DA SILVA v C H CHEMICALS (PTY) LTD: FIDUCIARY DUTIES OF RESIGNING DIRECTORS

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INTRODUCTION

It is a well-entrenched principle of corporate law that a director has a fiduciary duty not to make a secret profit out of his trust, and generally must not place himself in a position in which his duty and self-interest may conflict (*Aberdeen Railway Co v Blaikie Bros* (1854) 2 Eq Rep 12 461; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL); *Robinson v Randfontein Gold Mining Co Ltd* 1921 AD 168; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA); *Bhullar v Bhullar* [2003] 2 BCLC 241 (CA); M S Blackman, R D Jooste, G K Everingham, M Larkin, C H Rademeyer & J L Yeats *Commentary on the Companies Act* Volume 2 (2008) 8-30). This broader principle may be subdivided into two categories, namely the corporate opportunity rule and the no-profit rule.

The corporate opportunity rule prohibits a director from appropriating for himself or for another property or economic opportunities which either belong to the company or to which the company has some kind of claim, so that the acquisition of the opportunity by the director would take place at the expense of the company (R C Beuthin 'Corporate opportunities and the no-profit rule' (1978) 95 *SALJ* 458 at 462). In very broad terms, the company has 'some kind of claim' where the opportunity falls within the line of business of the company and the company is justifiably relying on the director to acquire the opportunity for it (R C Beuthin & S M Luiz *Beuthin's Basic Company Law* 3 ed (2000) 202).

By contrast, the no-profit rule is breached where a director makes a profit (which may consist not only of money but also any other gain or advantage (*Robinson* (supra)) in some way as a result of his office, even though the acquisition by the director is not at the expense of the company (Beuthin op cit 462; *Regal (Hastings)* (supra); Blackman et al op cit 8-142–144). The no-profit rule is justified as a prophylactic rule (Paul L Davies *Gower and*

Davies' Principles of Modern Company Law 8 ed (2008) 562), meaning that liability arises regardless of whether the company itself could have taken the opportunity and regardless of whether the director acted in good faith (Blackman op cit 8-144–148; *Regal (Hastings)* (supra); see also *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4).

It is worth emphasizing that a director must take care to avoid breaching both categories of this fiduciary duty. Accordingly, even where an opportunity is not a corporate opportunity because it is not taken at the expense of the company, the director is not automatically relieved of liability — the director must still overcome the hurdle of the no-profit rule (Beuthin op cit 465). These are the basic and elementary principles relating to the fiduciary duty of a director to avoid a conflict of interest.

In *Da Silva & others v C H Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) the central issue before the Court was whether Da Silva, a managing director, had breached these fiduciary duties owed to his company, C H Chemicals (Pty) Ltd (hereafter referred to as CHC) (para 18).

THE FACTS

The factual background, which is complex, was as follows: Resinex, a European company engaged in the business of the international distribution of chemical and plastic products, wished to enter the South African market. For these purposes, it considered two alternatives: either entering into a joint venture or some other form of collaboration with CHC, an established South African company engaged in the distribution of chemical and plastic products; or, alternatively, establishing its own business in South Africa in competition with CHC. Da Silva, the managing director of CHC, was responsible for the negotiations with Resinex.

After a number of months of unsuccessful negotiation, Resinex informed Da Silva that it had decided against collaborating with CHC and wished instead to pursue the route of entering the South African market on its own. Resinex simultaneously offered Da Silva a position as the managing director of the South African subsidiary companies that it proposed to set up for these purposes.

Da Silva did not inform CHC at this stage of the offer which he had received from Resinex. Da Silva also continued to negotiate with Resinex, on behalf of CHC, for a number of months after having received the offer from Resinex.

Eventually, Da Silva did accept the offer of Resinex in principle, entered into discussions on the details of the offer, and concluded a written agreement with Resinex. The day after the agreement was reached Da Silva resigned by handing in his notice of termination of employment to CHC.

