva and Others v CH Chemicals (Pty) Ltd*:[8]

'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".'

[38] Of particular importance in this case is that it is also irrelevant that the corporate opportunity would not have materialised. The director remains under a duty to disclose its existence and the information pertaining to it to the company.[9] Ultimately, as was pointed out in *Da Silva*:

'[T]he 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

[8] *Da Silva* (above fn 2) paras 18 and 19. (References omitted.)
[9] F H I Cassim (above fn 3) at 538; Compare *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, decided on the basis of the no-conflict rule though arguably concerning a corporate opportunity that had come to the defendant while a managing director of the plaintiff company.

or 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.'[10]

[39] This much is clear from an analysis of the facts as found by the high court and confirmed above. Sandler initially, and then Tladi, had actively been pursuing the ARB opportunity as one of four opportunities. It was integral to Tladi's business strategy and Modise had expressly been mandated to pursue it. When Burke discussed offering the opportunity to Modise in May 2005 the latter must have realised immediately that there was a conflict between his personal interest in pursuing the offer for himself and his duty to act in Tladi's best interests. Not only did he fail to disclose this conversation with Burke to Tladi, but he concealed the fact that he was pursuing the opportunity in his own interest. When he finally concluded the deal in early December 2005, he avoided having any contact with Sandler. Sandler discovered through a media release later on that the deal had been done. Instead of fulfilling his fiduciary duty to act in good faith and in Tladi's best interests he purloined the opportunity for himself.

[40] Modise's two remaining contentions are also without merit: First, it is argued that the opportunity did not arise by virtue of Modise's association with Tladi and was, in any event not available to Tladi; and secondly, that the information pertaining to it was not confidential because Tladi had no proprietary interest in it. As has been mentioned earlier it is irrelevant that the opportunity would not have materialised or for that matter that it had been initiated by ARB. Once Modise was aware that Tladi was pursuing the opportunity, and that he stood in a fiduciary relationship with it at the time

[10] *Da Silva* (above fn 2) para 19.

when the opportunity became available to him, he was not entitled to secure it in his own interest without disclosure to and approval by Tladi's board.[11] With regard to the second contention there is no legal requirement in the corporate opportunity rule for a Company to have a proprietary interest in any information. It is sufficient in the present circumstances that the acquisition of the ARB opportunity was integral to Tladi's business strategy for Modise – as chairman and director – to be saddled with the fiduciary duty to act in its best interests. Tladi thus established its claim against Modise.

Prescription

[41] In regard to Batsomi Power, the second appellant, it is contended on its behalf that the claim had prescribed and also that the case against it, being a separate legal entity, to account to Tladi, was not made. The court a quo dismissed both contentions. I deal first with Batsomi Power's appeal against the dismissal of its special plea of prescription. If successful the second issue falls away.

[42] The contention that the claim against Batsomi Power to disgorge its profits and account to Tladi had prescribed was grounded squarely on this court's judgment in *Symington and Others v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd*.[12] There, the court accepted for the purposes of prescription that a claim for damages and a claim for disgorgement of profits arising from a breach of a fiduciary duty are different. Put differently, they are not the same debt. This is because a claim for damages arises as soon as a fiduciary duty is

[11] *Philips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 SCA para 35.
[12] *Symington and Others v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] ZASCA 47; 2005 (5) SA 550 SCA.

breached, whereas with a claim for disgorgement of a profit prescription begins to run against the debt only after the payment giving rise to the profit is made.[13] The former is compensatory and arises regardless of whether or not any profit was made. The measure of the damages suffered is the value of the lost opportunity. The duty to account for profits on the other hand is aimed at stripping the fiduciary of his ill-gotten profits and therefore only arises if and when a profit is made. The court in *Symington* was required to decide whether the particulars of claim disclosed a disgorgement claim or a damages claim.[14] Having analysed the pleadings it concluded that the claim was only one for damages and not for disgorgement of profits. It consequently upheld the plea of prescription.

[43] Counsel for Tladi, Mr Bham, fairly accepted that Batsomi Power's special plea of prescription was therefore a difficult one for Tladi to overcome. He nonetheless urged us to dismiss the appeal. He submitted that what distinguished *Symington* from the present case was that the claim against Batsomi Power was introduced by way of amendment to the particulars of claim. And that the amended claim for disgorgement, introduced after the prescriptive period had run, was substantially the same claim as the original claim for damages – a submission the court a quo upheld.

