



THE REPUBLIC OF SOUTH AFRICA
**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 9293/2013

Before the Hon. Mr Justice Bozalek
Hearing: 26 – 28 February 2018; 1, 6 – 8, 13, 14 March 2018;
16 – 20, 23, 24 April 2018; 4, 6 and 7 June 2018
Delivered: 30 July 2018

In the matter between:

SIME DARBY HUDSON & KNIGHT (PTY) LTD

Plaintiff

and

JUAN PIERRE LERENA

Defendant

JUDGMENT

BOZALEK J

[1] The plaintiff, a manufacturer and seller of a range of fat and oil products, sued the defendant, a former employee, for damages in the amount of R9 407 651.05 together with interests and costs as well as an order directing the defendant to disgorge secret profits made by him at the expense of the plaintiff in the amount of some R33 million.

[2] The defendant disputes the claims in their entirety and defended the action. He was legally represented only during the pleadings stage and defended himself throughout the trial in which the evidence of the parties was heard over 19 days.

Background

[3] The plaintiff's claim covers the period from May 2005 when the defendant was first employed by it as its Key Accounts Manager, responsible for the sales of Crispa Sunflower Oil and Palm Oil products on its behalf, until his dismissal in May 2012. In this position the defendant was responsible for the management of the plaintiff's commercial relationship with its many customers in relation to the marketing and sale of Crispa Gold Sunflower Oil products ('Crispa Gold' or 'Crispa'). Flowing from his appointment the defendant's responsibilities included procuring sales of Crispa for its benefit and following up sales opportunities.

[4] In a nutshell, the plaintiff's case was that the defendant breached these obligations by diverting sales opportunities to two companies that he owned or controlled, Fast Track Marketing CC ('Fast Track') and FDC Distributors CC ('FDC'), and in so doing abusing his position with the plaintiff to procure a reduction in price for Crispa Gold which he then sold to the plaintiff's customers via his companies for his own personal benefit. The consequences, the plaintiff's case proceeds, is that the plaintiff sold substantial quantities of Crispa Gold to two particular customers, Seafood Botswana and Saania, at prices that were too low. Secondly, the defendant made a substantial personal profit out of sales to the plaintiff's customers or prospective customers without the plaintiff's knowledge or consent. Based on these facts the plaintiff pursues its damages claim against the defendant as well as its claim for disgorgement of secret profits.

The evidence

[5] Before summarising the evidence it is appropriate to consider in greater detail the pleaded basis of the plaintiff's damages claim and its claim for secret profits. The plaintiff's claim for damages is calculated on the basis of what it referred to as 'the

Makro benchmark' being the price at which it sold Crispa Gold to Makro, one of its main customers, from time to time. Its case was that this price represented the base plate price being the most competitive price at which the plaintiff could achieve its required margin. Further, its business objectives were best served if Crispa Gold was sold to other customers at or above the Makro price. Such other customers should only be offered a price better than the Makro price if this were justified by reason of special circumstances and only on limited occasions. Notwithstanding the existence of the Makro price benchmark, during his period of employment the defendant allowed two customers, Saania Distributors ('Saania') and Seafood Wholesale Botswana ('Seafood Botswana') to buy Crispa Gold at prices markedly and consistently lower than the Makro price. This the defendant did in order to further his secret profit-making activities. The plaintiff's case for damages was further that if the defendant had complied with his obligations and used the Makro benchmark in relation to these two customers, the plaintiff would have sold the same quantities of Crispa Gold but at a higher price.

[6] In calculating its damages claim it compared the price received from Saania and Seafood Botswana over the relevant period with the price received from Makro over the same period. The difference between these two prices represented the damages that it alleged it suffered.

[7] In terms of its claim for the plaintiff to disgorge secret profits (the '*secret profits*' claim), the plaintiff seeks disgorgement of R33 291 599.24, representing the full amount of the secret profit or benefit received by the defendant through his two companies; alternatively the immediate disgorgement of R6 733 042.27 and then disgorgement of such further profits as may be found owing after a statement and debatement of account. It alleges that between January 2007 and April 2012 the defendant secretly set up and

operated a scheme with the object of making a profit for himself out of the sale of Crispa Gold. The plaintiff's case is further that the defendant did so by utilising Fast Track, of which he was the sole member, and by establishing FDC which he controlled and of which he was the beneficial owner. It is alleged that the defendant dishonestly advised certain customers that they were not entitled, alternatively, were not well advised, to order Crispa Gold directly from the plaintiff and should rather place orders either through Fast Track or FDC, or that it would be in their best interests to do so. It was further alleged that the defendant secured a reduction in the price received by the plaintiff in respect of orders placed either directly via FDC or Fast Track or by Fast Track through Saania Distributors.

[8] It was common cause that throughout his employment (at least prior to his suspension) the defendant did not disclose his interest in Fast Track or FDC. The plaintiff's allegation is that he used both corporations to order and on-sell Crispa Gold from another of the plaintiff's customers, Saania, in the process procuring, through various means, that the price per drum of Crispa Gold sold by the plaintiff to Saania was substantially reduced by various means. One such method was that Saania were allowed to order excessive quantities of stock at old prices before price increases and to pay for and take delivery of that stock at times when all other customers were required to pay for stock at the higher price. The plaintiff alleges further that the defendant approved so-called '*guaranteed margins*' and '*low margin*' claims to certain customers for the purposes of benefitting his own private interests. In paragraph 9.9 of the particulars of claim it was alleged that the defendant '*earned a secret profit for himself in the form of distributions out of FDC and Fast Track, which amounts were available as profits because they constituted the difference between the price received by FDC and Fast*

Track for the plaintiff's products from customers and the amount paid, directly or via Saania, to the plaintiff in respect of those products'.

[9] The defendant filed a brief plea admitting the terms of his letter of appointment and that he was the sole member of Fast Track. Apart from that he denied the remaining contents of plaintiff's particulars of claim.

The issues

[10] The following issues arise in relation to the plaintiff's claim for damages:

- (a) whether the plaintiff in fact used the Makro benchmark as a '*base plate price*';
- (b) whether the defendant caused the plaintiff to sell Crispa Gold to Saania and Seafood Botswana at a lower price than the Makro price and by how much;
- (c) whether, if proved, that was a breach of his employment contract;
- (d) whether, but for the defendant's breach of contract, the same quantities of oil would have been sold at no less than the Makro price.

[11] In relation to the secret profits claim the following issues arise:

- (a) whether the defendant stood in a position of confidence in relation to the plaintiff and owed it a fiduciary obligation inter alia not to place himself in a position where his personal interests might conflict with his duty and the interests of the plaintiff and which entailed that he was not entitled to make a secret profit out of the plaintiff's corporate opportunities;
- (b) whether his activities through Fast Track and FDC in relation to the sale of Crispa Gold breached any such fiduciary duties, this in turn requiring a determination of whether he so sold the product without the plaintiff's knowledge or whether he made a secret profit therefrom and whether such sales were corporate opportunities belonging to the plaintiff;
- (c) the extent of any secret profit made.

The plaintiff's evidence

[12] The plaintiff called seven witnesses whilst the defendant testified on his own behalf and called one witness.

Mr Chris Schulz

[13] Plaintiff's main witness was Mr Chris Schulz, a well-qualified forensic investigator specialising in financial analysis with a fraud perspective. In 2012/2013 he was briefed by the plaintiff's instructing attorneys to conduct a financial analysis of the sales of Crispa Gold by the plaintiff to two wholesalers, Saania and Seafood Botswana, and to do a price comparison with Makro. Shortly before trial he was also given sets of bank statements relating to Fast Track and FDC to analyse in relation to the secret profits claim.

[14] In regard to the damages claim, Mr Schulz's task was to determine an average nett price and, if there was a significant difference between the nett price of sales to these two customers, compare it to the average nett price to Makro over the same period. In so doing he had to take account of the various rebates and discounts obtained by these customers off the value of the invoices presented to them. He recorded a summary of his findings on page 1.1 in the '*Damages Bundle*' and which he divided into two periods – January 2007 – February 2011 and March 2011 up to the termination of the defendant's employment with the plaintiff. He found that total difference between what these two customers paid for the Crispa Gold which they purchased versus the prevailing Makro price was the sum of R9 935 990.01. His method in arriving at these figures was to obtain all the invoices showing the number of units sold to these customers and the value after which he isolated all the rebates, advertising discounts etc. and deducted these from the total invoice value. He would then divide that figure by the number of units sold and get a claim per unit price for Seafood Botswana, Saania and Makro. He then subtracted the

difference and multiplied out by the units sold in the case of Saania and Seafood Botswana to find what the plaintiff would have received had they sold the product in question to the two customers at no lower than the Makro price. As will be seen from the supporting documents Mr Schulz's calculations appear to have been meticulously done. The defendant did not materially dispute these figures, the thrust of his defence being that there was no such thing as a Makro base plate price and that he had sold Crispa to these customers at bona fide prices.

[15] The other main area of Mr Schulz's evidence was an analysis of Fast Track and FDC's bank statements, which were only obtained by subpoena from the bank by the plaintiff shortly before trial, in conjunction with the plaintiff's financial statements in an effort to determine what income and expenditure was received by these two corporations from the sale of Crispa Gold. The difficulties that the witness experienced in this particular exercise were manifold. In the first place no other financial documentation relating to the affairs of these two corporations was available to him; secondly, the bank statements themselves were in many respects lacking in description and particularity making it difficult to determine the source of many of the deposits and, lastly, the recipients of many payments could not be identified since they are not described in the bank statements and nor were the cheques stubs or the cheques available. To complicate matters further, as will be described more fully later, the defendant either could not or would not furnish the vast bulk of the missing information regarding the financial affairs of Fast Track and FDC. Yet another complicating factor was that the defendant had, throughout the period in question, used Fast Track as a vehicle to conduct other business, namely, property restorations and sales, property rental, sales of motor vehicles, and sales and trading in forex. What is more, he had by his own account used the Fast Track

account interchangeably with his personal account, receiving funds into it in his personal capacity and making payments in respect of personal expenses.

[16] Be that as it may, Mr Schulz was able to determine that during the period in question income from sales of Crispa Gold in a total amount of R36 669 308.46 had flowed into Fast Track and FDC's bank accounts. The bulk of this, R33 255 172.32 was deposited into Fast Track's account.

[17] Mr Schulz was also able to determine the monies expended by the defendant in generating the disputed sales of Crispa Gold. These expenses, as they appeared in the bank statements of both companies, amounted to R3 377 709.22, the bulk thereof, R2 746 802.25 being in FDC's books. The great unknown, however, was payments by way of cheques from the two corporations to unknown parties in a total amount of R26 558 556.97. The bulk of this amount, R25 762 852.70, comprised payments from Fast Track. The defendant cross-examined Mr Schulz at length but was not able to dent the figures that he presented. A striking feature of the defendant's cross-examination was his disinclination to furnish any information relating to the financial statements whilst at the same time repeatedly and inappropriately asking the witness to give him more information about these payments. The reply he invariably received from Mr Schulz was *'I don't know Mr Lerena, only you will know'*, but to no avail.

[18] Mr Schulz was an excellent witness who had clearly made a careful evaluation of all the financial documentation which he had studied. At no stage did he make any unwarranted claims or assumptions and he readily made concessions where these were justified. On occasions he recalculated figures to take into account factors which were favourable to the defendant. I have no hesitation in accepting his evidence.

