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# DISPUTE RESOLUTION ALERT

## IN THIS ISSUE

**Corporate Opportunity: The fine line between opportunism and breaching a fiduciary duty: A discussion of the Supreme Court of Appeal judgment of *Modise and Another v Tladi Holdings (Pty) Ltd* (Case no 307/19) [2020] ZASCA 112**

In the recent case of *Modise and Another v Tladi Holdings (Pty) Ltd* (Case no 307/19) [2020] ZASCA 112, the Supreme Court of Appeal (SCA or the court) considered the principles of fiduciary duties and whether misappropriation of a corporate opportunity by a director of a company amounts to breach of fiduciary duties. Furthermore, the court gives an interesting perspective on the implementation of the Broad-Based Black Economic Empowerment Act (the BEE Act), Act 53 of 2003.

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In its introduction to the case, the court explains the rationale and purposes underlying the BEE Act and notes that businesses complying with the Act receive benefit by being afforded preference in the adjudication of their bids to offer goods and services to the government and large corporate companies. However, the court makes the observation that this Act has often resulted in unsustainable and shallow relationships between individuals and entities, resulting in disintegration and acrimonious disputes.

The case consists of an appeal heard from the Gauteng Division of the High Court, which found that Jacob Modise (Modise) and Batsomi Power (Pty) Ltd (Batsomi Power), of which Modise was a director, had misappropriated a corporate opportunity to buy shares in another company, ARB Electrical Wholesalers (Pty) Ltd (ARB). The opportunity to buy the ARB shares properly belonged to the respondent, Tladi Holdings (Tladi).

The facts largely revolve around Modise and Johnathan Sandler (Sandler), who first met as board members of a listed company Johnnic Holdings Ltd (Johnnic) two decades ago. After leaving Johnnic, Sandler acquired 68% shareholding in Muvoni Contracting Services (Pty) Ltd (Muvoni), a small electrical company. Sandler made this acquisition with the aim of exploring the economic benefits which would ensue from doing business with state-owned entities and municipalities in the energy sector. In order to be able to do so, Muvoni had to be compliant with the BEE Act to become eligible to access these opportunities.

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ARB, a major supplier of electrical equipment to Muvoni, began negotiating with Umbani Mentis Electrical (Pty) Ltd (Umbani) to conclude a BEE transaction. As Sandler was known for his experience in structuring BEE deals, ARB sought his advice regarding a 30% stake ARB had available to offer a potential BEE partner. Sandler learned that ARB had unsuccessfully negotiated previous BEE deals and realised that, if the deal between ARB and Umbani did not succeed, there would be a potential corporate opportunity for him to exploit. However, the deal between ARB and Umbani was successfully concluded, without Sandler's knowledge thereof. Sandler continued researching potential opportunities for Muvoni and in pursuit of such opportunities, made a presentation to a Ghanaian business acquaintance, Sir Sam Jonah (Jonah), in which he presented the idea of an electrical conglomerate. The idea was that its core assets would consist of Muvoni, ARB (as, at this stage, Sandler still believed the deal with Umbani would unravel) and three other entities also operating in the electrical field. Jonah and Sandler agreed to form Empalane Investments (Pty) Ltd (Empalane) and to invest R5 million each to exploit these opportunities. Empalane eventually became a shareholder in the future Tladi. Sandler thereafter identified

Modise as a requisite asset for the opportunity as he was in good repute and would assist in BEE compliance. Sandler presented the opportunity to Modise, including the potential ARB deal and the idea that the 68% shareholding in Muvoni would be held by an 'electrical holding company' which would eventually be Tladi.

Despite Modise's denial that the ARB opportunity was discussed in his meeting with Sandler, cross-examination revealed that Modise drew a circle around the words 'ARB opportunity' and had written 'potential' twice next to it. Modise however submitted that it was not an opportunity at all because, as far as Sandler was aware, the negotiations between ARB and Umbani were ongoing. The SCA however confirmed the view of the *court a quo* who found that Sandler had drawn the ARB opportunity to Modise's attention and that he was well aware of it. Sandler and Modise met numerous times thereafter which eventually resulted in the other BEE-partners, Jonah and his son, having their attorneys prepare agreements.

