THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 516/02

In the matter between

ERIC M PHILLIPS **APPELLANT**

and

FIELDSTONE AFRICA (PTY) LTD **1ST RESPONDENT**

FIELDSTONE PRIVATE CAPITAL GROUP **2ND RESPONDENT**

Coram: **MPATI DP, STREICHER, FARLAM, HEHER JJA and MOTATA AJA**

Heard: **21 NOVEMBER 2003**

Delivered: **28 NOVEMBER 2003**

Summary: **Employment – fiduciary relationship – pleading – when such relationship arises – breach – what constitutes**

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JUDGMENT

HEHER JA

HEHER JA:

[1] This appeal concerns the liability of an employee to account to his employer for secret profits made by the employee out of an opportunity arising in the course of his employment.

[2] The first respondent is a South African company which was set up by the second respondent to provide a corporate face for its activities in this country and to render services on its behalf.

[3] The second respondent, Fieldstone Private Capital Group, was, at the times with which the litigation was concerned, a partnership operating from New York. Its business, which is international, consists in the main in raising investment capital and advising on activities in the infrastructure sector (that area which includes public utilities, port and road construction and telecommunications). It frequently works with small enterprises which have gained or hope to obtain large opportunities for which they have neither expertise nor the financial clout to raise capital beyond the means of their individual members. In the South African context the redressing of historical imbalances in society by the promotion of black economic empowerment provides the typical field for the second respondent's endeavours. It charges fees for its services. Often, however, its clients are unable to pay in cash or need to be carried financially. To cater for this difficulty, the second respondent frequently agrees to partial satisfaction of its fees in the form of an equity participation in the client or in the investment which is acquired by the client. The importance of this kind of opportunity (and its concomitant risk) was

described in evidence by Mr Andrew Capitman, the second respondent's managing director and chairman of the first respondent:

'The cream in our business is the equity participations because just as we make money for our clients out of their opportunities, the biggest gains sometimes come from the equity but it often takes years to collect, to harvest that investment.'

[4] The appellant is a young black American recruited in the United States by Capitman especially for his expertise in the sphere of telecommunications. He was employed by the second respondent in April 1997 at a salary of US$ 8333,33 per month and an annual performance-based bonus guaranteed at a minimum of US$ 50000.

[5] The *dramatis personae* are completed by Safika Investment Holdings (Pty) Ltd and Safika Wireless (Pty) Ltd. The latter is a South African company established principally by black businessmen to pursue opportunities in telecommunications. It is a subsidiary of the first-mentioned company. The leading lights in both are Messrs Cuba and Ngoasheng. In this judgment, unless there is a reason to distinguish between their roles, I shall refer simply to 'Safika'.

[6] In June 1997 a letter agreement was signed between Safika Wireless, represented by Safika Investment Holdings, the second respondent, represented by the first respondent, and Citibank. It recorded that Safika Wireless sought to raise capital to finance the acquisition of all or part of the ordinary shares of MTN Holdings (Pty) Ltd currently owned by SBC Communications Corporation. Safika Wireless employed the other two parties and their affiliates as its 'exclusive and joint Financial Advisors and Placement Agents'. (Since Citibank soon fell out of the agreement and the obligations then

devolved solely on the respondents there is no need for further reference to the role of Citibank beyond this point.)

[7] In summary, the respondents undertook to perform the following services to Safika Wireless:

(a) to familiarize themselves, to the extent required to perform their duties under the agreement, with the business, operations, properties, condition (financial and otherwise) and prospects of Safika Wireless and MTN;

(b) to assist Safika Wireless in the valuation of MTN, the formulation of a negotiation strategy for the acquisition of the MTN shares and the actual negotiations with SBC;

(c) in co-ordination with Safika Wireless, to develop a computer-based financial model capable of incorporating alternative financial structures and operating and investment scenarios;

(d) to assist Safika Wireless in developing an optimum financial structure and, 'in close co-ordination with the company', formulate a strategy for achieving the financing within the required time;

(e) to prepare, with the assistance of Safika Wireless, an appropriate financing information memorandum;

(f) to advise and assist Safika Wireless in structuring and executing the financing, contacting potential investors or underwriters and making appropriate presentations;

(g) to make their best efforts to obtain commitments for the financing and to obtain the best terms and conditions on behalf of Safika Wireless.