[44] Now it is accepted that an amendment to a pleading, even if effected after the period of prescription has run against the claim, shall generally be permitted provided the debt claimed by way of amendment is the same or

[13] Ibid paras 24, 27, 34 and 35.
[14] Ibid para 28.

substantially the same debt as originally claimed.[15] So, the question to be decided is whether *Symington* may be distinguished, merely on the basis that the claim for disgorgement, was effected through an amendment to the particulars of claim, after the prescriptive period had run, and was at least substantially the same as the original claim for damages. It is therefore necessary to compare the original claim against Batsomi Power with the amended claim against it.

[45] I do so bearing in mind that a debt as contemplated in the Prescription Act is of wide import. As Harms JA put it in *Drennan Maud & Partners v Pennington Town Board*[16] one must ascertain what the 'claim' was in the broad sense of the meaning of that word, before and after the amendment. This is consistent with Constitutional Court's characterisation of a debt in *Makate v Vodacom Limited*[17] as:

'Something owed or due: something (as money, goods or services) which one person is under an obligation to pay or render to another [or a] liability or obligation to pay or render something; the condition of being so obligated.'

[46] Tladi originally sought inter alia a disgorgement of benefits, gains, profits and dividends only against Modise, but not against Batsomi Power. The alternative claim against Modise and Batsomi Power was for the payment

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[15] *Rustenburg Platinum Mines (Ltd) v Industrial Maintenance Painting Services CC* [2008] ZASCA 108; [2009] 1 All SA 275 (SCA) para 13.
[16] *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 at 212F-H
[17] See the minority judgment of Wallis AJ in *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) para 187, referring to the definition of the term in the *New Shorter Oxford English Dictionary* 3 ed (1993) vol 1 at 604, which accords with '[t]he meaning that has been given to the word "debt" since the Prescription Act came into force'. See, in this regard, *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344E-G; *Joint Liquidators of Glen Anil Development Corporation Ltd (in Liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 (A) at 110A-B; and *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 330F-H.

of damages in the amount of R122 million jointly and severally. The damages claim was not persisted with, but what was pleaded remains relevant to the analysis as to whether the amended claim or debt is the same or substantially the same claim or debt as pleaded in the original claim.

[47] In its original particulars of claim, and in relation to the alternative damages claim, Tladi pleaded that through Modise, Batsomi Power acting in concert with him and also being aware of the facts as pleaded giving rise to the disgorgement claim, aided or induced Modise to breach his fiduciary duty to it and deprived it of the corporate opportunity. But for their joint unlawful conduct, the particulars continued, Tladi would have taken up the corporate opportunity, as a consequence of which it suffered damages. Tladi thus claimed damages, jointly and severally, against both of them. The claim against Batsomi Power was based on the principle that a person who enables, assists in or facilitates a breach of trust by another with knowledge that a breach of trust is being perpetrated, is himself liable for damages flowing from the breach of trust.[18]

[48] The amendment, granted on 9 September 2015,[19] introduced allegations that Modise used Batsomi Power as his conduit and alter ego to misappropriate and receive the corporate opportunity. It also included a paragraph that Batsomi Power was jointly and severally liable with Modise to Tladi for the benefits, gains, dividends and profits referred to in its disgorgement claim.

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[18] *Yorkshire Insurance Co Limited v Standard Bank of SA Limited* 1928 WLD 251; *Gross and Others v Pentz* 1996 (4) SA 617 (A) at 625E-H; *Breetzke and Others NNO v Alexander NO and Others* [2020] ZASCA 97.
[19] See *Tladi Holdings (Pty) Ltd v Modise and Others* [2015] ZAGPJHC 331.