Mr Gareth Thomas

[19] Mr Thomas was the plaintiff's National Sales Manager from 2010 until he left its employ in 2014. The plaintiff is a Malaysian company whose business in South Africa is the manufacture and sale of oils and fats. This it does, inter alia, through a refinery in Boksburg which it purchased from Unilever and through which it makes cooking oil from sunflower and palm oil which it purchases either locally or from overseas sources. Crispa Gold is one of the brand names in the plaintiff's food division and under which name it sold cooking oil made from sunflower and palm oil in 20 litre buckets. The defendant reported directly to the witness and the plaintiff's general manager, and his responsibilities were to ensure the sale and profitability of Crispa Gold. This, Mr Thomas, testified was a very strong brand going back some 35 years. Sales representatives from the Eastern Cape, Western Cape, Kwa-Zulu Natal and Gauteng all reported to the defendant.

[20] The witness testified that the price of crude oil could fluctuate on a daily basis and so pricing for Crispa Gold is managed by the Financial Manager and pricing parameters are set between certain dates. He explained the various discounts, rebates and allowances which could be granted to a customer to reduce the invoice price and explained that there were different pricing structures for different Crispa Gold customers. These pricing parameters were set by the Financial Manager and the defendant, the latter being the person who concluded agreements with various customers on price and on the various allowances, discounts and rebates. In this area the defendant had a great deal of discretion and was trusted to run things within the price parameters established by the financial manager and in the best interests of the plaintiff.

[21] Mr Thomas explained that what was referred to at times as the '*Makro Rule*' was an unwritten rule in place even before he joined the plaintiff, and was probably still in place, to the effect that no customer should get a better price than Makro. This was because Makro was one of the plaintiff's most substantial customers and was treated with kid gloves. As a result the nett price paid by Makro was seen as a benchmark price. Unless there was a special deal or promotion or some other special reason, no smaller customer should get a better price than the nett price Makro was required to pay for Crispa Gold.

[22] The witness was shown certain email correspondence from a customer in January 2012 which led to an investigation into the defendant trading in Crispa Gold through Fast Track and FDC. A suspension meeting was held with the defendant on 12 April 2012, the minutes of which were put before the Court and pursuant to which the defendant was suspended from his position pending a full scale disciplinary enquiry. During the meeting the defendant presented a picture of himself being minimally involved in FDC's business activities. A disciplinary enquiry was held at a later stage where the defendant pleaded not guilty to two charges but guilty to a third charge of giving considerable free product i.e. Crispa Gold, to certain of Fast Track's customers. Mr Thomas led the case for the plaintiff at the disciplinary enquiry. It was chaired by an independent chair who ultimately recommended the defendant's dismissal. The witness identified email documentation which had come to light showing the defendant directing and advising customers and potential customers to purchase Crispa Gold through Fast Track or FDC rather than through the plaintiff. In cross-examination, the defendant drew the witness' attention to documentation emanating from the plaintiff indicating customers who were enjoying a lower price of Crispa Gold than Makro. Mr Thomas pointed out, however, that

the important price is the remittance price i.e. that actually paid by the customer after rebates and discounts. Even on this basis the documentation suggested that at times several customers were paying less than Makro by way of remittance price. In this regard Mr Thomas testified that there was no computerised system that enforced the Makro rule by disallowing lower remittance prices to other customers. The defendant put it to the witness that there was no Makro rule, written or unwritten, but could obtain no concession or admission in this regard.

[23] Mr Thomas was an open and honest witness, also prepared to make concessions where appropriate and he appeared to have no axe to grind with the defendant.

Ms Gemma Wright-Ingle

[24] The witness was 19 or 20 years of age in 2010 when she was interviewed by the defendant for a job as an office administrator after responding to an advertisement in an Edenvale newspaper. She testified that she was successful in the interview and began work at a small office in Edenvale attached to a hairdressing salon. Her responsibilities were to take calls, do some data capturing relating to debtors and creditors and to prepare invoices for sales acting on instructions from the defendant. No one else involved in the business gave her any instructions other than the defendant. The only other employee was a driver known only to her as Samuel. The invoices and sales related only to cooking oil, Crispa Gold, and she would simply pass invoices on to ‘*Samuel*’ to make deliveries of Crispa Gold. In the beginning the defendant came to the premises every day and thereafter only once or twice a week. Her understanding was that she was working for the defendant and his company and that Fast Track Marketing and FDC were one and the same company. She worked for the defendant for less than a year. Ms Wright-Ingle testified that her employment commenced sometime in October 2010 and she only ever

worked for the defendant during her employment and that she parted on good terms with him. She never took an instruction in any shape or form from Samuel the driver who did not appear to be in any position of authority. The witness confirmed that she received incoming calls from certain companies placing orders for oil and that she and the defendant also communicated via cellphone.

[25] Ms Wright-Ingle had a reasonably good recollection of her employment eight years previously although at times she was a little vague in relation to the detail thereof. Her evidence was not dented in cross-examination and I accept it without reservation.

Ms Kate Ramocheke

[26] From 2009 to December 2013, Ms Ramocheke worked for the plaintiff as a call centre agent. Her job was to take orders from customers which she received by way of email or over the phone or from the defendant or sales representatives reporting to him as Key Accounts Manager. The orders were for all of the plaintiff's products but included Crispa Gold. She would capture the information on the computer, namely, price, quantity and delivery date. The price would be obtained from the defendant or from the call centre operator supervisor, Charmaine Burger. The computer system had a price for every customer for Crispa Gold. It was possible to enter a lower price on the system but then only with the approval of Burger or of the defendant after some paperwork was done. This happened often.

[27] The witness recalled that the defendant placed orders for FDC and Saania. Saania would take three truckloads at a time. Generally these orders would be for a lower than listed price and would be accompanied by a deal sheet and order form, the latter containing the higher price but the deal sheet, signed off by the defendant, containing a

lower price. The witness also arranged deliveries using a range of private transporters and all delivery costs were for the account of the plaintiff. The minimum delivery the plaintiff would do in Johannesburg would be three pallets but in other centres the minimum was only one pallet. Ms Ramocheke was shown email correspondence from a certain Connie from Ace Distributors which indicated that the customer had been very confused as to whether she was dealing with the plaintiff or with FDC. When Ms Ramocheke spoke to her supervisor, Charmaine, about this she was told that she must do whatever the defendant told her should be done. She understood FDC to be the plaintiff's customer and had not understood why other customers were buying from FDC if the plaintiff was supplying Crispa Gold. She had not known who was running FDC. The witness was also shown emails indicating Saania treating Crispa Gold as being transferred to and from Saania. She could give no logical explanation for this because Saania never called to say that they were sitting with excess stock of Crispa Gold.

[28] Ms Ramocheke was a good witness whose evidence was not damaged in cross-examination.

Ms Penelope De Freitas

[29] Ms De Freitas testified that she had been the plaintiff's HR Operations Manager from 2004 to date. She had known the defendant since his pre-employment interview in 2005. The witness was involved in both the defendant's pre-suspension hearing and his disciplinary enquiry. She took the notes relating to the former and confirmed that it was 100% accurate. The proceedings of the disciplinary enquiry were audio-taped and subsequently transcribed.

[30] One of the statements made by the defendant in the disciplinary enquiry were that there was no evidence that he would put forward to prove the company wrong as regards their case against him relating to Fast Track. Another statement he made was that Fast Track bought stock from the plaintiff's customers who already had the stock and sold that stock onto other people and that he *'would have made some money from that'*.

[31] The charge to which the defendant pleaded guilty was that he acted in conflict with the interests of the plaintiff in setting up Fast Track when he offered the plaintiff's customers significant quantities of free product through Fast Track which had the effect of significantly reducing the selling price of the company's product and thus financial losses being sustained by plaintiff.

[32] The witness confirmed that the plaintiff had at all material times a code of business conduct. All employees received a booklet incorporating that code in December 2011. Paragraph 6.1 of the Code of Conduct which deals with avoiding conflicts of interests provides that such a conflict arises:

'When you have a personal interest that could be seen to have the potential to interfere with your objectivity and performing duties or exercising judgment on behalf of the Group. You should avoid conflicts of interest.'

[33] Paragraph 6.2 covers dealings with suppliers, customers, agents and competitors and provides that any employee must not have *'any financial interest in a supplier, customer, agent or competitor of the Group'*.

[34] In cross-examination, Ms De Freitas testified that the defendant called her after his dismissal and told her that if the plaintiff litigated against him it would *'open the flood gates'*. In an attempt to show malice on the part of the plaintiff in the litigation, the defendant himself drew to the witness' attention that after his dismissal he had sent a

complaint to the South African Bureau of Standards regarding the plaintiff's ethics and referred a complaint against it to the Competition Commission. The witness confirmed that as a result of the complaint the plaintiff had paid a fine of some R30 million and had to invest an even more substantial sum into a BEE packaging facility. Ms De Freitas testified nonetheless that these complaints had not influenced the plaintiff's decision to proceed with the present litigation against the defendant.

[35] Ms De Freitas was a good and credible witness whose evidence was not shaken in any way. I accept her evidence without qualification.

Mr Thabo Mosomane

[36] The witness was the manager of the small business services department at the Edenvale branch of Nedbank Limited. He was shown documentation relating to the authorised signatories on the FDC account which had been opened on or about 30 June 2002. The first two signatories were the defendant and one S Kgatla. He testified that the defendant was thus able to operate the account fully from its date of opening. In addition, internet banking access to the account was immediately created and became available for use by the defendant. The witness met the defendant a month or two before the trial when he came into the branch wanting to reactivate the internet banking facility on the account. This could not be permitted because only a registered director or member could do so. The account was still open and functioning, the registered officer being Mr Kgatla. Previously the account had been closed on 6 November 2015 with a negative balance. When the defendant made this request the internet banking facility had apparently been blocked since 27 December 2017. The witness' evidence was not contentious and was not challenged.

Mr Laurie Milne

[37] Mr Milne worked for Unilever between 1970 and his retirement in 2002. The plaintiff formed part of Unilever until 2004 when it was bought out by an entity known as Golden Hope. There was then an international merger and the plaintiff as it is presently constituted came into existence. In 2004, the witness (Milne) was appointed by the plaintiff as National Sales and Marketing Manager with a brief to get the disintegrating business back on its feet. It was only 14 months later that Crispa Gold became a Golden Hope product after purchasing the brand from Unilever. Crispa Gold was used in the catering market and Golden Hope had to change its distribution and marketing strategy to deal with the new product. To that end it employed a number of sales reps and sales managers. In due course the defendant was placed in charge of this enterprise. Before this occurred the witness had to develop a new distribution strategy involving fast food clients, cash and carry clients (such as the Makro Group) and catering distributors. After the defendant's appointment, Mr Milne introduced him to the Crispa Gold side of the plaintiff's business. They worked together for a while but the defendant proved very competent and in due course was running the Crispa Gold product section single-handedly. By 2012 the witness had been replaced by Mr Gareth Thomas and was only working two to three days per week. During that year whilst on leave he was asked by Mr Thomas to return immediately because the defendant was about to be suspended and he was needed to take on the Crispa Gold business again. As a result he effectively stepped into the defendant's shoes. The idea was that he would first see as many of the Crispa Gold customers as possible. Almost immediately upon his return he was presented with documentation to approve substantial credit notes for Seafood Botswana which he refused to do after baulking at the size and number of the credits. He then pulled the

figures received for Seafood Botswana and noticed large discrepancies in their monthly purchases. When he contacted the customer he was told that the defendant had told them to make their purchases through FDC. The witness could see no justification for the defendant having done this since Seafood Botswana was a very important client and there was no reason why it should not be kept within the plaintiff's accounting structure. He went to see Seafood Botswana's management on several occasions and eventually the customer '*came back on board*' and sales of Crispa Gold to them went back to their original levels. He also contacted I&J Oil Traders, another customer, but they were not interested in making any purchases of Crispa Gold because they had got a '*better deal*' from the defendant. Mr Milne also contacted Saania and spoke to a certain Yunus, who initially did not want to do any business with the plaintiff or to talk about prices at all. The witness left him with a '*deal sheet*' and he eventually ordered some stock about two weeks later. Mr Milne retired about two years after stepping back into the defendant's shoes but over this period Saania's purchases declined dramatically compared to the levels at which it had purchased during the defendant's time.