[8] The agreement further provided that if Safika Wireless were to acquire the MTN shares from SBC during the term of the engagement, the respondents would be deemed to have completed their assignment successfully and to be entitled to full payment of the agreed compensation. If the financing was completed, the second respondent would be paid a structuring fee of 1½% of the total nominal face value of the financing and a placement fee of the same percentage but not less than US$ 2 250 000. The agreement was to terminate at the earlier of the closing of the financing or 12 calendar months from the date of the agreement but might be extended if agreed in writing by the parties. Finally, the agreement recorded that the respondents' team on the MTN engagement would be led by the appellant and would include Mr Clive Ferreira of the Johannesburg office and Mr Capitman of the New York office and such other middle and junior-level personnel as might be required.

[9] The second respondent duly seconded the appellant to South Africa for the purposes of carrying out the contract. He became the 'lead principal' in the undertaking, a role described in evidence by Capitman in the following terms:

'the Fieldstone person who will be responsible for communicating strategy to the client, be responsible for the ordering of resources within Fieldstone to get the work product in the client's hands, generally will lead all the client presentations and will get the lion's share of the revenue associated with a transaction'.

Generally, he said, the MTN project would be referred to within the second respondent

as 'Eric's deal' ('Eric' being the appellant). Although the appellant was employed on a fixed salary he would be entitled to additional reward if the project was successfully executed, the amount depending on the extent of the second respondent's profit.

[10] Work on the contract commenced. On 16 September 1997 the appellant attended a meeting of management and employees of the second respondent, including its 'Africa team' at Skytop, a venue some 100 miles from New York. During the course of the return journey to that city, the appellant, who was travelling in a vehicle with Capitman and others, announced that there might be an opportunity to acquire 10% of the shares in Safika (it is not clear that he had in mind a particular company). According to Capitman this provoked great excitement. He told the appellant to pursue the matter and let the second respondent know on what terms the shares were offered.

[11] During November 1997 the appellant, during a visit to New York, was asked by Capitman what was happening about the Safika shares, a question which gave rise to an incident so described by Capitman:

'He [appellant] came into my office and said, "They do not want to sell the shares to Fieldstone but they will sell them to me". I said "Eric, if they want to sell them to you and you are simply holding them in trust for us, that is fine, but otherwise you cannot buy them, they are ours', and he got very angry and said "What do you mean 'they are ours', I am being offered them because of the work I am doing." I said "The work you are doing we are paying for, we are paying your salary, we are paying your expenses, you cannot take up those shares. Furthermore it is a huge conflict of interest and he said "I don't see what the conflict is". I said "Say that there is some issue with the MTN deal about collecting our fee and you are a 10% holder of the company for your own account and the company is going to be a couple of million dollars poorer if it pays our fee, then you have a different interest about

our getting paid our fee than we do. That is what the conflict of interest is. Furthermore, under our rules you cannot buy the shares, you are appropriating an opportunity." And this argument went on for 15 or 20 minutes and finally it got too hot for me to, you know, I was just repeating myself. So I said "If you don't believe me, go and see Charlie Hill [second respondent's founder and managing partner]".'

Capitman also testified that the appellant said on this occasion that Safika was a black empowerment company which only wanted black shareholders.

[12] At about this time the appellant told Capitman that he had been asked by Safika to become a director. Capitman was prepared to agree provided that Safika furnished a letter informing the second respondent of the invitation. He stipulated that any remuneration so accruing had to be handed over to the second respondent although it was the policy to refund fees so received to the payee on a dollar for dollar basis. On 1 December 1997 Cuba faxed a letter to Hill in the following terms:

'This is to inform you that the board of directors of Safika Investment Holdings (Safika) has requested Mr Eric Phillips to join the board as a non-executive director.

As Safika has a business relationship with Fieldstone in South Africa which we would like to continue, the Safika board thought it would be proper to inform you of the request to Mr Phillips.'

[13] The appellant continued to work on the project. Nothing more was said about the Safika shares. In March 1998 he expressed unhappiness with his bonus allocation of $ 50000 and referred, in that context, to the 'lost' opportunity to acquire the shares.

[14] The appellant travelled extensively, worldwide, in fulfilling his duties to the second respondent (not solely in relation to the Safika contract). Late in 1998 he took to doing so without keeping the second respondent informed of his whereabouts. In

January 1999 he made no contact for an entire month. He re-appeared briefly, disappeared throughout February and, at the end of that month, resigned from the employ of the second respondent.

[15] The bid by Safika Wireless for an interest in MTN was successful. It obtained 10% of that company's shares. However the second respondent's labours on its behalf went unrewarded (save for payment of out-of-pocket expenses) because the appellant had failed to ensure that the engagement was extended beyond June 1998, although he ostensibly continued to work on the project for the respondents until at least January 1999.