The agreement between Da Silva and Resinex, entitled 'Heads of Agreement', provided that Da Silva would establish two South African subsidiaries of Resinex (a holding company and a trading company); that Da Silva would be the managing director of both companies; that future acquisitions by the Resinex group in the territory would be directed through the said holding company; and that Da Silva would be allocated a 25 per cent interest in the said holding company.

During his notice period, Da Silva acquired two shelf companies which subsequently became the two subsidiaries of Resinex, was appointed a director of both companies and hired premises for the two companies. During his notice period, Da Silva also purchased and then sold on behalf of the trading subsidiary of Resinex three containers of LLDPE, a plastic product.

The issue before the Supreme Court of Appeal was whether Da Silva had breached his fiduciary duties to CHC, both in relation to the LLDPE transaction as well as by usurping the opportunity that CHC had had to collaborate with Resinex. (There were also certain other claims relating to Da Silva's alleged procurement on behalf of the subsidiaries of Resinex of certain existing and/or prospective business of CHC, but the court rejected these claims on the facts.)

THE JUDGMENT

The LLDPE transaction was quite straightforward: the court held, with reference to *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T), that it is not a breach of fiduciary duty for a managing director who is serving his notice period merely to incorporate a company that was in the future to compete with the director's existing employer (in this case the two Resinex subsidiaries) or to obtain premises for the future companies (as Da Silva had done) as these actions amount to mere preparatory steps taken to enable the director to obtain alternative employment (para 54).

However, by purchasing and on-selling the three containers of LLDPE on behalf of the Resinex subsidiaries while still serving his notice period with CHC, Da Silva had clearly breached his fiduciary duty to CHC. This is because any transaction involving the purchase and sale of plastic products fell within the scope of business of CHC, regardless of whether or not such products were off-specification (i e commodities in which CHC did not normally deal) (para 55). On this basis the court found that Da Silva had undoubtedly breached the corporate opportunity rule in respect of the LLDPE transaction.

The more challenging and controversial question before the court, however, was whether Da Silva had breached his fiduciary duty to CHC in relation to the Resinex transaction. In this regard CHC alleged that Da Silva, by agreeing to set up the subsidiaries of Resinex in South Africa and to be appointed as their managing director, had exploited an opportunity belonging to CHC to establish some form of collaboration with Resinex in South Africa (hereafter referred to as 'the Resinex transaction').

The Supreme Court of Appeal analysed the Resinex transaction on the basis of the corporate opportunity rule (paras 18–21). The court briefly mentioned the tests for a corporate opportunity, including the requirement that the opportunity must be in the line of business of the company or must be one which the company is actively pursuing (para 19). The court correctly pointed out that once an opportunity amounts to a corporate opportunity, it is not a defence that in the particular circumstances of the case the company could not or would not have taken the opportunity (para 19) — the opportunity still remains a corporate opportunity. (Included in such circumstances would be unwillingness on the part of the third party to deal with the company, which occurred in *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 as well as in *Da Silva*'s case.) The court further affirmed that, while a director is as a general rule free to resign and thereafter to obtain employment with a competing company or to compete with his former company (para 21), in those cases where the director's resignation is aimed at enabling him to appropriate a corporate opportunity, his resignation will not be a defence against liability arising from the corporate opportunity rule (para 20). (It is suggested that this is in accordance with the principles enunciated by the court in *Sibex Construction SA (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T); see also *Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291 (C).)

Applying these principles to *Da Silva*'s case, the Supreme Court of Appeal found that Da Silva had not exploited a corporate opportunity of CHC. In this regard, the court placed much emphasis on the nature of the agreement between Da Silva and Resinex. The Supreme Court of Appeal rejected the finding of the court a quo that the agreement was one of a joint business venture. This was notwithstanding the fact that the agreement dealt with the structure of the business operations to be established in South Africa, the acquisition of future business opportunities and the allocation of a twenty five per cent shareholding to Da Silva (paras 32–34). The Supreme Court of Appeal instead held that the agreement was a contract of employment (or at least analogous to one (para 29)) since it made provision for Da Silva to establish two South African subsidiaries of Resinex and for his appointment as managing director by the subsidiaries which were yet to be formed (para 37).