[49] It was thus contended on behalf of Tladi that the two claims were substantially the same. In this regard reliance was placed on the following passage from this court's judgment in *Phillips v Fieldstone Africa (Pty) Ltd*:[20]

'Counsel for the appellant emphasised that the particulars of claim contained no reference in terms to a fiduciary duty. They submitted that the claim must be understood as a claim based on breaches of the contractual terms which had been pleaded and said that that was how they had understood and approached the case. If they did that, however, I think that they placed far too restrictive an interpretation upon the claim. The contract of employment (with its implied terms) is pleaded as a single element of a broader picture of why an opportunity that arose out of the appellant's employment properly belonged to the respondents. The implied duties (ie duties which derive *ex lege*) are said to have arisen in the context of a contract which defined the relationship between the parties …

There is no magic in the term "fiduciary duty". The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship … While agency is not a necessary element of the existence of a fiduciary relationship … that agency exists will almost always provide an indication of such a relationship. The emphasis in the particulars of claim upon the representative nature of the appellant's status in dealing with Safika and the duty to account for profits acquired by him in that capacity should have been to counsel an unmistakeable beacon which marked the claim as one in which the appellant stood towards the respondents in a position of confidence and good faith which he was obliged to protect. *No more was required to set up a case on a fiduciary duty. It is true that the amount claimed was said to be the value of the benefit which the respondents would have derived from the lost opportunity rather than a simple disgorgement of profits made by him, which would have been a more appropriate measure.* But the method of calculation, ie the value of shares taken up less the price paid for them, was in essence the measure of the appellant's profits.' (Counsel's emphasis added.)

[20] *Philips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) para 27. (References omitted).

[50] *Phillips* involved a claim by a company against its employee to account to his employer for shares he had acquired from an opportunity arising in the course of his employment. The claim was based on an 'obligation to account' for the benefit. One of the issues that arose there was whether the company's claim as pleaded was limited to breach of contract and not breach of a fiduciary duty. The court held that the employment contract had been pleaded as a single element of why the opportunity had arisen and did not preclude the existence of a fiduciary duty, even though this was not specifically pleaded. In other words once the employment contract was pleaded *no more was required to set up a claim based on a fiduciary duty* even though, as the court observed, the value of the benefit the respondents would have derived from the lost opportunity, rather than a simple disgorgement of profits made by him, would have been a more appropriate measure.

[51] As I understand the submission Tladi thus contends that damages and disgorgement claims were broadly pleaded as a single element of why the opportunity had arisen. The fact that the disgorgement was not initially pleaded as the more appropriate measure should not matter. In short, they should be treated as substantially the same claim – or, as the court a quo found, 'substantially the same debt'.

[52] I do not think that *Phillips* is of any assistance to Tladi. Prescription was not in issue there. It is also apparent that the issue was whether the company was required to specifically plead in terms that the employee had a fiduciary duty to the company to set up the claim to account for the shares. That is why the court said that once the employment contract was pleaded no more was needed to set up the case on a fiduciary duty. And that the value of

the loss of the benefit from the lost opportunity to the company from the employee's acquisition of the shares for himself and the value of the benefit to be derived from a disgorgement of profits made by him was in essence the same. There was, unlike in this case, thus no claim for damages.

[53] It is, however, clear from the facts here that a claim for disgorgement of profits arose upon the breach of the fiduciary duty and not when each of the dividends from the ARB shares were ultimately paid to Batsomi Power. This debt quite clearly arose more than three years before the amendment was granted on 9 September 2015. In this regard it is apposite to refer to what Corbett JA said in *Evins v Shield Insurance Co Ltd*:[21]

'Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was a part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages …'

[54] In my view Tladi has not demonstrated that the amended disgorgement claim against Batsomi Power was 'part and parcel' of the original cause of action or substantially the same claim as the claim for damages. The claim, or debt, is based on an entirely different cause of action and the prescriptive period had run. Accordingly Batsomi Power's appeal against the court a quo's finding on prescription must succeed.

[55] The following order is made:

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[21] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D-E.

1 The appeal by the first appellant (Mr Jacob Resetlhake Daniel Modise) is dismissed with costs, including the costs of two counsel.

2 The appeal by Batsomi Power (Pty) Ltd is upheld, with costs including the costs of two counsel.

3 The order of the court a quo is amended by deleting the reference to Batsomi Power (Pty) Ltd and the phrase ‘jointly and severally’ in paras 1-3 of the order, and also by adding the following in para 4:

‘The claim against Batsomi Power (Pty) Ltd is dismissed with costs including the costs of two counsel.’

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JUDGE OF APPEAL

Appearances

For appellant:	L Harris SC (with him A Botha)
Instructed by:	Tshisevhe Gwina Ratshimbilani Inc, Sandton
	Matsepes Attorneys, Bloemfontein
For respondent:	A E Bham SC (with him T Dalrymple)
Instructed by:	Knowles Husain Lindsay Inc, Sandton
	McIntyre Van der Post, Bloemfontein