[38] The witness was shown documentation relating to various Crispa Gold transactions between the plaintiff and customers during the defendant's employment. He expressed astonishment at an instance where Saania was credited with 633 free drums of Crispa Gold. He testified that although the plaintiff would quite often give 5 or 10 free drums of oil to a customer as part of a promotion or allowance, 633 free drums of oil was an extraordinarily large quantity having a value of approximately R140 000. Another practice of the plaintiff was to give credits for allowances to customers in respect of store openings. Upon being shown an invoice from FDC claiming R60 000 in respect of six store openings which had been approved by the defendant, the witness commented that it

looked '*a bit dodgy*'. He was also shown invoices relating to dealings between Saania and Global Trading the effect of which would be to transfer a debit from Global Trading to the plaintiff, to Saania. He commented that there would have to have been documentation to support this transaction and that it made no sense unless there was a physical delivery to Saania.

[39] Mr Milne testified that Crispa Gold was a key value item in the plaintiff's product range and enjoyed a price premium in the market of approximately 15%, which the plaintiff sought to maintain. The product had a 20 to 30 year history of quality, consistency and reliability. His evidence relating to the plaintiff's customer, Makro, was of particular importance. Makro was far and away the plaintiff's largest cash and carry customer and it gave Crispa Gold great benefit in the form of promotional activities. It had the most outlets and was keen to develop its catering business. Makro was sometimes in the plaintiff's top 5 customers overall and often in their top 10 for purchases of Crispa Gold. Every customer would '*squeeze*' the plaintiff for a good price but Makro was transparent in its pricing and advertised widely which was very beneficial to the plaintiff as it would carry a picture of Crispa Gold in their broadsheet and display ads. The price at which Crispa Gold was sold to Makro was significant because the plaintiff used it as a '*base plate*' and cascaded from that price down to other customers. Overall the price of Crispa Gold was watched by all in the market like hawks because it carried a 10 – 15% premium over competitors. If, for example, the price of a drum of Crispa Gold to Makro was R240 and if the plaintiff sold to Seafood Botswana at below that price they would receive a call from Makro to come and see them '*in ten minutes*'. Although the plaintiff had to please as many customers as possible it had to pay particular attention to big customers. If competitors started selling their product competing with Crispa Gold at well

below the Makro base plate price, then the plaintiff's price could be reduced. However, big deviations in plaintiff's price affected its integrity.

[40] The witness' evidence regarding price increases in Crispa Gold was also significant. Generally the plaintiff gave customers six weeks warning of a price increase since they needed time to prepare themselves and to make orders ahead of the price increase. Prior to the announcement of any price increase the plaintiff would calculate how much stock they could allow customers to order at the old price and deal this out equally. Orders at the old price had to be delivered within four weeks of the new price coming in. It was highly unlikely that customers would not take up their allocations at the old price.

[41] In cross-examination, Mr Milne stated that he did not regard Crispa Gold as a '*commodity*' to be traded as the defendant claimed to see it. He also disagreed with the defendant in other respects, stating that there was no reason why the plaintiff would give away its 15% margin or price premium on Crispa Gold which was viewed as the '*Rolls Royce*' of cooking oils. When the defendant put to him that there were no quotas or allocations of Crispa Gold stock to clients at old prices before price increase introductions, Mr Milne strongly disagreed. Shown once again the invoice for R60 000 from FDC for six store openings the witness stated that what were referred to were not new store openings and the allowance in each case was excessive.

[42] The defendant raised with the witness that portion of the plaintiff's particulars of claim referring to the Makro rule and averring that Crispa Gold would generally not be sold to other customers at less than the Makro price. The witness' response was that the use of the word '*rule*' was too strong and he would rather regard it as a base plate price.

Exceptions to the Makro base plate price i.e. those who got a better price, would be kept to a minimum and only in exceptional circumstances. Asked by the Court to put figures to this the witness stated that if 10% of the Crispa Gold that was not sold to Makro was being sold at below the Makro price he would be asking questions but at 5% he would be comfortable. The witness agreed that during the time that their employment had overlapped, the defendant had met his volumes and profits and his key performance indicators and had been rewarded with regular salary increases. The defendant had had a volume target for Crispa Gold but Mr Milne could not recall if nett proceeds of sale was part of the defendant's key performance indicators. He emphasised that if the defendant had reached his target this did not mean he could relax as all staff were obliged to sell as much and as profitably as possible.

[43] The witness conceded that the Makro base plate price regime was not contained in anyone's contract of employment but according to him it was well understood by all involved. He repeated his evidence that the reasons why the plaintiff used the Makro Crispa Gold price as a base plate was Makro's pricing transparency with the result that everyone in the trade would know at what price Makro was selling the product. The other factor was that Makro had a nationwide presence. For these reasons the Makro price was an ideal indicator of a minimum or competitive price for Crispa Gold.

[44] Mr Milne was a very good witness whose evidence was credible in all aspects. Where appropriate he made concessions readily and he appeared to be fair-minded in relation to the issues in dispute. He was clearly very experienced and completely conversant with the requirements of the defendant's job and in particular with all aspects of the sale and marketing of Crispa Gold.

The defendant's case**Mr Teboqo Mofolo**

[45] Mr Mofolo was a former employee of the plaintiff, who worked for it for ten years until 2015 as a Regional Account representative in the Gauteng area, handling a number of products including Crispa Gold. For much of his employment he reported to the defendant and his duties were to call on existing and potential customers to discuss pricing, resolve any problems, arrange deliveries and make sure the product was on their shelves and visible. Testifying about Crispa Gold he confirmed various discounts and bulk allowances available to customers. The witness confirmed that the plaintiff's cash and carry customers, including Makro, were transparent in their pricing but testified that he had never heard of the concept of the Makro price being a base plate price. Led by the defendant he was shown documentation identifying a number of customers apparently enjoying a better price than Makro. His explanation was these customers bought bigger truckloads whereas Makro's orders were placed by stores individually and thus were for smaller amounts. Mr Mofolo confirmed that when sales representatives such as himself wanted to agree a price outside of the established parameters for a particular customer, the ultimate arbiter of prices was the defendant. He appeared to testify that after the defendant was dismissed Laurie Milne had implemented a Makro price strategy because Makro had developed their warehousing and were thus ordering significant quantities and distributing them to their stores. Led by the defendant he testified that 14% of Crispa Gold production was sold to the cash and carry sector and that Makro took 8% of total production of Crispa Gold i.e. more than 50% of the stock sold to cash and carry customers. Mr Mofolo testified that customers were given approximately a month's notice of price increase so that they could prepare themselves by placing orders to

stockpile. In these circumstances customers would often double their normal orders. According to him there were no specific allocations to customers at such times and customers would strive to get as much as possible as long as the plaintiff had stock. However, he conceded that if there was not enough stock for the orders coming in that stock would be shared out between customers. He seemed to testify moreover that under Laurie Milne's management between 2012 and 2014 allocations of old stock, which could be ordered by customers ahead of a price increase, were made.

[46] Under cross-examination much of the witness' evidence was cut back, as I will describe more fully at a later stage. He agreed that pricing for Makro was agreed at a national level as it was for other large cash and carries. Asked about FDC he stated, after a long pause, that he knew FDC as a small distributor on the plaintiff's buying list but did not negotiate or deal with them. Regarding free stock Mr Mofolo confirmed that small amounts were given as an incentive but that he had never heard of as much as 150 free drums being given – at most, 64 drums i.e. one pallet. Giving free stock in the amount of 677 free drums would amount to a producer giving its stock away. He knew of Fast Track but to this day does not know who the persons were behind it. The position was the same regarding FDC. Shown emails regarding a transaction between Saania and Global Trading involving 432 drums of Crispa Gold, he testified that it would only make sense if Global had stocks of Crispa Gold, the other customer did not have and wanted such stock and there was a physical transfer of the stock.

Mr Juan Pierre Lerena

[47] The defendant started working in 1992 as a sales rep for his father's company. After five years and some part time study in the fields of sales and marketing he began working for a series of manufacturers in sales or marketing positions. In approximately

2004 he joined the plaintiff's predecessor. In July 2005 the plaintiff became the owner of the Crispa Gold brand. Initially he worked very closely with Laurie Milne, visiting every customer and concluding trading term agreements with them. After a while Mr Milne stepped back to concentrate on the bulk business and Crispa Gold became the defendant's sole responsibility. He testified that the plaintiff's price policy remained the same throughout all his years of employment and that there was no such thing as the Makro rule. He tried not to give Makro the best price nationally in order to leave some room for negotiation downwards. Every month a document was generated within the plaintiff's system setting out the prevailing prices to customers. This document was available to all in management.

[48] Fast Track was registered by himself and his father in 1992 but he (the defendant) eventually acquired all the shareholding. Its accountant was a Mr Herman. When the defendant took sole control of Fast Track he used it to engage in the property business and the sale and purchase of motor vehicles. Attempting to explain the lack of any financial statements for Fast Track, the defendant testified that Mr Herman passed away in 2008/2009 at a stage when he was far behind in drawing up Fast Track's accounts. The defendant did not hear from the accountant for a long time and when he went to physically look for him found that Mr Herman had '*disappeared*' with all the financial documentation relating to Fast Track. In 2009 he was introduced to someone from a bookkeeping company and explained to her his problems of having no financial statements for Fast Track or FDC. Between them they reconstructed some financial statements which were not very accurate but met the CIPRO requirements for all the years that Mr Herman had missed. I pause to observe that the defendant did not even discover these roughly approximated financial statements. In fact he discovered no

financial statements for either company, at all. Fast Track had purchased vehicles and scooters which were rented out and it had an average of 3 – 4 permanent employees as well as agents and partners.

[49] Dealing with Crispa Gold the defendant sought to explain his unusual dealings in the product vis-à-vis Global Trading and Saania. He testified that pricing of Crispa Gold was volatile with some years when the price was either too high or too low. A consequence was that some customers would stockpile ahead of price increases, a prime example being Saania. The apparently suspicious transaction involving Global Trading and Saania was when Global asked to sell back or return existing stock which it could not sell because it was too expensive. This the witness eventually arranged by allocating stock to Global which had been ordered by Saania at the old (lesser) price but which had not been delivered to it. This was accomplished through debit and credit notes i.e. without any physical transfer of Crispa Gold and through the defendant satisfying Saania's representative, one Yunus, that the defendant, acting through Fast Track, would guarantee that Saania would receive payment. I pause to observe that this convoluted explanation of the transaction makes no commercial sense at all.

[50] The defendant testified that Saania may have made a '*back end*' profit out of the transaction but that overall Fast Track made no profit out of its dealings in Crispa Gold and in fact incurred a loss. According to the defendant, the plaintiff did not make a loss in regard to this transaction. Again I interpolate to observe that the defendant's explanation of how more expensively priced stock with a customer was replaced with cheaper stock emanating from a customer without any physical delivery taking place, these customers being in Johannesburg and Port Elizabeth respectively, with Fast Track guaranteeing the price and being responsible for payment, but with no party making any profit was simply

illogical and not credible. The example of this transaction has particular importance in that it would appear that similar transactions accounted for the extremely substantial sums of money being deposited into Fast Track and FDC's accounts arising out of sales of Crispa Gold.