On this basis, the Supreme Court of Appeal reasoned that the transaction between Da Silva and Resinex was not the transaction pursued by CHC, but rather the antithesis of that which CHC had pursued (para 37). The court elaborated by stating that when Resinex had decided to extend its operations to South Africa, it had had two choices: either to enter the market in competition with CHC; or to do so in collaboration with CHC. While CHC had pursued the latter transaction, Da Silva had pursued the former transaction; in other words, the transaction between Da Silva and Resinex was not the same transaction pursued by CHC, but the very antithesis thereof (para 37). The Supreme Court of Appeal accordingly concluded that Da Silva had not appropriated any corporate opportunity belonging to CHC and had consequently not breached his fiduciary duty to CHC.

CRITIQUE OF THE JUDGMENT

With respect, the judgment of the Supreme Court of Appeal may be criticized on three grounds. First, the court's analysis of the corporate opportunity doctrine is debatable. Secondly, the court concluded its analysis after interrogating the corporate opportunity rule, but failed to consider the no-profit rule. Thirdly, the court did not take account of the broader rule that a director may not place himself in a position of *conflict of interest*. These criticisms will be discussed in turn.

The Corporate Opportunity Rule

The court's elucidation of the legal principles relating to the corporate opportunity rule was disappointing in its lack of profundity and depth. Although the court briefly mentioned the tests for a corporate opportunity, it did not deal in much detail with the complexities involved in this area of law. Moreover, the finding of the court in relation to the Resinex transaction is questionable. One wonders whether the court based its decision on a distinction without a difference by stating that while the opportunity open to CHC was one for a joint venture or other form of collaboration, the opportunity open to Da Silva was one of employment, and accordingly did not amount to the appropriation of the same opportunity that belonged to his company.

It is certainly arguable that Da Silva did indeed appropriate a corporate opportunity of his company in relation to the Resinex transaction. As the court a quo stated (in *C H Chemicals (Pty) Ltd v Da Silva* [2007] JOL 19340 (T) 166; see also para 34 of the judgment of the Supreme Court of Appeal) both the opportunity open to CHC and that open to Da Silva could be labelled in common as an opportunity for a 'business relationship' with Resinex. It is submitted that in substance there was no material difference between the two opportunities, and that the Supreme Court of Appeal erred in its analysis.

One may have regard to the USA case of *Thorpe by Castleman v CERBCO Inc* 676 A 2d 436 (Del Supr 1996) where the Supreme Court of Delaware found that the directors had usurped a corporate opportunity of the company despite the fact that the opportunity open to the company and that open to the directors were *not* identical or fungible. In *Thorpe*'s case INA wished to acquire one of its sub-licencees, East Inc, which sub-licensee was the only profitable subsidiary of CERBCO Inc. The opportunity open to the company, CERBCO, was accordingly the potential sale of control of its subsidiary, East, to INA. The Eriksons, who were directors of CERBCO, offered as a counter proposal to sell to INA their controlling interest in CERBCO, by means of which INA would gain control over East. Thus, the opportunity open to the company was the sale of its shares in East, while the opportunity open to the directors was the sale of their shares in CERBCO.

The Delaware Supreme Court had no difficulty in finding that the directors had usurped a corporate opportunity of CERBCO, despite the fact that the company itself clearly could not have taken the *same* opportunity that was open to the directors. The court labelled the opportunity widely as an opportunity to 'sell shares' to INA (*Thorpe by Castleman* (supra) 443). The court continued by stating that although the corporate opportunity doctrine is generally applied where the director and the company compete to buy something, *Thorpe*'s case differed in that both the directors and company wished to sell stock and the objects of the dispute (that is, the stock to be sold) were not, in the words of the court, 'perfectly fungible' (ibid). In such a case, the directors and the company may still be said to compete against one another for the purposes of the corporate opportunity doctrine, provided that their respective blocks of stock were 'rough substitutes in the eyes of [the purchaser]' (ibid). In other words, the Delaware Supreme Court held that one must look at the situation from the purchaser's standpoint and determine whether, from the purchaser's point of view, the two transactions were acceptable substitutes. Only if the purchaser considered none of the transactions with the company to be an 'acceptable substitute' for the transaction with the directors, then may it be said that the opportunity was not really available to the company (ibid). (Although the court was in effect limiting the test for a corporate opportunity by considering whether the opportunity was as open to exploitation by the company as it was to the director, this case supports the proposition that for the purposes of the corporate opportunity rule the two opportunities open to the company and the director, respectively, need not be identical in nature.)