The general 'non-compete' clause, included in the initial draft agreements, was later removed as Sandler stated that both he and Modise had similar ventures. He further explained that each individual party would continue pursuing their own

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interests and through their common holding vehicle, which would be Tladi, they would pursue mutual opportunities. Modise did not argue against this explanation in court and wanted the perspective shown to be that, despite Tladi being an electrical conglomerate of which Modise would become both chairman and director, he could still pursue his own interests and compete freely against it in respect of any opportunities he became aware. The deceptive and faulted reasoning in the latter is evident.

Sandler began negotiations with Nedbank to obtain funding for the BEE transactions and specifically included the ARB opportunity as part of his envisaged electrical conglomerate. Soon thereafter Modise was appointed as Director and Chairperson of Tladi. A shareholder's agreement was concluded on the same day between Empalane, Batsomi Investment Holdings (BIH), Hapang Business Solutions (Hapang), Lukhele, Bounomano and Boomerang Trading 4 (Pty) Limited, which was renamed Tladi. Hapang later withdrew from the agreement and a new agreement, retrospective in nature, was concluded a few months later. Consultancy and administration services agreements were further concluded between Empalane,

Batsomi and Tladi. Sandler thereafter conveyed to ARB that Modise was "on board" which would underline the importance of their BEE credentials. Sandler soon thereafter also introduced one of ARB's directors to Modise. Modise, when faced with a resolution to be removed from Tladi's board for breaching his fiduciary duties two years later, denied ever being introduced to a member of ARB's management team.

During a meeting in February 2005, Sandler and Modise briefly discussed Tladi's business strategy and flagged the ARB-opportunity as they were uncertain whether the ARB-Umbani deal was still ongoing. Modise denied any discussion of the ARB-opportunity and the SCA concurred with the *court a quo* in finding that the probabilities supported Sandler's version. As Sandler had foreseen, nine months into the ARB-Umbani deal, the relationship unravelled and ARB was seeking a new BEE partner, for which Modise was identified as an ideal candidate. ARB offered Modise and his company, Batsomi, a deal Sandler had identified as an opportunity for Tladi. Modise, on behalf of Batsomi, accepted the deal and a further confidentiality agreement was concluded between the parties.



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The SCA held that it is insignificant whether the issue was pertinently raised in the meeting, or even whether the ARB opportunity was available to Tladi.

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The SCA had to decide whether a corporate opportunity at been available to Tladi at all. Modise denied that Sandler or Tladi had come up in his meeting with ARB, which the *court a quo* rejected. It had been put to Sandler that Modise's evidence would be that ARB did not wish to sell shares to Sandler or the companies with which he was associated because he is 'white' and ARB 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. The Court found that the probabilities indicated that it would have arisen because they were aware Sandler was interested in pursuing the opportunity. This meant, in turn, that Tladi must have also arisen in the meeting, a contention with which both the *court a quo* and SCA agreed. The relevant director from ARB elected not to testify to clarify the issue and the *court a quo* drew a justified adverse inference from this decision.

The SCA held that it is insignificant whether the issue was pertinently raised in the meeting, or even whether the ARB opportunity was available to Tladi. The court however found 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.

As soon as the unwinding of the ARB-Umbani deal began, Sandler contacted Modise and told him to pursue the ARB opportunity for Tladi. Despite Modise's denial of this call, the court once again found that it must have taken place as Modise informed ARB of Sandler's idea. Sandler requested that Modise arrange a meeting with the management of ARB, which Modise never did nor did he mention the meeting and confidentiality agreement he concluded with ARB. Within the same year, Batsomi Power concluded an agreement in terms of which it acquired 26 percent shareholding in ARB, of which Sandler was not aware. Sandler learned of the Batsomi Power-ARB deal by means of a newspaper article and thereafter tried to contact Modise to no avail. 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.