[16] Sometime after the appellant's resignation the respondents gradually became aware of the truth of what had been happening behind the facade of the appellant's employment and thereafter. For present purposes the relevant facts are these:

(1) During August 1997 the directors of Safika Investment Holdings proposed to the appellant that he take up a 10% share of their company against a payment by him of an amount sufficient to cover working capital for six months and on condition that he take up full-time employment with the company as soon as he was able. He accepted the offer and paid R732 000,00 as a *quid pro quo*.

(2) On 26 September 1997 the appellant wrote to Safika proposing to bring a 'team' to work for it. Four of the five members of the team (including the appellant) were employees of the second respondent, three of them being black Americans and one a Botswana national.

(3) The shares were allocated to the appellant and registered in his name in October 1997.

(4) The appellant attended board meetings of Safika Investment Holdings by invitation from about August 1997 but his appointment as a director only became official in February 1998.

(5) About October 1999 the appellant fell out with Safika and ceased his association with the group.

(6) During April 2000 the appellant sold his shares in Safika Investment Holdings back to its other shareholders for R12 250 000,00.

[17] In August 2000 the present respondents issued summons in which they claimed from the appellant payment of the sum of R11 250 000,00, said to be the difference between what he had paid for the shares and the price received when selling them. In brief, they alleged that the appellant had acted as their agent in dealing with Safika, that he owed them duties of loyalty and good faith, and that he had breached those duties in acquiring the shares and failing to account to them.

[18] The appellant defended the action. While admitting that, in entering the employment of the second respondent, he impliedly or tacitly undertook a duty of loyalty to that company and that he undertook, in relation to his dealings with its clients, not to appropriate for himself opportunities which were presented to him in his capacity as its representative, he denied that he acted as an agent of the second respondent in relation to the Safika contract and was therefore obliged to account to it

for profits acquired by him while allegedly acting in that capacity.

[19] In relation to the offer of the Safika shares the appellant pleaded as follows:

'18.1.1 during or about September 1997 and after his appointment as a director of Safika the defendant, in his capacity as a director of Safika, became aware that Safika urgently required capital;

18.1.2 Safika was prepared to issue shares for the purposes of raising such capital to selected black empowerment individuals;

18.1.3 Safika offered the defendant as a board member thereof a 10% shareholding in Safika;

. . .

19.1 The defendant avers that the offer of shares by Safika was an offer:

19.1.1 made to the defendant in his capacity as a director of Safika;

19.1.2 that did not represent a corporate opportunity for the first plaintiff alternatively the second plaintiff;

19.1.3 not made to the first plaintiff alternatively the second plaintiff and was accordingly not capable of being accepted by them;

19.1.4 that was nevertheless conveyed to the first plaintiff alternatively the second plaintiff;

19.1.5 that was accepted by the defendant with full knowledge of the first plaintiff alternatively second plaintiff.'

The appellant averred that by reason of the allegations set out in paragraph 19 of the plea, he was under no obligation to account to the respondents in respect of the Safika share offer.

[20] An order was made in terms of rule 33(4) that the questions of the value of such benefit as the respondents would have derived but for the appellant's alleged breaches of duty and the indebtedness, if any, of the appellant to the respondents

should stand over.

[21] At the trial, Messrs Capitman, Hill, Ferreira (managing director of the first respondent) and Cuba testified for the plaintiff. The appellant's case was closed without leading evidence. The summary of the facts which I have provided earlier derives from the evidence of the first three of the said witnesses who were accepted by the trial Judge (Fevrier AJ) as truthful and reliable. Those findings were not attacked on appeal and are borne out by a perusal of the record. It follows that a number of the allegations pleaded by the defendant were either disproved or remained unsubstantiated. The testimony of Cuba was likewise accepted by the Court *a quo* as beyond serious criticism. I shall refer to his evidence where necessary in the context of dealing with specific submissions addressed by counsel.

[22] Fevrier AJ made the following findings which are relevant to this appeal:

(1) The proposals contained in the appellant's letter to Safika of 26 September 1997 constituted

'a breach of trust, faith, confidence and loyalty and are tantamount to an outright betrayal by defendant of Fieldstone. Defendant placed himself in a position where he personally was striving for goals essentially similar to those which he was obliged to pursue in the interests of both the American and South African companies.'

(2) No practical distinction could be drawn between the American and South African companies. Although the appellant was employed by the second respondent, the duties of a principal involved working for the benefit of the Fieldstone family of companies as directed. The appellant knew that deals were done through the medium

of the South African company in accordance with the policy of the American company and accepted the position of lead principal of two Fieldstone teams within the South African company. The duties and obligations the appellant owed to the American entity were (at least) impliedly owed to the South African company.

(3) It was the appellant's duty to secure the benefit of the investment in the Safika shares for the respondents, albeit that the shares were offered to the appellant only and would not have been offered to the respondents.