[51] Fast Track's registered office and physical presence was in Edenvale, where Ms Wright-Ingle worked. The defendant explained how FDC came into being which began with him meeting Mr Kgatla in 2008/2009. The latter was an owner/driver distributing car parts and the defendant assisted him by developing his business to distribute Crispa Gold and collect used cooking oil at the same time. Mr Kgatla had been buying Crispa Gold from Makro and other cash and carry businesses and was initially no more than an informal trader selling to customers along a route. According to the defendant he noted potential in Mr Kgatla and started to mentor him. He suggested that Mr Kgatla should formalise the business and proceeded to do this on the latter's behalf by incorporating Fast Track, setting up its bank account and arranging for Ms Wright-Ingle to be employed to do the administrative work. The defendant had also noticed that large catering customers for Crispa Gold such as Bidvest were charging their own customers '*too much*' for Crispa Gold and such customers were not able to buy the product elsewhere because of their agreements with Bidvest. The defendant saw an opportunity to form a buying group i.e. FDC through which smaller Crispa Gold customers could purchase the product and get a better price which could be collectively bargained. The plan had two objectives, namely to get the customers to implement an oil collection system and to obtain a better price from the plaintiff for Crispa Gold. In some way, never clearly explained by the defendant, the implementation of such a scheme would enable the plaintiff to better manage pricing of Crispa Gold both through its existing systems

and through FDC. In this way plaintiff would not *'have to do anything'* and he, the defendant, would manage both the input price and output price for Crispa Gold. He arranged for Mr Kgatla to open an account directly with the plaintiff, as FDC and they both had joint signing powers on its account. FDC operated for about 18 months before the disciplinary enquiry which led to his dismissal.

[52] In cross-examination, it was put to the defendant that the plaintiff's case was that, save for that evidence of the defendant which was admitted or corroborated by other evidence, his evidence was false and he must view the cross-examination in that light. The defendant stated that he did not know where Mr Kgatla was presently. He testified that he had negotiated the trading term agreements between FDC and the plaintiff with himself. This of course means that he was negotiating with himself. He admitted that he had used the Makro price as a market price indicator in his evidence in chief but stated (illogically) that he could have just as easily have used another cash and carry customer. The defendant testified that he only became MD of FDC after he left the plaintiff's employment but it was put to him that he fabricated this evidence when he saw his predicament, namely that he was MD of FDC while still employed by the plaintiff. He was shown the Nedbank account documentation and appeared to admit that he and Mr Kgatla had gone to the bank together at the inception of the account and that the critical letter to the bank regarding signing powers had been drafted by himself. When documents apparently drafted by him relating to FDC were shown to him the defendant initially ascribed them to other employees. When pressed on this he conceded that he had told them exactly what to write in the document. When portions of the disciplinary enquiry transcript were put to him containing admissions against his interest the defendant stated that he had told Ms De Freitas that the minutes were not accurate. He

accepted that in certain important instances the minutes were at odds with his present testimony. It was further put to him that he had not advised the suspension enquiry of a number of critical aspects of his relationship with FDC. The witness' response was that he had not lied to the suspension enquiry – he had simply not given a comprehensive answer.

[53] This was a revealing insight into the defendant's thinking, namely, that when he gave an explanation to his employer which omitted material aspects this was not a lie but simply an omission. It was put to him that his behaviour pattern was to give information but not all information, precisely in order to mislead. When it was put to the witness that he had not revealed the existence of Fast Track and FDC to his employer because of the impossible conflicts of interest which they created for him, his answer was that there had been no conflict of interest because the operation of these companies was beneficial to the plaintiff.

[54] Significantly, the defendant agreed that when payments were made to Fast Track from various customers of the plaintiff he accepted that these were orders which the plaintiff would ordinarily accept from such customers and that it would want such business. The defendant stated that he would seldom get involved with a potential customer, except Saania. He conceded that within the plaintiff his nickname was '*Mr Crispa*' and that he had enjoyed a free hand to achieve corporate objectives. He also had an almost unlimited discretion to do what was in the best interests of the plaintiff. He maintained that although no one had to approve the deals which he struck with customers, everyone had access to them because it was a transparent system. He conceded, however, that the plaintiff's management had not followed the details of his transactions.

[55] The defendant insisted that Fast Track was never in a conflict of interest situation but he conceded that in retrospect he should never have used Fast Track to invoice customers for Crispa Gold. Upon being shown an email where he offered two options to a customer to buy either through the plaintiff or at a cheaper price through Fast Track, he conceded that any customer would take the cheaper option.

[56] The defendant testified that he never made a profit out of any Fast Track deal; the only reason Fast Track got involved was to guarantee payment to Saania by Global or another customer. Shown admissions in the disciplinary enquiry that he made money out of Fast Track he says that his present evidence to the contrary is not a lie because after the disciplinary enquiry when he went back and examined his books (undiscovered by him) he realised that Fast Track had made huge losses. He was shown a series of Saania invoices and conceded that these are only a fraction of the business that was conducted between Saania and Fast Track.

[57] In an effort to explain his almost complete lack of documentation relating to Fast Track and FDC's business he says that he fell upon hard times after his dismissal and lived in his car for a month so the preservation of documents was not a high priority. When he testified that the private companies which he utilised were never intended to make a profit it was put to him that the plaintiff only has his word for that. He was shown emails from an employee of his, one Brian, concerning sales of Crispa Gold and it was put to him that they were written as if the stock belonged to Fast Track or FDC. It was put to the defendant that Fast Track was trading in Crispa Gold and was doing so by getting Saania to order and hold stock on its behalf. It was put further that in truth he had been buying stock of the product from the plaintiff cheaply through Saania for himself and Fast Track. The defendant was constrained at one point to state although this looked

to be the case, it was not so. When it was put to him that Mr Schulz's investigations and calculations showed that Saania got more favourable terms than Makro to the tune of R9 million, he conceded that it '*certainly looks like that*'.

[58] The defendant was taken to the bank statements relating to Fast Track and FDC and it was put to him that he had barely engaged with their contents notwithstanding his lengthy evidence in chief. It was further put that he did not do so because the more he dealt with them the worse the picture became for him. It was also put to the witness that he made at least R4 million out of the monies deposited into Fast Track and FDC for Crispa Gold purchases by way of private expenses, drawings and the like; further that, once he was dismissed from the plaintiff, the deposits into these two bank accounts rapidly diminished and petered out by November 2015. It was put to the defendant that in other words without access to the plaintiff's stock and his ability to manipulate prices, the huge volumes of transactions through these two bank accounts diminished to nothing. The defendant's explanation was that the plaintiff would not deal with FDC after his dismissal and it reverted to being a cash business. It was further put to him that a large portion of the R37 million that flowed into the two accounts over the relevant period were payments for Crispa Gold purchases.

[59] Regarding pricing the defendant testified that his two main goals whilst with the plaintiff were to not sell Crispa Gold at a loss and to establish consistency in pricing in the market. It was put to him that when one customer, Saania, had a huge amount of old stock that created problems for consistency of pricing in the market. The defendant did not accept this. He was shown further emails which he wrote during his employment with the plaintiff citing Makro as a base price. Notwithstanding this the defendant would not concede that there existed anything like the Makro rule or base plate price.

[60] The defendant was also taxed with various threats that he made against the plaintiff after his dismissal. All these were written between October and December 2012 and he described them as a ‘*lash out*’ following his threat to Ms de Freitas that if the plaintiff did not stop ‘*badmouthing him*’ he would report them to various authorities. One document is particularly interesting. It reflects the plaintiff’s trading arrangements with a range of customers and providing confidential details of maximum rebates, settlement discounts and distribution allowances as at December 2012. The top half of the document is clearly part of a document purloined from the plaintiff. To it had been added the following text:

‘If you believe that your business opportunities have been undermined by Sime Darby Hudson and Knight’s market pricing and customer trading arrangements and that Sime Darby Hudson and Knight have not afforded you an equal opportunity to participate and compete fairly in the market, it is your time to take action in the following ways:

- 1. Boycott Sime Darby Hudson and Knight products;*
- 2. Lodge a complaint with the Competition Commission of South Africa’.*

[61] There follows a smaller table by the anonymous author of the above message which sets out the pricing for Massmart, Bidvest and independent distributors for six pallets of Crispa Gold after rebates and allowances i.e. the nett price. Significantly the Massmart/Walmart Group price (also known as the Makro price) is the lowest price at R327.84. The document clearly indicates that as at December 2012 the Makro price was the lowest price by some margin and that what the anonymous author was urging was a boycott campaign or the lodging of a complaint against the plaintiff because it was offering differential nett prices to customers, the lowest being to the Massmart/Walmart (the Makro Group). The defendant denied that he was the author of the document. He conceded that he had been accused of being the author of this letter in a letter from the

plaintiff's legal representatives and that he had not bothered to reply thereto. The defendant was shown correspondence from the plaintiff's attorneys indicating that the first letter of demand that he received in relation to the present litigation was 30 November 2012 and that on 13 December 2012 he received the letter of complaint from the plaintiff's attorneys regarding the anonymous document.

[62] The defendant testified that he met monthly with Saania's representative, Yunus, to set that account in order. Its claims for deductions off the invoice price would be presented to him and if he considered them justified, he would sign them off there and then. The defendant was shown various claims which he signed off in this regard, many of which were for appreciable sums: a R63 000 credit, another claim for R145 000 for an advertising subsidy and many other generous discounts. Another telling instance put to the defendant was one where Fast Track invoiced Seafood Botswana for Crispa Gold in the amount of R250 000 which was collected by it from Saania but at the same time Saania was given credit for 667 free drums of oil. The nett result was that Fast Track received R250 000 from Seafood Botswana but apparently had to pay only R40 000 to Saania for the stock which it delivered to, or had been collected by, Seafood Botswana. This would mean, if correct, that Fast Track (to all intents and purposes, the defendant) would have made a clear profit of some R200 000 on this transaction alone. It was again put to the defendant that he used Seafood Botswana and Saania to create profit opportunities for Fast Track and that Saania's orders for large amounts of stock at low prices were in fact disguised orders from Fast Track. It was further put to him that all this was kept secret by him not least by concealing from the plaintiff his ownership or relationship with Fast Track and FDC.

[63] When the defendant was asked why he concealed his involvement with Fast Track and FDC from his employer, his only (and improbable) response was that he could not say what he was thinking back then. He was asked why he did not call Mr Kgatla as a witness and he responded that he had fallen out with him. When it was put to him that he had advised many of the plaintiff's customers to buy through Fast Track he denied this even when the customers were named. It was further put to him that he used his position at the plaintiff to reduce the price payable by Saania and Seafood Botswana through subsidies and allowances which only he could approve, using them as tools for his, and not for the plaintiff's, benefit. His response was that this was counsel's opinion. The defendant testified that using the Makro price as a base plate would not be a fair basis to evaluate any damages suffered by the plaintiff but was unable to suggest any fairer basis. It was pointed out to him that of all the witnesses he was the only one who stated that there was no Makro price.

[64] At the conclusion of the defendant's evidence it was pointed out to him that he had failed to deal with the bank statements relating to Fast Track and FDC. He was given a further opportunity by the Court to do so by drawing up a document with written remarks or explanations relating to those bank entries in the two accounts which were devoid of any meaningful descriptions and therefore difficult to characterise or analyse. He would have to confirm that account under oath.

[65] When the defendant resumed his evidence on 4 June 2018, having been afforded this second bite at the cherry, he handed up a schedule where selected transactions in the bank statements were dealt with together with a summary page. However, the main thrust of his document was to allocate some of the expenses analysed by Mr Schulz and attributed to Crispa Gold and reallocate them to non-Crispa Gold business transactions.