Parallels may be drawn between *Da Silva*'s case and *Thorpe*'s case. In *Da Silva*'s case the general aim of Resinex was to expand its business to South Africa. While the opportunity open to CHC was to enter into a joint venture or some other form of collaboration with Resinex, the opportunity open to the director, Da Silva, was to take up an appointment as managing director of the South African subsidiaries of Resinex that were to compete with CHC. The two opportunities were not 'perfectly fungible' or identical. From the viewpoint of the third party, Resinex, the transaction with the CHC certainly was an 'acceptable substitute' for the transaction with Da Silva. In fact, as the Supreme Court of Appeal itself stated, the two transactions were 'antitheses' or alternatives, both of which were actually considered by Resinex. Accordingly, on the basis of *Thorpe*'s case it may be stated that Da Silva certainly did usurp the corporate opportunity belonging to CHC to enter into the Resinex transaction.

One may also have regard to the English case of *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200, where Bryant, a director of a chartered surveying firm, FBS, had *already resigned* and was serving out his notice period when he was offered a retainer arrangement by the largest (if not the only) client of the company, Alliance. Alliance had in fact wished to employ Bryant, but as a result of certain technicalities was unable to do so. Accordingly, the retainer arrangement between Bryant and Alliance was structured to be substantially similar to a contract of employment, in that it provided for a set monthly salary that was neither project-based nor fee-based; that is to say the salary was unrelated to the amount of work done. As such, the retainer arrangement was not an opportunity that was in itself available to his former company, FBS. In the vein of *Thorpe*'s case and *Da Silva*'s case, the precise form of the opportunity available to the director was not available to the company.

The court in *Bryant*'s case found, on the simple basis that Alliance had made the offer to Bryant *after his resignation* from FBS, that there had plainly been no breach of the corporate opportunity rule. Nevertheless, the court there seemed to have had no difficulty with the fact that the form of the opportunity accessible to the company and that accessible to the director were not perfectly identical. This equates with the finding set in *Thorpe's* case, and lends further support to the submission made above that the Supreme Court of Appeal misapplied the corporate opportunity doctrine by relying on a distinction without a difference and erred in absolving Da Silva from liability for the Resinex transaction.

In addition, it has been held that for the purposes of the corporate opportunity rule it makes no difference whether the opportunity in question is taken up by the director himself or by a corporate vehicle established by him for the purpose of taking the opportunity (see *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 (ChD) paras 98–105, relying on *Cook v Deeks* [1916] 1 AC 554 at 561–65 and *Canadian Aero Service v O'Malley* (1973) 40 DLR (3d) 371 (SCC)). In this case Da Silva took the opportunity himself in his personal capacity. But if Da Silva had instead undertaken the Resinex transaction through a new company, then the new company would have been the entity to receive the twenty five per cent shareholding in the Resinex subsidiaries (and to receive the equivalent of Da Silva's salary as its management fees). In those circumstances the court may indeed have been more inclined to regard the transaction between Resinex and the new company established by Da Silva as a joint venture and, as such, an appropriation by Da Silva of the corporate opportunity of CHC to enter into a joint venture with Resinex. One wonders, then, in view of the principle affirmed in the above cases, why it should make any difference to the court that Da Silva took up the Resinex transaction in his personal capacity.

The no-profit rule

As set out in the introduction, a director's fiduciary duty not to make a secret profit out of his trust may be divided into two types of cases, namely the corporate opportunity cases and the no-profit cases. Even where an opportunity is not a corporate opportunity, it may not automatically be said that the director has not breached his fiduciary duties — the director must still overcome the hurdle of the no-profit rule (Beuthin op cit 465).