(4) By accepting the offer to acquire the shares in Safika without the respondents' knowledge and consent the appellant placed himself in a position where his personal interest conflicted with his duties to the respondents.

(5) The respondents' case was not, as contended on the appellant's behalf, simply a claim based on a breach of a contractual obligation but reliance was placed both in the pleadings and the evidence upon the existence of a fiduciary duty, a breach of that duty and a consequent right to a disgorgement of profits secretly earned.

(6) Whether the appellant was under a fiduciary duty to the respondents in relation to the offer and acquisition of shares depended upon the facts.

(7) An analysis of the relationship between the parties, the nature of the business of the respondents and the role demanded of the appellant in promoting and furthering that business established that he indeed stood in a fiduciary relationship to them and the duty to acquire the shares for the respondents and not for himself fell within that relationship.

(8) The appellant was liable to account to the respondents for the profits made by him.

[23] The learned Judge accordingly decided the issues before him in favour of the respondents and ordered the appellant to pay the costs including those of senior counsel.

[24] The appellant applied unsuccessfully to the trial Judge for leave to appeal, but such leave was granted on application to this Court.

[25] Before us the appellant's counsel confined their submissions to -

1. Whether the respondents' case as pleaded had been limited to a claim based on breach of contract and not on a breach of a fiduciary duty as found by the trial Court.
2. Whether a fiduciary duty attached to an *employee* in the position occupied by the appellant.
3. Whether or not the offer of shares to the appellant was an opportunity which
   (a) properly belonged to the respondents;
   (b) the respondents were able to and would have taken up.

The first issue: the plaintiffs' cause of action

[26] The particulars of claim was carefully structured. The elements are readily identifiable. They are, briefly-

(1) The conclusion of the agreement between the first appellant and Safika Investment Holdings (Pty) Ltd which identified the scope of the project

for which the first respondent was appointed. (para 5)

(2) The employment of the appellant by the second respondent, its terms and scope, the implied duties of loyalty, non-appropriation of corporate opportunities and accounting for profits acquired while acting as agent of his employer. (para 6)

(3) The assignment of the appellant by the second respondent to represent the first respondent in relation to the Safika contract, giving rise, tacitly, so it was pleaded, to equivalent duties towards the first respondent. (paras 7 and 8)

(4) From August 1997 until March 1999 the appellant acted in regard to the Safika contract as the representative and agent of the respondents. (para 9)

(5) Safika's offer to place shares in order to raise capital; the shareholding which accordingly became available to the appellant while acting in the aforesaid capacity; the opportunity belonged to the respondents and was one which they were able to take up; the obligation of the appellant to secure the opportunity for the benefit of the respondents. (paras 10 and 11)

(6) The breach of the obligation by the appellant in acquiring the offer for himself and in his refusal to account to the respondents. (para 12)

(7) The obligation to account. (para 14.1)

[27] Counsel for the appellant emphasized 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. Cf *Hodgkinson v Simms* [1994] 3 SCR 377 (SCC):

'. . . the existence of a contract does not necessarily preclude the existence of fiduciary duties between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations'.

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 (cf *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1130F). While agency is not a necessary element of the existence of a fiduciary relationship (*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD

168 at 180), 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.

[28] During the course of the trial the nature and extent of the relationship between the parties was canvassed at length. Counsel for the appellant were unable to identify any aspect which was not covered by cross-examination or which they might have dealt with differently if they had treated the case as one based on a breach of a fiduciary duty, bearing in mind that the separated issues did not extend to the measure of profits (or damages). In the circumstances I agree with counsel for the respondents that the pleadings, properly construed, embodied such a claim, no label being demanded of the pleader, and that the evidence thoroughly exposed the real issues between the parties. It is a matter for note in this regard that the appeal on the merits

is not directed to a failure to prove the existence of a fiduciary duty but only to what constitutes such a duty in relation to an employee such as the appellant.

The law relating to breach of fiduciary duty and its consequences

[29] Before I address the two parts of the second of the issues which I identified in para [25] it would be helpful to give some attention to the nature and scope of the remedy. The reason for doing so is that certain of the submissions of appellant's counsel seek to draw a distinction between the fiduciary consequences of the breach of duty as it attaches to directors of companies, trustees and agents on the one hand and employees on the other.

[30] The principles which govern the actions of a person who occupies a position of trust towards another were adopted in South Africa from the equitable remedy of English law. The Roman and Roman-Dutch law provided equivalent relief. In *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 at 19-20 and 34-5 the sources were considered and the conclusion was expressed that the extension and refinement of the Civil Law by English courts was a development of sound doctrine suited to 'modern conditions'. The fullest exposition in our law remains that of Innes CJ in *Robinson v Randfontein Estates Gold Mining Co Ltd*, *supra*, at 177-180. It is, no doubt, a tribute to its adequacy and a reflection of the importance of the principles which it sets out that it has stood unchallenged for 80 years and undergone so little refinement.