He testified further that he put R1.5 million back into the company which led him to the conclusion that Fast Track and/or FDC owed him R180 000 after the correct allocation of his private expenses. Plaintiff's counsel went through the new documentation and isolated those which had nothing to do with generating the income passing through the account in relation to Crispa Gold sales. In the result, very few expenses could be identified by the defendant as relating to Crispa Gold. The defendant's evidence was characterised by considerable vagueness and a lack of particularity. It was put to him that the plaintiff was not a general partner of his in the property and vehicle business which he apparently conducted through Fast Track. The defendant was not able to shed any further light on the unknown '*payments*' to the tune of some R26 million recorded in the books of Fast Track and FDC.

[66] The defendant is clearly an intelligent and articulate person as evidenced by the fact that he was able to present his case without legal representation, notwithstanding the complexity of some of the evidence and issues. He has an easy and engaging manner and it is not difficult to see why, at least up until 2012, he had such a successful career in sales and marketing. The defendant testified at length in a plausible and assured manner. However, notwithstanding these attributes and the apparent plausibility of some of his evidence, the defendant proved to be anything but a credible or reliable witness. Much of his evidence was notable for its vagueness when he was pressed for any meaningful detail and was unsupported by any objective evidence, whether documentary or *viva voce*, in circumstances where common sense suggested that such corroborating evidence would be available. For example, the defendant conducted extensive business operations through Fast Track and FDC over a four or five year period yet produced no documentation recording any details of these transactions. This was also not in keeping

with the generally well organised manner in which the defendant appeared to conduct his affairs and how he conducted his case in the trial. Virtually every document placed before the Court relating to these dealings and the defendant's sale of huge quantities of Crispa Gold oil through these companies was produced by the plaintiff. The defendant's explanations were always vague, sometimes contradictory and seldom credible. There were important witnesses who the defendant could have called to substantiate his version of disputed events, such as his ex-wife, his former business partner, Mr S Kgatla, or various professional people who had done work for the defendant. None of these witnesses were called and the explanations given were generally vague and unsatisfactory. Ultimately an acceptance of the defendant's version of events on disputed points relies on accepting his word. That would be a hazardous step since the defendant had no difficulty in giving evidence which could not conceivably be true. For example, he testified that there was no conflict of interest in him using his private companies to sell Crispa Gold. He also testified that he made no profit at all in these activities when it was shown that in just one transaction he appeared to have derived a benefit of R200 000. His statement that he made no profit through his private sales was also directly contradicted by his evidence in the disciplinary enquiry. When confronted with his own contradictory testimony the defendant showed a great facility for producing a glib or evasive answer. So, for example, he disputed the accuracy of the minutes at the suspension enquiry but without providing any detail thereof. In short I find that the defendant was quite prepared to give false evidence and did so in many respects. In general he was not a credible or reliable witness. Only where his evidence is corroborated by other evidence or aligns with the evidence which the plaintiff presented can it be treated with anything approaching confidence.

The claim for damages

[67] The plaintiff's claim for damages was based on the defendant's alleged breach of contract in selling Crispa Gold to selected customers at prices lower than the prevailing Makro price, in so doing breaching his contract of employment and causing harm or loss to the plaintiff. The plaintiff pleaded the following implied or tacit terms in that contract:

'4.3.1 to procure sales of Crispa Gold Sunflower Oil for the benefit of the plaintiff;

...

4.3.4 to negotiate and agree prices with customers within the limits of his authority;

4.3.5 to grant customers rebates within the limits of his authority and according to the standard business practice of the plaintiff.'

[68] It was further pleaded that:

'4.4 the defendant represented the plaintiff as its agent in its dealings with customers, and stood in the position of confidence in relation to the plaintiff. As a result he was under a fiduciary obligation to the plaintiff which entailed that:

4.4.1 the defendant was obliged to promote and protect the plaintiff's best interest and not to work against the plaintiff's interest.'

[69] In paragraphs 5 and 6 of its particulars of claim, the plaintiff pleaded the existence of the Makro pricing benchmark, representing the most competitive price at which the plaintiff could achieve its required margin and below which price other cash and carry or distributor customers should, generally, not be charged unless this was justified by special circumstances. It further pleaded that the defendant was obliged in terms of his contract to employ the Makro benchmark *'which meant that generally he was obliged to ensure that the price at which he sold to other customers should be equal to or higher than the price at which products were sold to Makro ...'*

[70] All of these allegations were denied by the defendant or must be taken to have been so denied. One must turn to the evidence to establish whether these allegations have been proven. The content of the defendant's responsibilities as pleaded above is self-evident and became common cause. The bulk of the evidence regarding the disputed aspects referred to above comes from the defendant's two managers during his employment, Mr Laurie Milne and Mr Gareth Thomas.

[71] A much disputed aspect was the existence or otherwise of the Makro benchmark. As set out earlier Mr Thomas confirmed the existence of the Makro benchmark which he described as an '*unwritten rule*'. Mr Milne testified of the importance of Makro to the plaintiff as its largest cash and carry customer and the transparency of Makro's pricing of Crispa Gold. He confirmed that the plaintiff used the Makro price as a base plate price to cascade down from for other customers. He testified of the very limited circumstances in which, based on the plaintiff's practices, he would expect a customer to enjoy a better price than that Makro base plate price.

[72] In cross-examination Mr Milne was shown the original formulation in the particulars of claim which referred to the so-called '*Makro rule*'. His fair concession was to state that describing the practice as a rule was too strong but he confirmed that this was the practice. The only other evidence regarding the Makro rule was that of the defendant himself. He strongly disputed the existence of the Makro rule or base plate price. In general his evidence was that there was virtually no pricing policy, only an infinite series of '*deals*' which he concluded with customers as and when he saw fit, allegedly in the best interests of the plaintiff. This was aptly described by plaintiff's counsel as the '*chaos theory*' of pricing. But the defendant had to admit that in various instances he had (inadvertently) used or referred to the Makro price as a market price indicator, a matter I

will return to. He also relied on the fact that on a regular basis prevailing pricing arrangements which he arrived at with customers were committed to paper and circulated to management figures, including Messrs Milne and Thomas.

[73] The defendant's witness, Mr Tebogo Mofolo, initially testified that there was no such thing as the Makro rule or benchmark price and that it did not always pay the lowest price for Crispa Gold. He stated that the price which Makro received differed from store to store, although he appeared to testify that after the defendant left the plaintiff's employment, Mr Milne did implement the Makro price strategy. In cross-examination, however, Mr Mofolo's evidence on these aspects did not stand up to scrutiny. He conceded that Makro's pricing was agreed at a national level and that he would not know what bulk or settlement discounts and the like Makro would receive and therefore he would not know what Makro's nett price was. When his estimate of Makro's nett price at a certain time was contrasted with Mr Schulz's evidence of its average nett price he quickly backed off his evidence in this regard.

[74] As previously mentioned the defendant denied the existence of any Makro rule or base plate price. I understood his evidence to be that nothing was fixed in his system of pricing. Notwithstanding this evidence it was pointed out to him that there were instances where he himself had used the Makro price as a base plate or benchmark, a prime example being the anonymous circular urging customers to boycott the plaintiff or complain if they were paying more than the Makro (Massmart) price. It was also put to him that if he had breached his obligations to the plaintiff by selling Crispa Gold at less than the minimum or benchmark price, the best way to calculate that would be to use the Makro price. The defendant was unable to suggest a fairer basis, which in itself is telling.

[75] Moreover, the defendant himself put the following proposition to Mr Thomas: *‘Do you think Makro would be a good customer to choose sort of what the general market pricing is out in the market?’* Elsewhere he testified: *‘I was the person using Makro as a peg in the ground; the Makro price is deemed to be sort of the market price at that day’*. The defendant was unable to offer any sensible explanation why, if the Makro price for Crispa Gold on its shelves represented the market price at the retail level, then the price at which the plaintiff sold to Makro should not represent the market price from a wholesale point of view. Given his acceptance that the Makro shelf price was a good indicator of the market price and that the goals of price setting were to achieve the necessary profit and price consistency, the defendant was not really able to counter the commercial logic of the Makro benchmark practice. Other reasons that Mr Milne gave for Makro being the plaintiff’s most favoured customer in the cash and carry and distributor sector of the market was because it had offered the plaintiff much in terms of promotional activities. It advertised widely and gave good exposure to the Crispa product. Its orders were consistent and it was easy to see what price it was selling at, as anyone could see its shelf price. Thus Messrs Milne and Thomas gave consistent evidence about the Makro benchmark, namely, that it was not a strict rule but rather a guideline indicating that in the absence of special circumstances no other customer should get a more favourable price for Crispa Gold than the prevailing nett Makro price.

[76] Having regard to the probabilities, the plaintiff’s evidence as to the Makro base plate price must be preferred. The evidence of Messrs Milne and Thomas, neither of whom are currently employed by the plaintiff, largely coincided on this aspect although it was by no means a carbon copy of the other’s evidence. They have no apparent interest in falsely confirming a practice which could lead to a successful damages claim against the

defendant. The defendant's evidence that the Makro benchmark practice never existed is not surprising since it is a *sine qua non* for the plaintiff's damages action. What is more, as I have found, the defendant was not a truthful witness and his mere say so that no Makro benchmark price was ever utilised carries very limited weight. In fact his own evidence, as well as certain propositions he put to witnesses, suggest that the Makro price was a benchmark. Lastly in this regard, the anonymous circular is perhaps the best proof that Makro generally, if not invariably, got the best price for Crispa Gold. On the probabilities the defendant was the author of the circular. The timing and content implicates him and issuing such a circular to the plaintiff's customers was in keeping with other vindictive steps the defendant took against the plaintiff after his dismissal. Just as importantly, the pricing practice confirmed by the evidence of Messrs Milne and Thomas makes commercial sense insofar as it would contribute to ensuring that the plaintiff achieved its profit margins and ensured price stability in the market as opposed to the defendant's '*chaos theory*' of pricing. Having regard to these factors, as well as the defendant's own frequent and, no doubt, inadvertent references to the Makro price as indicative of the product's market value, both in correspondence and in evidence, I consider that the plaintiff's evidence on this aspect must prevail.

[77] The next issue to be addressed in respect of the damages claim is whether the defendant breached his contract by failing to adhere to the Makro benchmark pricing policy, by selling Crispa Gold to Saania and Seafood Botswana at a price lower than the Makro price as alleged by the plaintiff, and if so by how much. This was the subject of the initial mandate given to Mr Schulz in his forensic investigation. He gave effect to this by examining the plaintiff's books of account in detail in respect of all the sales invoices for Seafood Botswana, Saania and Makro. He also extracted all the documents he could

find pertaining to rebates or discounts, promotion and advertising and added all of these amounts together. Using these figures he calculated an average price per drum of Crispa Gold sold to these three customers, to arrive at a unit price per drum and was able to compare the unit price per drum of the same product sold to Seafood Botswana, Saania and Makro for each year. He then took the total number of units sold to Saania and Seafood Botswana and multiplied those by the difference between the Makro price and the prices actually paid by Seafood Botswana and Saania. That exercise produced the figure of R9 935 990.01, being the amount the plaintiff would have received if sales of Crispa Gold to Seafood Botswana and Saania had taken place, as they should have, at no less than the Makro price.

[78] Mr Schulz conducted an exhaustive investigation using, wherever possible, source documentation. He was at pains to tilt any assumptions in the accounting exercise in favour of the defendant. The latter did not raise any meaningful challenge to Mr Schulz's evidence, being content to maintain throughout that he was quite entitled to sell to any customer at a price lower than the Makro price. In this regard his evidence implied that Saania somehow displayed a commercial acumen which their competitors lacked by always purchasing large amounts of stock at the old price and therefore always paid lower prices than other customers.