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The duty has three core tenets: directors may not place themselves in conflicts of interest, make secret profits or acquire economic opportunities for themselves that properly belong to the company.

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Modise presented various unsuccessful arguments before court and was not found to be a consistent and credible witness as he first argued that the only purpose of Tladi was to hold shares in Muvoni but, in contrast, he vehemently pursued other opportunities on Tladi's behalf. The SCA confirmed the finding of the *court a quo* that Modise's version of events was not only improbable but also evasive, contradictory, and untruthful. He argued that he owed no fiduciary duty to procure the ARB opportunity on behalf of Tladi as the opportunity, on his version, did not accrue to him by virtue of his association with Tladi, but despite of 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.

The common law provides that directors have an overarching and paramount fiduciary duty to exercise their powers in good faith and in the best interests of the company. This sentiment is echoed in section 76(3)(c) of the Companies Act, 71 of 2008 (the Act) and the court correctly stated that the basic duty is that of loyalty which is 'unbending and inflexible' to

ensure that it is not abused. The duty has three core tenets: directors may not place themselves in conflicts of interest, make secret profits or acquire economic opportunities for themselves that properly belong to the company.

The no-conflict rule does not require an actual conflict to be established, only that a reasonable person would have foreseen the real possibility of a conflict. Similarly, the no-profit rule applies even if the company would not have made a profit and therefore the director has not profited at the company's expense. In line with the reasoning of the latter two rules, the corporate-opportunity rule is not restricted to assets or property only but extends to confidential information that directors use for their personal gain.

The SCA makes an important reference to the flagship case, heard before the same court, relating to corporate opportunity which was that of *Da Silva and Others v CH Chemicals* 2008] ZASCA 110; 2008 (6) SA 620 (SCA). The court in *Da Silva* held that a director is obliged to acquire an economic opportunity for the company if an opportunity is acquired at all. The corporate opportunity belongs to the company and if the directors seizes the opportunity for himself, the law will disregard his actions and treat the

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The SCA confirmed the sentiments of Da Silva which held that a director remains under a duty to disclose the existence of the opportunity, and the information pertaining thereto, to the company.

acquisition as if made for the company. It is of no consequence that in the particular circumstances of both Da Silva and the present matter that the opportunity would not or even could not have been taken up by the company but rather that the opportunity in question must be one which can properly be categorised as a "corporate opportunity". The SCA confirmed the sentiments of Da Silva which held that a director remains under a duty to disclose the existence of the opportunity, and the information pertaining thereto, to the company.

The SCA held that Sandler and Tladi had been actively pursuing the ARB-opportunity. It was an essential component of Tladi's business strategy and Modise had been expressly mandated to pursue it. At the time when ARB made an offer to Modise, he should have realised

the conflict of interest immediately as he would be unable to act both in his own and Tladi's best interest. The court found that he not only failed to disclose the offer received from ARB, he actively concealed his pursuance of the opportunity in his personal interest. Once his deal with ARB was finalised, he avoided Sandler, who had to learn the truth in a media release. The court concluded and held that once Modise was aware Tladi was pursuing the opportunity, he was not entitled to secure it in his own interest without disclosure to and approval by Tladi's board as he stood in a fiduciary duty to the company at the time.

The appeal by Modise was dismissed with costs and the appeal by Batsomi Power was upheld.

*Lucinde Rhoodie and Simone Nel*



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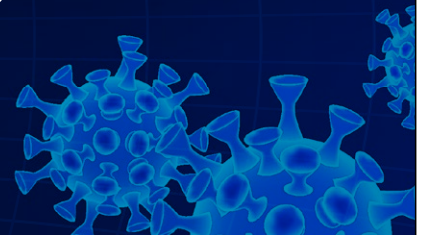
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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