'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place

himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal afford examples of persons occupying such a position. As was pointed out in *The Aberdeen Railway Company v Blaikie Bros.* (1 Macqueen 474), the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilized system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent . . . Whether a fiduciary relationship is established will depend upon the circumstances of each case . . . But, so far as I am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases.'

The principles so stated remain true, not only for this country, but also in many Commonwealth (and United States) jurisdictions.

[31] The following short summary attempts to encapsulate the present level of development. The rule is a strict one which allows little room for exceptions (*Regal (Hastings) Ltd v Gulliver et al* [1967] 2 AC 134 at 154F-155E, [1942] 1 All ER 378 (HL) at 392G-393C; *Canadian Aero Service v O'Malley et al* [1974] 40 DLR (3d) 371 (SCC) at 382; *Peffers NO and Another v Attorneys Notaries and Conveyancers Fidelity Guarantee Fund Board of Control* 1965 (2) SA 53 (C) at 56D-57G). It extends not only to actual conflicts of interest but also to those which are a real

sensible possibility (*Aberdeen Railway Co v Blaikie Bros, supra*; *G E Smith, Ltd v Smith; Smith v Solnik* [1952] NZLR 470; *Boardman v Phipps* [1966] 3 All ER 721 (HL) at 737I, 743F-I, 748E-F, 756I; *Canadian Aero Service v O'Malley*, *supra* at 384, 385). The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice (*Robinson v Randfontein Estates GM Co Ltd, supra*, *loc cit*; *Regal (Hastings) v Gulliver*, *supra* at 392C, *Boardman v Phipps*, *supra* at 737D, 744H, 747D; *Warman International Ltd and Another v Dwyer and Others* [1994-5] 182 CLR 544 (HC of A) at 559). Because the fiduciary who acquires for himself is deemed to have acquired for the trust, (*Palmer*'s case *supra* at 20) once proof of a breach of a fiduciary duty is adduced it is of no relevance that (1) the trust has suffered no loss or damage (*Regal (Hastings) v Gulliver*, *supra* at 386B, 392F; *Re Reading's Petition of Right* [1949] 2 All ER 68 (CA) at 70E-F, 71A; *Soulos v Korkontzilas* [1997] 2 SCR 217 (SCC); (2) the trust could not itself have made use of the information, opportunity etc (*Regal (Hastings) v Gulliver*, *supra* at 378, *Reading v Attorney-General* [1951] 1 All ER 617 (HL) at 619H; *Boardman v Phipps*, *supra* at 746I; *Industrial Development Consultants v Cooley* [1972] 2 All ER 162 (Assizes) at 175f-j; *Warman International v Dwyer*, *supra* at 557-8; *Bhullar and Others v Bhullar and Another* [2003] EWCA Civ 424 at para 41) or probably would not have done so (*Furs Ltd. v Tomkies et al* [1936] 54 CLR 583 (HC of A) cited in *Canadian Aero Service v O'Malley supra* at 385; *Boardman v Phipps*, *supra* at 747A-D); (3) the trust, although it could have used the

information, opportunity etc has refused it or would do so (*Warman International v Dwyer*, *supra* at 558; *Industrial Development Consultants v Cooley at supra*); (4) there is not privity between the principal and the party with whom the agent or servant is employed to contract business and the money would not have gone into the principal's hands in the first instance (*Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 at 367); (5) it was no part of the fiduciary's duty to obtain the benefit for the trust: *Regal (Hastings) v Gulliver supra* at 378, 386B; *Jones v East Rand Extension Co Ltd* 1903 TH 325; or (6) the fiduciary acted honestly and reasonably: *Regal (Hastings) v Gulliver supra* at 386A, 392D; *Boardman v Phipps supra* at 744D, 745C-D; (although English and Australian courts make some allowance for equity in calculating the scope of the disgorgement in such cases). The duty may extend beyond the term of the employment. (See *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) at 820I and the cases there cited).

[31] The approach enunciated by Lord Upjohn in *Boardman v Phipps*, *supra* at 758 commends itself as a practical way of dealing with cases of this nature:

'1. The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal.

2. Once it is established that there is such a relationship, that relationship must be examined to see what duties are thereby imposed on the agent, to see what is the scope and ambit of the duties charged on him.

3. Having defined the scope of those duties one must see whether he has committed some

breach thereof by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.

4. Finally, having established accountability it only goes so far as to render the agent accountable for profits made within the scope and ambit of his duty.'