[79] Having regard to this body of evidence, I find that the plaintiff has established to my satisfaction that Crispa Gold was sold to Saania and Seafood Botswana at a price below the Makro price over the relevant period to the tune of R9 935 990.01.

[80] The next issue is whether the defendant caused this price difference. Here the evidence is clear. The defendant was the National Key Accounts manager for Crispa

Gold and all sales representatives reported to him. He had complete authority to run the day to day business in Crispa Gold albeit subject to pricing parameters set by the financial manager. Mr Thomas testified as follows regarding the defendant's role: *'Mr Lerena basically had the leeway and the day to day running of who should be what based on his relationships, volume etc'*. No other managers signed off or approved the deals which the defendant concluded with customers. Unfortunately, it would seem that nobody checked whether he kept within the parameters laid down by the financial manager. The reason for this was probably that the defendant was completely trusted to run his portfolio in the best interest of the company. Ms Ramocheke gave evidence that where any deal rebate or discount was approved by the defendant i.e. bore his signature, then effect was unquestioningly given to that. The evidence was further that no one other than the defendant set and agreed prices with customers. There was no countervailing evidence from the defendant that the prices at which Crispa Gold was sold to Saania and Seafood Botswana were set by anyone other than him. In the result, it could only have been the defendant who caused these two customers to buy product at prices lower than the Makro price.

[81] A further issue is whether, in selling at a price below the Makro benchmark, the defendant breached his employment contract. The defendant was clearly under a general obligation to do his best for his employer and to conduct the plaintiff's business in good faith and for its benefit. The defendant's conduct in selling Crispa Gold to the two customers at less than the Makro benchmark was more than a simple failure to comply with a workplace procedure or practice. In the larger context of this matter, the reduced prices to Seafood Botswana and Saania could only have been designed to advance the defendant's personal interests, more particularly, his profit-making ventures conducted

through Fast Track and FDC. Seen in this light, the defendant was in breach of his fundamental obligation of loyalty and good faith which he owed to the plaintiff as his employer. The defendant was unable to put any credible evidence before the Court of a valid business reason to consistently and extensively under-price the Crispa Gold which he sold to Saania and Seafood Botswana. In these circumstances, I consider that the defendant was in breach of his employment of contract in so doing.

Seafood Botswana

[82] Although it seems clear that the defendant used Saania to assist him in purchasing Crispa Gold from the plaintiff at a reduced cost and then on-selling it in order to make a profit for himself, the role and involvement of Seafood Botswana was initially not so clear. At the Court's request the plaintiff's counsel filed a supplementary note specifically dealing with its role and involvement.

[83] Firstly, an analysis of the financial documentation put before the Court shows that approximately one third (in total R10 419 468) of all the Crispa Gold income received by Fast Track emanated from Seafood Botswana. Over the four year period, Seafood Botswana obtained a consistently better price from the plaintiff for Crispa Gold than did Makro. For example, in the year ending February 2008 its nett price was R197.61 against Makro's nett price of R244.68 and in March to February 2011 the respective nett prices were R209.06 versus R245.51.

[84] Mr Milne testified that Seafood Botswana was treated as a local company i.e. on the same footing as South African customers, with the consequence that the Makro benchmark applied to it. The defendant furnished no explanation for his favourable

pricing treatment of Seafood Botswana or of any special circumstances which justified this treatment of Seafood Botswana. Mr Milne also testified that he was able to restore a normal relationship with Seafood Botswana after the defendant's dismissal. This alone indicates that there was no legitimate commercial reason for it to have received preferential treatment from the defendant.

[85] It is not known how the defendant took advantage of his reduced pricing to Seafood Botswana for his own benefit or even whether he did, although this seems likely. It is possible he was simply looking after one of his biggest personal customers. But even if this was the case he was doing this for his own benefit and not for the plaintiff's.

[86] In the result, I am satisfied the damages suffered by the plaintiff arising from reduced price sales to Seafood Botswana must also be brought into account.

[87] The next question to be addressed is whether the plaintiff has established that it would have sold the same quantities of Crispa Gold to these two or other customers had it been priced at no less than the Makro price. It is of course not possible to answer this question with certainty since it is essentially hypothetical. However, it was established in the evidence that Crispa Gold was a sought after product by reason of its quality and consistency. This allowed the plaintiff's management, except where this was breached by the defendant, to have a pricing policy which sought to maintain a 15% pricing premium above competitors. There was evidence furthermore that smaller distributors and cash and carry outlets would likely stock Crispa oil since if they did not, customers would go elsewhere to satisfy not only their cooking oil needs but other purchases. After the defendant's departure the plaintiff restored and maintained its commercial relationship with Seafood Botswana although not with Saania where purchases declined dramatically

compared to when the defendant ran their account. Saania was a distributor, however, and not a user of Crispa Gold. Whichever vehicle was used it is clear that any customers who purchased Crispa Gold from Fast Track or FDC paid a significantly higher margin than whatever nett price had been paid by Saania to the plaintiff. That difference would have been represented by the margins which Fast Track, FDC and Saania received for their parts in the scheme of selling Crispa Gold purchased at below the commercial (Makro benchmark) price.

[88] It was contended on behalf of the plaintiff that inasmuch as the products delivered to Saania Distributors ended up being sold to numerous customers, including Seafood Botswana itself, on the probabilities these sales would have taken place even if the stock was priced at the Makro benchmark price. In my view the probabilities favour this proposition since such customers were, after all, not receiving the benefit of the reduced price to Saania but were paying a higher price thereby inadvertently creating the margin available for the defendant and Saania.

[89] Once it is accepted that damages have been suffered, and provided the plaintiff has placed all of the available evidence before the Court, the Court will do its best to assess the extent of the damages and will not lightly determine that no damages have been proved. See *Aaron's Whale Rock Trust v Murray and Robinson Ltd*.¹ Where the quantification of pecuniary losses cannot be done exactly or mathematically, the plaintiff should not be non-suited because in the nature of things the damages cannot be computed in exact figures. See *Esso Standard SA (Pty) Ltd v Katz*.²

¹ 1992 (1) SA 652 (C) at 655.

² 1981 (1) SA 964 (A).

[90] In my view the evidence establishes on the probabilities that the sales made by the defendant through Fast Track and FDC would have been made by the plaintiff but for the defendant's conduct. Ultimately all the final sales of the product i.e. as opposed to the sales to Saania, involved customers who wanted the product and were prepared to pay for it and did so at a rate that included a margin for Fast Track and Saania distributors. The damages are already computed on a conservative basis, namely, that the stock would have been sold at the Makro benchmark price i.e. at the most favourable price which the plaintiff would ordinarily have sold its stock to its most favoured customer in the cash and carry/distributor sector of the market. In the result, accepting that mathematical certainty is not possible, I find that the plaintiff has established that were it not for the defendant's conduct the stock in question would have been sold anyway but at no less than the Makro price.

[91] An award for damages calculated on the basis computed by the plaintiff in an amount of R9 407 651.05 will place the plaintiff in the same position it would have been had the defendant complied with the provisions of his contract. See in this regard *Mostert N.O. v Old Mutual Life Assurance Company SA Ltd.*³

The plaintiff's claim for disgorgement of profits

[92] It is as well to have regard to the general principles applicable where an employer sues an employee for disgorgement of secret profits. It is the duty of an employee when rendering his or her services always to act exclusively in the interest of the employer. See *Robinson v Randfontein Estates Gold Mining and Company Ltd* ⁴where Innes CJ stated as follows:

³ 2001 (4) SA 159 (SCA).

⁴ 1921 AD 168 at 177-8.

'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. ... the doctrine is to be found in the civil law ... and must of necessity form part of every civilised 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.'

[93] Thus it is that an employee is not entitled to use his or her employment relationship with the employer without the employer's permission to make a profit or earn commission for his or her own account. See *Stewart Wrightson (Pty) Ltd v Thorpe*⁵ and *Phillips v Fieldstone Africa (Pty) Ltd and Another*.⁶ In the latter case Heher JA summarised the law relating to a breach of fiduciary duty and its consequences as follows:

'The rule is a strict one which allows little room for exceptions ... It extends not only to actual conflicts of interest but also to those which are a real sensible possibility ... 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. ... Because the fiduciary who acquires for himself is deemed to have acquired for the trust, ... 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 ...; (2) the trust could not itself have made use of the information, opportunity etc ... or probably would not have done so ...; (3) the trust, although it could have used the information, opportunity etc has refused it or would do so ...; (4) there is no privity between the principal and the party with whom the agent or servant is employed to

⁵ 1977 (2) SA 943 (A).

⁶ 2004 (3) SA 465 (SCA).

*contract business and the money would not have gone into the principal's hands in the first instance ...; (5) it was no part of the fiduciary's duty to obtain the benefit for the trust ...; or (6) the fiduciary acted honestly and reasonably ... The duty may extend beyond the term of the employment ...'*⁷

[94] In the context of the duties of directors and officers of companies it has been held that the rule against the making of secret profits has been held to be an inflexible one, its object being to prevent directors from placing themselves in a position where they may be tempted to prefer their own interest to those of their company. In *Transvaal Cold Storage Company Ltd v Palmer*,⁸ it was held that whenever an agent in the course of 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 and paid over to the principal.

[95] In order to succeed in its claim for a disgorgement of profits the plaintiff must establish that the defendant owed it a fiduciary obligation; that in breach of that obligation the defendant placed himself in a position where his duty and his personal interest were in conflict and, finally that the defendant made a secret profit out of corporate opportunities belonging to the plaintiff. I deal with these requirements in turn.

[96] In its particulars of claim the plaintiff pleaded that the defendant represented it as its agent in its dealings with customers and stood in a position of confidence in relation to it. As a result he was under a fiduciary obligation to the plaintiff inter alia to promote and protect the plaintiff's best interests, not to place himself in a position where his personal interests might conflict with his duty and the interests of the plaintiff; further that he was not entitled to profit from the sales of Crispa Gold (except by way of his agreed

⁷ *Ibid* at para 31.

⁸ 1904 TS 4.

remuneration) and was not entitled to make a secret profit out of the plaintiff's corporate opportunities without its knowledge and consent. These allegations were all denied by the defendant in his plea.

[97] In *Fieldstone*, the Court held that where an employee is sued for the disgorgement of an alleged secret profit the following approach commended itself as a practical way of dealing with such cases:

- '(1) *the facts and circumstances had to be carefully examined to see whether in fact a purported agent and even a confidential agent was 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 an 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; and*
- (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.'*⁹

[98] A primary question is whether the defendant owed a fiduciary obligation to the plaintiff. In *Fieldstone*, the Court approved a dictum from *Hodgkinson v Simms* to the following effect:

*'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.'*¹⁰

⁹ Above at para 32, quoting *Boardman v Phipps* [1966] 3 All ER 721 (HL).

¹⁰ Above at para 34 (482B), quoting *Hodgkinson v Simms* [1994] 3 SCR 377 (SCC).