In *Da Silva*'s case the Supreme Court of Appeal simply concluded its analysis of the Resinex transaction without any consideration of the no-profit rule. The question thus arises whether Da Silva had breached the no-profit rule. The no-profit rule applies where a profit (which is widely defined to include any gain or advantage) comes to the director by virtue of his office and in the course of performing his duties as a director, even though the acquisition by the director is not at the expense of the company (Beuthin op cit 462; Blackman et al op cit 8-142; *Regal (Hastings)* (supra)). In other words, it is irrelevant for the purposes of the no-profit rule that the company could not have made the acquisition. Good faith on the part of the director is also no defence against liability under the no-profit rule (Blackman et al op cit 8-144; *Regal (Hastings)* (supra)). The director may only retain the profit in such instances with the consent of the company; that is, the majority of the members in general meeting (Blackman et al op cit 8-142; *Robinson* (supra); *Transvaal Cold Storage Co* (supra)).

Applying the no-profit rule to *Da Silva*'s case, Da Silva's chance to make a profit by way of his appointment as managing director of the Resinex subsidiaries undoubtedly came to him by virtue of his office as the managing director of CHC. Since Da Silva was directly responsible for the negotiations with Resinex on behalf of CHC, it was in his capacity as a director of CHC and in the course of performing his duties as a director of CHC that the profit came to him.

On a straightforward application of the leading case of *Regal (Hastings)* (supra) the profit was constituted by the shares that Da Silva received in the Resinex subsidiary (that is, his twenty five per cent shareholding in the South African holding company). Accordingly, Da Silva breached the no-profit rule. The judgment of the Supreme Court of Appeal may be criticized for totally neglecting this issue. In order for Da Silva properly to have retained the profit, he ought to have made complete disclosure to the shareholders of CHC in general meeting and sought their consent and approval by way of an ordinary resolution.

Although it is submitted that on a simple application of the *Regal (Hastings)* case Da Silva did breach the no-profit rule, it is possible to construct a converse argument that the shares in question may not necessarily have constituted a profit for the purposes of the no-profit rule. Relevant considerations in this regard would include whether the shares were truly part of Da Silva's salary or remuneration package with the Resinex subsidiaries, and/or whether Da Silva really was liable to pay for the shares. While on the evidence of Resinex, Da Silva was liable to pay for the shares, which payment would come from his share of the profits, Da Silva's conflicting evidence was that he was not liable to pay for the shares at all (para 36). The judgment of the Supreme Court of Appeal was, with respect, rather shallow and superficial in this regard, and the court could certainly have probed these matters further on the evidence.

Conflict of Interest and Duty

In addition to overlooking the no-profit rule, the Supreme Court of Appeal in *Da Silva's* case also failed to consider the implications of the broader no-conflict rule. The no-conflict rule is the crucial underlying enquiry.

The no-conflict rule provides that a director may not place himself in a position in which his personal interests conflict, or may possibly conflict, with his duties to the company (Blackman et al op cit 8-39 and 8-111; *Aberdeen Railway Co v Blaikie Bros* (supra) *Regal (Hastings)* (supra); *Robinson v Randfontein Gold Mining Co Ltd* (supra); *Phillips v Fieldstone Africa* (supra); *Bhullar v Bhullar* (supra)). 'Interest' in this context entails a pecuniary or financial interest (Blackman et al op cit 8-116). The term 'possibly may conflict' means that the reasonable person, looking at the relevant facts and circumstances of the particular case, would think that there was a real, sensible possibility of conflict (Blackman et al op cit 8-116–117; *Boardman v Phipps* [1967] 2 AC 46 (HL) 124). This rule thus prohibits a director from acting where, in order to fulfil his duty to the company, he will or may have to prefer the interests of the company at the expense of his own interests (Blackman et al op cit 8–116). Merely by acting in such circumstances, the director breaches his fiduciary duty, regardless of whether he acts in the interests of the company (ibid) and regardless of whether he acts in good faith (*Regal (Hastings)* (supra) *Aberdeen Railway Co v Blaikie Bros.* (supra); *Phillips v Fieldstone Africa* (supra); Blackman et al op cit 8–111–112).