(See also *Industrial Development Consultants v Cooley*, *supra* at 173c-f.)

[32] The principles which I have summarised are consistent with the doctrine enunciated in *Robinson*'s case, *supra* and necessary for its effective operation and should be approved by this Court.

The second issue: whether the appellant, as an employee, was subject to a fiduciary duty

[33] Counsel for the appellant submitted that a distinction exists (or should exist) between the doctrine as applied to company directors and agents on the one hand and employees on the other. The appellant, they said, was a mere employee and should not be burdened with the strict and extensive application of the doctrine which I have described. Counsel referred to *SA Historical Mint (Pty) Ltd v Sutcliffe and Another* 1983 (2) SA 84 (C) at 90B-91B in this regard. English law apparently recognizes a lesser duty of disclosure in the case of employees, even of senior status: *Bell v Lever Bros Ltd* 1932 AC 161 (HL) in which a bare majority of the House held that an employee is under no duty to his employer to disclose his own acts of dishonesty toward that employer. (But cf *Sybron Corporation v Rochem Ltd* [1984] Ch 112 (CA) where, the Court having found, with obvious reluctance, that it was bound by

Bell v Lever Bros held nevertheless that the duty *did* extend to a disclosure of the dishonesty of other employees even if the source had to implicate himself in doing so). It may be that it was *Bell v Lever Bros* that Laskin CJ had in mind when he said, in *Canadian Aero Service v O'Malley supra* at 381:

'They [O'Malley and Zarzycki] were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what is said on this point by Gower, *Principles of Modern Company Law*, 3rd ed. (1969), at p. 518 as follows:

". . . these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorized to act on its behalf, and in particular to those acting in a managerial capacity."'

(The quoted passage is repeated in the 6th edition of the cited work (1997) at 600.)

The South African cases which recognize the duty of an employee to account for profits received in breach of a fiduciary duty (*Jones v East Rand Extension Co supra*, *Robinson v Randfontein Estates GM Co supra*, *Peacock v Marley* 1934 AD 1 and *Uni-Erections v Continental Engineering Co Ltd* 1981 (1) SA 240 (W) at 252H) do not lay down that such a duty can only arise in the relationship of managerial employees to their employers. What Nestadt J in the *Uni-Erections* case, at 254B, intended in saying

'It seems to me some circumspection is required in applying it [the "Palmer principle"] to the case of master and servant', is made clear by his comments which followed:

'Innes CJ in *Palmer*'s case referred to the difficulty in deciding whether the profits were made "in the course or by means of the agency" or whether the agreement complained of was "a subsidiary contract". It will not assist to canvass the facts of that case. Each matter has to be decided on its own particular facts. In my opinion the profits made have not been shown to be directly or indirectly connected with Rousseau junior's employment or earned by virtue of his position as an employee. Had his position been that of a salesman canvassing for work the position might have been different. His duties were merely those of an estimator whose task it was to calculate what defendant would charge its customers.'

The learned Judge was clearly intent to reiterate the need to determine from the facts of each case whether a duty exists which carries with it a duty of disclosure, emphasizing that the lowlier or more restricted in discretion the position held the less likely that the facts will support such a conclusion. (See also *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC and Others* 1988 (2) SA 54 (T) at 65F-G.) That dictum, it seems to me, provides no support for the submission that an employee is *per se* to be approached on a different basis from any other supposed fiduciary whose relationship with another is being examined. See *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 (PC) at 1129. As La Forest J said in *Hodgkinson v Simms*, *supra*, 'It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.' The learned Judge also referred with approval to the judgment of Wilson J in *Frame v Smith* [1987] 2 SCR 99 (SCC) at 136 which suggests that relationships in which a fiduciary obligation has been imposed are marked by three characteristics: (1) scope for the exercise of some discretion or

power; (2) that power or discretion can be used unilaterally so as to effect the beneficiary's legal or practical interests; and (3) a peculiar vulnerability to the exercise of that discretion or power. I agree that that analysis is helpful in the identification of such a relationship although not decisive. It can be applied in the employment context as easily as to relationships giving rise to more obvious duties of trust.

The third issue: a corporate opportunity which belonged to the respondents?

[34] The summary of the legal principles which I have set out goes some way, I think, to answering the second ground of appeal. The fundamental question is not whether the appellant appropriated an opportunity belonging to the respondents, but whether he stood in a fiduciary relationship to them when the opportunity became available to him; if he did, it 'belonged to the respondents'.