[99] The Court also approved a dictum to the effect that the relationship in which a fiduciary obligation has been imposed are marked by three characteristics:

‘(1) a 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 particular vulnerability to the exercise of that discretion or power.’¹¹

[100] The Court in *Fieldstone* added that such an analysis can be implied in the employment context as easily as in relationships giving rise to more obvious duties of trust.¹² By the time of argument, the evidence on these aspects was largely common cause. The defendant admitted in the pleadings that he acted as the plaintiff’s agent in its dealings with customers. The evidence led from various of the plaintiff’s witnesses, not least Messrs Thomas and Milne, established that the defendant was responsible for all aspects of the conclusion of agreements with customers in relation to Crispa Gold and was entitled to do so without reverting to management. Within a short time of entering into the plaintiff’s employment the defendant was trusted to run the Crispa Gold portfolio without close oversight by management. He had the power to unilaterally conclude agreements with customers at certain prices and also to approve payments of claims by customers for discounts, rebates, allowances and the like. Although, as this Court has found, the defendant’s authority was subject to compliance with the Makro benchmark price (save in exceptional circumstances), his power to agree different and lower prices with customers was, in practice, unfettered. On the other hand it is quite clear that the defendant was not employed by the plaintiff to enable him to set up a secret oil trading or distribution business for his own benefit. The fact that as soon as the plaintiff gained an inkling that the defendant was running his own business within the plaintiff’s business it

¹¹ Above at para 34 (482C) with reference to *Frame v Smith* [1987] 2 SCR 99 (SCC) at 136.

¹² *Ibid.*

commenced an investigation, suspended him and ultimately dismissed him, alone testifies to this. As plaintiff's counsel submitted, and as was fully borne out by the evidence, the plaintiff relaxed its vigilance and supervision because it trusted the defendant to act in its best interest.

[101] The circumstances of the defendant's position were also marked by the three characteristics identified by Wilson J in *Frame v Smith* and endorsed by Heher J in *Fieldstone*. The defendant exercised wide discretionary power in regard to the pricing of Crispa Gold for customers, he was able to use that power of discretion unilaterally to effect the legal or practical interests of himself, the customer and the plaintiff and his wide power left the plaintiff particularly vulnerable to its exercise when not used by the defendant in its best interests. In the result, I find that the defendant clearly did owe a fiduciary duty to the plaintiff as alleged in the particulars of claim.

[102] The next issue is whether the defendant did in fact make a secret profit out of the plaintiff's corporate opportunities.

[103] Details of the scheme utilised by the defendant to make a secret profit emerged as through distorted and dark glass, during the course of the evidence. What was striking was how little information was provided by the defendant on the secret business he ran selling Crispa Gold through Fast Track and FDC. The result was that the plaintiff had to try and piece together a picture using no more than the bank statements over the relevant period for the defendant's two companies, a number of incriminating emails found on the defendant's computer after he left the plaintiff's employment and sundry pieces of information either winkled out of the defendant in evidence or which emerged from the evidence of the plaintiff's witnesses.

[104] Of primary importance is what emerges from the bank statements which, in essence, is that Fast Track and FDC received deposits totalling R36 669 308.40, all of that being made up of payments by customers for the purchase of Crispa Gold sunflower oil. The great bulk of this income was received into Fast Track whilst the balance, some R3.5 million, was received into FDC. On the most favourable interpretation of the evidence, namely, the bank accounts and the defendant's belated and inadequate explanation thereof, some R3 291 556.24 can presently be attributed to the costs of making the sales of Crispa oil, i.e. in order to generate the income in question. This amount reflects payments to Saania, to the plaintiff directly, payments back to Crispa customers, salaries to employees of Fast Track or FDC and rental for the Edenvale office that these entities used. Out of the total Crispa cost of sales, a total of R2 746 802.25 was incurred in FDC and R630 906.97 in Fast Track. This leaves an amount of R33 291 599.24 which is the maximum amount of the claim the plaintiff has against the defendant for disgorgement of secret profits. A large component of that amount is represented by '*unknown cheques*' in the amount of R26 558 556.97 i.e. cheque payments made by either Fast Track or FDC to unknown beneficiaries. Although these could be payments in respect of possible further Crispa Gold expenses e.g. payments to Saania or Seafood Botswana for Crispa Gold stock which these customers purchased from the plaintiff but which Fast Track or FDC on-sold to customers, they could equally be payments to other accounts held by the defendant or to other beneficiaries of his. The plaintiff's forensic investigator was unable to identify any of these sums as payments to the plaintiff in which event they would accrue to the cost of sales and reduce the plaintiff's claim. The defendant professed no knowledge as to whom these payments were made and, accordingly, in the absence of proof that these constituted part of the Crispa costs of sales, they must be taken as secret profits which the defendant must

disgorge. The balance of the total nett Crispa Gold income, R6 733 042.27 comprises what the plaintiff refers to as its minimum proved disgorgement claim and represents the positive balance remaining after Crispa Gold expenses and possible Crispa Gold expenses (*'the unknown cheques'*) are deducted from the total Crispa Gold income. According to the plaintiff that amount, R6 733 042.27 is, by definition, a secret profit made out of Crispa Gold sales.

[105] Against this background the first issue is whether the defendant in fact made a secret profit out of the plaintiff's corporate opportunities. As was correctly observed by the plaintiff the evidence before the Court revealed that the defendant's activities in selling Crispa Gold through his two companies took a number of different forms. No single methodology was used by him but that fact is not material to the plaintiff's claim. What evidence there was indicates that the primary method employed by the defendant when using Fast Track was to ensure that large quantities of Crispa Gold were sold by the plaintiff to Saania at heavily discounted prices. The plaintiff's witness, Ms Ramocheke testified that Saania received about three full truckloads of the product per week at prices that were lower than any other customer. The defendant's explanation was that Saania placed large orders for stock at the old prices before price increases. However, this evidence was not substantiated by that of the plaintiff's witnesses and runs strongly against the probabilities. There would be no logical reason why one comparatively unimportant customer would be allowed to regularly make huge orders of stock at the old price thereby benefitting at the expense of all other customers, including Makro, who would also want to place large orders at the old price and have them delivered to them well after the new price had come into effect.

[106] Mr Milne's evidence was that if orders for stock at the old price threatened to get out of hand then what remained of the old stock would be allocated between customers to ensure some equality of treatment and to avoid customers becoming disgruntled. This makes complete sense. In any event this evidence from the defendant to the contrary was a mere assertion, in no way backed up by detailed evidence showing large orders being placed at old prices. The only plausible explanation for Saania receiving a consistently lower price in large volumes is that the defendant deliberately granted it this favourable treatment but for his own private purposes. This in turn is borne out by the fact that the defendant used the stocks of cheap Crispa Gold in the warehouse at Saania Distributors to carry out irregular transactions, some of which were highlighted by the plaintiff. One notable such transaction was in May 2011 when the plaintiff had already delivered an invoice for 432 drums of Crispa Gold to Global in East London. On 11 May 2011, the defendant instructed the plaintiff's staff to credit Global and debit Saania for the amount invoiced. The effect thereof was that the plaintiff would no longer regard Global as its creditor but would look to Saania for payment of the invoice. Fast Track would then invoice Global at a price lower than the price initially invoiced by the plaintiff which amount was paid directly by Global to Fast Track. On the probabilities the debit owing by Saania would have been reduced by the defendant through the granting of rebates and allowances to Saania. In another example, the defendant put a similar arrangement into place for IJ Oil Traders and made the deal more attractive for it by giving it 173 drums of Crispa Gold at no charge.¹³

[107] The defendant's own evidence was that he sat with 'Yunus' of Saania Distributors (or the latter's assistant) once a month and agreed discounts, rebates and allowances for

¹³ See pages 149 and 150 of the bundle.

the credit of Saania. It was thus in his power to reduce the amount that would ultimately be paid by Saania to the plaintiff. In other words, by moving debts from certain customers of the plaintiff to Saania Distributors, the defendant placed himself in a position where it was easy for him to reduce the ultimate amount paid over to the plaintiff. He hid, and then reduced the debt in Saania's account and took the benefit of the customers payment for his own companies. It is likely that Saania must have gained some real benefit from concluding these transactions with the defendant, perhaps in the form of a sharing of the profits, but no details of this emerged and were certainly not disclosed by the defendant. He maintained throughout that these were simply normal business dealings between himself, representing the plaintiff, and Saania. Of course this does not explain why, after defendant left the plaintiff's employment, all business with Saania very soon dried up.

[108] As far as Seafood Botswana is concerned, it purchased extensively through Saania but also directly from the plaintiff. Mr Schulz's evidence showed that even in the direct transactions between the plaintiff and Seafood Botswana, the defendant agreed on reduced prices for Crispa Gold i.e. below the Makro benchmark price. The only plausible explanation why the defendant did this was that he was favouring Seafood Botswana since it was a lucrative source of income to Fast Track, via Saania Distributors. Most of these transactions were effected using Fast Track, a company completely owned and controlled by the defendant.

[109] A different system appears to have applied to FDC which, on the face of it, was nominally owned by Mr Samuel Kgatla. He does not appear to have been the beneficial owner, however, as is apparent from the fact that on the defendant's own evidence it was he, the defendant, who conceived the idea of incorporating FDC, arranged the

incorporation and chose the name. The only product ever sold by this company was Crispa Gold. According to Ms Wright-Ingle, she was employed by the defendant and he was the only person who ever gave her instructions in relation to FDC business. At the beginning of her employment he came into the office in Edenvale every day and thereafter once or twice a week. She regarded Mr Kgatla as no more than the driver and not the type of person who could have run the company. He certainly never gave her any instructions and as the sole member he earned a paltry salary. It was the defendant who drafted and set up the so-called buying group described in a letter to one of their customers and which expounded the virtues of belonging to the group. Although FDC had an account with the plaintiff, none of the plaintiff's other employees knew, until the defendant was suspended, that it was his business or that he was involved with it. Before this came out and when the plaintiff sought financial statements from the FDC because of its increased purchases, the defendant changed its method of business with the plaintiff so as to avoid having to meet this requirement. It is thus abundantly clear that FDC was controlled and beneficially owned by the defendant and that Mr Kgatla was largely a front for the defendant.

[110] There was no shortage of evidence that the defendant steered the plaintiff's customers towards FDC. He told various customers, including Stefan Benade, Illovo and General Supply, that they were either not allowed to buy directly from the plaintiff or that they should order or purchase from FDC. In doing so he more often than not did so on the basis of falsehoods regarding the minimum requirements to do business with the plaintiff. All the members of the FDC buying group are customers who could and should have been purchasing directly from the plaintiff.¹⁴ In direct dealings between FDC and the

¹⁴ See page 108 of the bundle.

plaintiff the defendant could control the amount paid by FDC to the plaintiff through rebates and allowances which he could grant, such as bogus new store opening allowances, as he in fact did. The incorporation of FDC appears to have been arranged so that the defendant could do business with the plaintiff secretly but ‘*in plain sight*’, without the necessity of having to use Saania (and possibly to avoid sharing his secret profits with it) as he had previously done with Fast Track. The defendant’s use of both of his companies resulted in the plaintiff’s customers making payments for Crispa Gold into bank accounts controlled by the defendant and with the plaintiff having no knowledge of the defendant’s involvement with Fast Track and FDC.

[111] As discussed earlier the only defence open to a fiduciary who has breached his trust is the free consent of the principal after full disclosure is made. A fiduciary who acquires for himself is deemed to have acquired for the principal and therefore upon proof of a breach it is not relevant if the principal has suffered no loss or damage or could not itself have made use of the corporate opportunity or might not have done so. In *Da Silva and Others v CH Chemicals (Pty) Ltd*,¹⁵ Scott JA stated as follows:

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

[112] In the present matter, no difficulty arises in determining whether the opportunities enjoyed by the defendant were ‘*corporate opportunities*’ for the purposes of a disgorgement claim. The opportunities which the defendant used were to sell the

¹⁵ 2008 (6) SA 620 (SCA) at page 627, para 19.

plaintiff's Crispa Gold product to its existing customers or, in a few cases, to new customers who would naturally have formed part of the plaintiff's target market because they wished to buy Crispa Gold. These opportunities clearly fell within the plaintiff's existing and prospective business activities. It follows from this that through his sales of Crispa Gold using Fast Track and FDC, the defendant made a secret profit out of corporate opportunities belonging to the plaintiff, in breach of his fiduciary duties to his employer.