Da Silva was clearly in a position of conflict, or possible conflict, of interest. Once Resinex had made the offer of employment to Da Silva, Da Silva was placed in a position in which his self-interest as the potential managing director of the Resinex subsidiaries was in stark conflict with his ongoing duty to his company to negotiate some form of collaboration between CHC and Resinex. As the Supreme Court of Appeal said, these were direct antitheses; in the latter situation CHC and Resinex were to collaborate, while in the former situation CHC and Resinex were to compete. Da Silva plainly placed himself in a position of conflict by continuing to act for his company CHC in its negotiations with Resinex, while simultaneously considering the offer that Resinex had made to him in his personal capacity. By merely acting in these circumstances Da Silva breached his fiduciary duty, even if he may have preferred the interests of CHC to his own interests and even if he may have acted in good faith.

With respect, the Supreme Court of Appeal erred in neglecting to consider this fundamental basic duty. This to a large extent contributed to the court's incorrect conclusion that Da Silva was not in breach of his fiduciary duties to CHC.

In *Framlington Group plc v Anderson* [1995] 1 BCLC 475 (Ch D), it was held that where a director is offered more favourable terms of service by another company, it is not in itself a breach of his duties to resign from his current employment and to accept the better offer. This principle will apply even if the other company was simultaneously also negotiating to purchase part of the business of the director's original company, provided however that the director himself was *not involved in the negotiations* on behalf of his original company. But where the director is involved in the negotiations for the sale of part of the business of his original company, when he is offered better terms of service by the other company, a conflict of interest may well arise (see *Framlington* (supra) 499–501, where the court distinguished the case of *Furs Ltd v Tomkies* (1936) 54 CLR 583, in which the managing director was in fact involved in the negotiations for the sale of the business of his original company).

In *Framlington*'s case, part of the plaintiff's business (that is, the fund management part of the business) was being sold to Rathbone. The three relevant directors, who were the managers of Framlington's fund management business, were also to be transferred to Rathbone. Significantly, the three directors did not play any part in the negotiations for the sale of the business. At the same time that the negotiations for the sale of the business were taking place, the three directors negotiated for themselves a generous remuneration package with Rathbone, including consideration shares which related to the value of the managed funds to be transferred to Rathbone. Framlington alleged that the consideration shares constituted secret profits. The court rejected the claim of Framlington and held that there had been no breach of fiduciary duty. Central to the court's reasoning was the fact that the three directors had not been involved in the negotiations for the sale of the business (*Framlington* (supra) at 499). There was thus no question of a secret bribe or commission in relation to the consideration shares.

By contrast, where a director is indeed involved in the negotiations for the sale of part of the business of his original company and is then offered better terms of service by the other company, as occurred in *Da Silva*'s case, the issue of a conflict of interest certainly arises. A director should not participate in negotiations if a conflict of interest would result (see e g *Weinberger v UOP, Inc* 457 A 2d 701, 710–11 (Del Supr 1983)). Once Resinex had made the offer of employment to Da Silva, Da Silva ought to have removed himself from the negotiations between CHC and Resinex and ought to have allowed disinterested persons to act on behalf of CHC. Alternatively, Da Silva ought to have obtained the informed consent of CHC by making complete disclosure to the shareholders of CHC in general meeting and obtaining their approval to continue to participate in the negotiations with Resinex.

CONCLUSION

The judgment of the Supreme Court of Appeal ultimately amounted to an incomplete and somewhat superficial analysis. The court overlooked the essential aspect that the key inquiry is whether the director placed himself in a position where his duty and his self-interest conflicted. This Da Silva clearly did. Secondly, the court's application of the corporate opportunity rule is debatable. It is respectfully submitted that the Resinex transaction did indeed amount to a breach of the corporate opportunity rule. Thirdly, the court failed to take into account the no-profit rule, which, on the facts of *Da Silva*'s case, appears to have been breached.