[35] The relevant facts are these. As lead principal in the Safika assignment the appellant directed its execution and the application of the respondents' resources of manpower and money required for that purpose. He acted with a considerable degree of independence, reporting to the respondents at his discretion. He was closely integrated with the client and its business. The expertise which he possessed in telecommunications was not shared by other employees or executives of the respondents and to that extent he was beyond their direction. The respondents were largely dependent upon the proper exercise of his judgment and good faith. (He could not conclude contracts on the second respondent's behalf but that was only

because he had not acquired the necessary certification under American law.) It was the responsibility of the appellant to ensure that whatever was required to justify the fees stipulated for in the Safika agreement was done. He was conversant with the financial affairs of Safika and must have known that the holding company was little more than a shell. Aware of the respondents' preference for reward by equity participation, he must also have known that the settlement of the respondents' account could not reasonably have been expected from the cash resources of Safika.

[36] With the background which I have sketched I have no difficulty in agreeing with the trial Court that the appellant was at all times, covering the initial approach to him by Safika, his own proposal of September 1997 and the acquisition of the shares, in a position of trust in relation to the business of the respondents which required him to place their interests above his own whenever a real possibility of conflict arose.

[37] The duties of the appellant which were inherent in his relationship with the respondents included the promotion of the respondents' interests and the disclosure to them of such information as came to his knowledge which might reasonably be thought to have a bearing on their business.

[38] That the appellant breached his duty is manifest. He failed to inform the respondents of the offer to him or its terms; he took it for himself without their consent. In both respects he succumbed to a potential conflict of interest between his duty and his self-interest.

[39] It is irrelevant, on the authorities which I have cited, that the opportunity

'properly belonged to the company' unless this means no more than that it was an opportunity which arose in the context of the appellant's fiduciary duty to the respondents and of which he was required to inform them.

[40] I have earlier referred to the authorities which say that whether the respondents were able to take up the offer or would have done so has no bearing on the issue. For the sake of stressing the overwhelming justice of the conclusion in the present case I should however make it clear that the evidence of Mr Cuba established that Safika would have had no objection to the appellant acquiring the shares as a nominee for the respondents. Messrs Hill and Capitman testified that such an arrangement might have been acceptable to the respondents. It is true that the offer required the appellant to become a full-time employee of Safika, but, as the evidence shows, that was not a matter of urgency and was only given effect to some 15 months after the acquisition of the shares. The likelihood is that Safika, the appellant and the respondents would have reached an accommodation.

[41] I conclude that Fevrier AJ was correct in deciding the reserved issues in favour of the respondents. The appeal is dismissed with costs.

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J A HEHER
JUDGE OF APPEAL

MPATI DP)Concur
FARLAM JA)
HEHER JA)
MOTATA AJA)

STREICHER JA:

[1] I agree with Heher JA that the appeal should be dismissed with costs.

[2] Before the commencement of the trial in the court *a quo* it ordered in terms of rule 33(4) that:

'1 The issues that arise from paragraphs 1 to 12 and paragraph 14.1 of the plaintiffs' particulars of claim (and the defendant's plea thereto) be decided separately from those arising from paragraphs 13 and 14.2 and that such former paragraphs be determined at the hearing of this trial.

2 Paragraphs 13 and 14.2 and prayers (a) and (b) of plaintiff's particulars of claim stand over for determination.'

Paragraphs 13 and 14.2 dealt with the quantum of the appellant's claim.

[3] The respondents alleged in their particulars of claim, *inter alia*:

6 On or about 12 April 1997 the second plaintiff and the defendant entered into a written employment agreement.

. . .

6.3.3 the defendant impliedly, alternatively tacitly, undertook a duty of loyalty to the second plaintiff.

. . .

10.1 During and pursuant to the defendant's assignment to the Safika contract as aforesaid, and in or about September 1997, the defendant became aware that Safika required an urgent raising of capital, and that it was prepared to place shares for the purposes of raising such capital.

10.2 In or about September 1997 Safika offered a ten percent shareholding in Safika in exchange for such capital.

11 The offer of shares pleaded in paragraph 10.2:

11.1 represented a material financial benefit to the offeree;

11.2 became available to the defendant in his capacity as agent and representative of the first plaintiff, alternatively of the second plaintiff;

11.3 was an opportunity which properly belonged to the first plaintiff, alternatively to the second plaintiff;

11.4 was an opportunity which the first plaintiff, alternatively the second plaintiff, was able to take up;

11.5 was one which the defendant was obliged to have secured for the benefit of the first plaintiff, alternatively of the second plaintiff.

12 In breach of his obligations to the first plaintiff, alternatively to the second plaintiff, unlawfully and intentionally;

12.1 and on a date unknown to the plaintiffs the defendant acquired the offer of Safika shares for himself, and failed to acquire such shares for the first plaintiff, alternatively for the second plaintiff;

12.2 the defendant has failed and/or refused to account to the first plaintiff or the second plaintiff in respect of the benefit derived by him as a consequence of the aforegoing.