The extent of the secret profit

[113] It was initially contended on behalf of the plaintiff that it was entitled to judgment for all the income received by the defendant through his two companies in respect of sales of Crispa Gold, irrespective of what expenses he may have incurred in generating that income. It was later contended that the only credit which the plaintiff contended the defendant should enjoy would be in respect of any amounts proved to have been paid to the plaintiff itself. But if this concession is made, as I believe it must, then the defendant must also be given credit for amounts which have been paid to the plaintiff by or through a third party for Crispa Gold stock. In the present case this would mean that if the defendant was trading in stock which he acquired from Saania, which had originally purchased it from the plaintiff, the monies paid by Saania to the plaintiff will have to be brought into account i.e. deducted. If this was not the case the plaintiff would be claiming double compensation, or a windfall, which I do not consider the disgorgement remedy to intend to confer.

[114] Initially the plaintiff submitted that any other payments made by the defendant in the course of running his business are irrelevant since, if I understood the argument

correctly, taking into account other expenses would be to call for an analysis of how profitably the wrongdoer conducted his illicit business.

[115] Be that as it may, by the time of final argument the plaintiff had modified its stance so as to seek an award for no more than the income received by the defendant in respect of the Crispa Gold sales less the cost of generating those sales also referred to as '*Crispa cost of sales*'. These amounts which could be identified totalled R3 377 709.22 and comprised mainly payments to Saania, to the plaintiff and salaries and rental in respect of Fast Track's and FDC's employees.

[116] Coming back to the question of the extent of the secret profit made by the defendant, the difficulty arises with the bulk of the payments made by Fast Track and FDC, an amount of R26 558 556.97, to unknown beneficiaries. In the nature of things the plaintiff could shed no light on the identity of the parties to whom these cheque payments were made, there being no description in the bank statements which the plaintiff had acquired under subpoena from the defendant's bank. What was surprising was that the defendant claimed that he was not able to shed any light on this question either, beyond stating that part thereof had been paid to Saania. The result is that in the final drafts of the two orders which the plaintiff put up, in the alternative, for consideration by the Court it sought, under the disgorgement claim, judgment against the defendant for some R33 million odd '*in respect of a disgorgement of profits made by him in respect of the sales of Crispa Gold*'. In its alternative formulation it sought under this head, judgment in the amount of R6.7 million being the minimum proved disgorgement amount, and a rule *nisi* in respect of the balance of the R27 million odd, with the order making provision that the latter sum could be reduced, prior to the return date, by any amount the defendant could show and prove by production of supporting vouchers or other acceptable evidence to

have been amounts paid to Saania Distributors for the purchase of Crispa Gold. This formulation was based on evidence by the defendant that some part of the R27 million odd was in fact paid to Saania.

[117] In the first place, however, the plaintiff sought judgment in the greater sum of R33 million on an unqualified basis, on the grounds that the defendant had been offered every opportunity to put evidence before the Court concerning the nature of the unknown payments or the identity of those beneficiaries and should be afforded no further opportunity to do so.

[118] At a late stage in argument the defendant provided a schedule to the Court in which he made the argument that using ‘*reverse engineering*’ of the plaintiff’s turnover and profit margins for Crispa Gold, it would have been impossible for him to have made secret profits over the four year period in the order of R 33 million.

[119] The schedule is itself confusing. In it the defendant’s calculations are based on Fast Track dealing in 511 tons of Crisp Gold per year i.e. nearly 28 000 drums per year. It is not clear whether this was a factual admission or a hypothesis. This and other matters requiring clarification could not be addressed by evidence and cross-examination because this thesis was only raised by the defendant in argument after he effectively had two opportunities to testify but did not raise this aspect of his case. The schedule also makes use of a table which was barely touched on in evidence as a result of which its authorship and accuracy were untested.¹⁶ It appears, furthermore, to be a budget document reflecting annual volumes of Crispa Gold production or sales. This makes it an unstable foundation for the further calculations which the defendant makes in his argument. Furthermore, the

¹⁶ See page 1407 of the trial bundle.

defendant's calculations appear to be founded upon the assumption that, at worst, he must only disgorge '*pure profit*' i.e. profits he made which the plaintiff did not make. This is to misconstrue the remedy which does not require that the claimant would have earned the same profits but for the defendant's activities nor that only '*pure profit*' must be disgorged. Flowing from the above it is also a misconception to compare (as the defendant sought to do) the plaintiff's envisaged profit margin as a large scale manufacturer to that of a small distributor. There was also no basis for a further assumption made by the defendant in his calculations, namely, that Fast Track sold at the same price as the plaintiff's desired selling price.

[120] As regards the general thrust of the defendant's argument viz that it was unlikely if not impossible that he could have made a secret profit of approximately R33 million over four years, it is worth noting that a secret profit of approximately R9 million per year (excluding costs of sales) is relatively insignificant when compared to the plaintiff's annual revenue from Crispa Gold which, according to the defendant's figures, was in the region of R860 million per year.

[121] There are other questionable assumptions in the defendant's argument based on his schedule and the budget document but it is not necessary to detail them. It suffices to state that had the schedule and its underlying thesis been ventilated by the defendant in his evidence, it could have been tested and assessed. Having failed to do this, limited, if any, weight can be given to the argument especially given the uncontroverted evidence of how much Crispa Gold income flowed into the bank accounts of the defendant's companies but remains unaccounted for.

[122] As previously stated by the end of the defendant's second round of testimony it was clear that the only other possible Crispa Gold expenses might be found in the unknown cheques. Coming back to the '*unknown cheques*' the defendant testified that none of the '*unknown cheques*' were paid to the plaintiff but some of them had been paid to Saania but he could not (or would not) give any further detail.

[123] The question thus arises whether the plaintiff is entitled to judgment for its minimum, proved disgorgement claim (R6 733 072.27) plus a rule *nisi* for the balance pending further steps in the accounting and debatement process, or for the main relief sought by the plaintiff, namely, final judgment in the amount of R33 291 599.24 i.e. its minimum proved disgorgement claim plus the full amount of the '*unknown cheques*'.

[124] The plaintiff's rationale for seeking final relief in this form was that in the circumstances of the present matter, the onus of proving any (further) expenses reasonably incurred by the defendant in acquiring his secret profit from sales of Crispa Gold lay upon him, and he had failed to discharge this onus. Although there appears to be no direct authority on this point, this analysis of the onus appears correct. Having regard to the nature of the disgorgement remedy, the principal is entitled to disgorgement of the secret profit or benefit obtained by the agent whilst the latter is entitled to be paid his reasonable expenses upon disgorgement of his secret profit or benefit. In order to render the disgorgement remedy effective, and in accordance with established procedural principles relating to onus (for one – he who asserts must prove), the onus of proving such expenses must rest with the agent (in this case the defendant).

[125] The defendant had ample opportunity during the trial to prove such expenses and failed to do so. After he completed his evidence he was furnished a further opportunity

(and a three week postponement) to deal in detail with the content of the bank statements relating to Fast Track and FDC, most notably the unknown cheques. He made use of this opportunity but ultimately put very little further information before the Court. In the result the trial has already seen a full debatement of account albeit in circumstances where the defendant has been unable or unwilling to render an account of his secret profits. The result has been that the plaintiff had to do all the running in this regard. Similarly there has been a full debatement of the defendant's expenses incurred in producing the secret profits. Here again the defendant put very little information before the Court and has, to a large extent, merely responded to information put before the Court by the plaintiff. Nor is there any suggestion from the defendant that given a further opportunity he will be able to produce any proof of such further expenses.

[126] For these reasons I consider that no good purpose will be served by making only a provisional order at this stage of the proceedings. In order to provide for the situation that the defendant may nonetheless see fit to prove such further expenses I propose to word the order to take account of that possibility.

[127] There will also be an order that the defendant is liable for the payment of damages in the amount of R9.407 million, being the plaintiff's claim for damages arising out of the sale of Crispa Gold to Saania Distributors and Seafood Botswana at a price less than the Makro benchmark. That judgment will be concurrent with the judgment granted in respect of the disgorgement claim, the rationale being that the plaintiff is not entitled to recover twice in respect of the same underlying transactions.

Costs

[128] It follows that the plaintiff is entitled to the costs of the trial. The plaintiff asked for costs on the attorney client scale. Given the secret and unlawful nature of the scheme which the defendant ran for four years at the expense of his employer, such an order is appropriate. It sought also an order that all of the witnesses whom it called be declared essential witnesses, presumably with a view to being reimbursed for their travel and accommodation. These witnesses had to be brought from Johannesburg to testify. Again, I see no reason to deny the plaintiff these costs. Finally, it sought an order for the costs of transcribing the record of the evidence presented as well as the costs of audio visual equipment used in court when Mr Schulz's financial evidence was presented. This equipment greatly facilitated the presentation of that important body of evidence and no doubt considerably shortened his evidence. I propose to allow these latter costs but not the costs of the transcription which was put to only limited use in the proceedings.

[129] Finally, an order was sought to cover the travel and subsistence costs of the plaintiff's legal representatives in relation to their attendance at trial. Out of caution the defendant was sued in the Court of the district where he was residing at the time of issue of summons. No objection to this step was received from the defendant nor, I presume, was there any suggestion that the matter be transferred to a Gauteng Court. However, the plaintiff and its witnesses were all based in Gauteng. In these circumstances it was not unreasonable that the plaintiff instructed attorneys and counsel practising in Gauteng. In the result I will accede to such an order.

[130] For all these reasons there will be judgment for the plaintiff in the following terms:

1. Judgment is granted against the defendant for payment of damages to the plaintiff of R9 407 651.05 together with interest thereon at 15.5% per annum from date of demand, being 30 November 2012, to date of final payment;
 2. Judgment is granted against the defendant for payment of R33 291 599.24 together with interest thereon at 15.5% per annum from date of demand, being 30 November 2012, to date of final payment, in respect of a disgorgement of profits made by him in respect of Crispa Gold Sunflower Oil, less any amount the defendant can (within a period of three months from date hereof) show and prove by production of supporting vouchers to have been amounts paid in making such profits (other than those already taken into account). In this regard the parties are given leave to approach this Court for directions in the event that disputes arise in such process.
 3. The order granted in 1 above is concurrent with the order granted in 2 above, in that upon payment of the plaintiff's damages, the defendant shall be entitled to a credit in respect of his disgorgement of secret profits.
 4. The defendant is ordered to pay the plaintiff's costs of suit on the scale between attorney and client.
- 4.1 The following trial costs and witnesses who testified for the plaintiff are declared to have been essential costs incurred in the trial and essential witnesses, and it is directed that the plaintiff shall be entitled to recover these costs and the witnesses' travelling and subsistence costs in relation to their attendance at the trial:

Witnesses

1. Mr Christiaan Schulz
2. Mr Gareth Thomas
3. Ms Gemma Wright-Ingle
4. Ms Kate Ramocheke
5. Mr Laurie Milne
6. Mr Thabo Mosomane

Audio Visual Equipment

CCPP Cape Town - (costs of audio visual equipment used in court when evidence presented).

- 4.2 It is directed that the plaintiff shall be entitled to recover its legal representatives' travelling and subsistence costs in relation to their attendance at the trial.

BOZALEK J

For the Plaintiff : *Adv A Lamplough*
As Instructed by : *ENS*

For the Defendant : *In Person*