. . .

14 In the premises the defendant:

14.1 is obliged to account to the first plaintiff, alternatively to the second plaintiff, in respect of the shares taken up by him;

14.2 . . .'

[4] The issue which the court *a quo* had to decide was, therefore, whether the appellant was obliged to account to the first respondent alternatively the second respondent in respect of the Safika shares taken up by him.

[5] The court *a quo* found that no practical distinction could be drawn between the two respondents and that whatever duties and obligations the appellant might have owed to the second respondent (the American company) he at least impliedly owed to the first respondent (the South African company). This finding was, correctly so, not attacked on appeal. I will therefore refer to the respondents as one entity. The court *a quo* found, furthermore, in favour of the respondents, that the appellant was, by virtue of a fiduciary duty owed by him to the respondents, obliged to account to the respondents. The appeal is against this decision.

[6] The appellant was an employee of the respondents and represented them in their dealings with Safika. In these circumstances he owed the respondents a fiduciary duty in his dealings with Safika. This duty entailed, *inter alia*, that he was obliged not to work against the respondents' interests; not to place himself in a position where his interests conflicted with those of the respondents; and not to acquire, in the course or by means of his agency, an interest or benefit without the consent of the respondents. (See *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 at 20-21 and 33-34; *Jones v East Rand Extension Gold Mining Co Ltd* 1903 TH 325 at 335; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177; *Premier Medical & Industrial Equipment (Pty)Ltd v Winkler and Another* 1971 (3) SA 866 (W) at 867H-877A; and *Uni-Erections v Continental Engineering Co Ltd* 1981 (1) SA 240 (W) at 252D-253F.)

[7] In the present case an opportunity arose to acquire shares in Safika. Counsel for the appellant submitted that the opportunity was not available to

the respondents. However, I agree with Heher JA that the contention is not borne out by the evidence. It was an opportunity which arose within the course of the appellant's dealings with Safika in his capacity as agent of the respondents and it was of a kind which the respondents frequently acquired in the course of their business dealings with clients such as Safika. Capitman testified:

'The cream in our business is the equity participations because just as we make money for our clients out of their opportunities, the biggest gains sometimes come from the equity but it often takes years to collect, to harvest that investment.'

[8] In the event the equity investment proved to be particularly profitable. When Capitman learnt of the opportunity he told the appellant to go for it. That is exactly what the appellant did but not in order to secure it for the respondents but to secure it for himself.

[9] The appellant, by negotiating the acquisition of the shares for himself, worked against the respondents' interests, placed himself in a position where his interests conflicted with that of the respondents and secured a benefit for

himself at the expense of the respondents.

[10] In *Transvaal Cold Storage Co Ltd v Palmer, supra* at 20 Innes CJ said:

'I should here like to quote two passages – one from the *Encyclopaedia of the Law of England* (vol. 10, p.355): "Whenever an agent in the course or by means of the agency acquires any profit or benefit without the consent of the principal, such profit or benefit is deemed to be received for the principal's use, and the amount must be accounted for and paid over to the principal." The other from *Story's Equity Jurisprudence* (sec. 329 (a)): "Where one sustains any such fiduciary obligation to another, that such other is fairly entitled to his advice and services, either for the joint benefit of the two, or the exclusive benefit of himself; and the party sustaining such relation, in violation of his obligations and duty, enters into any subsidiary contract, with a view to his own advantage, all profits thus resulting belong to the party for whose benefit he ought to have acted." These passages seem to me to contain an accurate statement of the law applicable to the present dispute.'

These statements still contain an accurate statement of the law. (See also the judgment of Mason J at 33 and *Jones v East Rand Extension Gold Mining Co Ltd, supra*).

[11] In the circumstances the appellant is deemed to have acquired the shares on behalf of the respondents and is obliged to account to the respondents in respect thereof.

[12] Counsel for the appellant also submitted that the respondents claimed an account in respect of the shares taken up by the appellant on the basis of a contractual undertaking to account and not on the basis that the appellant was obliged to account by virtue of a fiduciary duty. They submitted in particular that the respondents did not allege in their particulars of claim that the appellant owed them a fiduciary duty. In my view there is no merit in this submission. The respondents alleged that, in terms of the appellant's employment contract, he impliedly alternatively tacitly undertook a duty of loyalty to the second respondent. I do not think that a duty of loyalty was intended or understood to mean anything other than a fiduciary duty.

[13] The particulars of claim, therefore, covered a claim based upon a breach by the appellant of a fiduciary duty arising from his employment contract with the respondents.

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STREICHER JA