GAUTENG DIVISION, JOHANNESBURG

(Commercial Court)

CASE NO: 28817/2020

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES** 21/2/2022

18 February 2022 .....

SIGNATURE

In the matter between:

ATLAS PARK HOLDINGS (PTY) LTD APPLICANT

and

TAILIFTS SOUTH AFRICA (PTY) LTD RESPONDENT

JUDGMENT

INTRODUCTION

1. This is an application in terms of s 75(8) of the Companies Act 71 of 2008 (*the Act*) to declare valid the terms of a main lease agreement and a subsequent amendment

to it purportedly concluded between Atlas Park Holdings (Pty) Ltd which is the applicant (as lessor) and Tailifts South Africa (Pty) Ltd which is the respondent (as lessee).

The main agreement was allegedly concluded on 22 May 2017 and the amendment (titled "*Addendum to Commercial Lease Agreement*") some two months later on 18 July 2017. They will be referred to collectively as the "*lease agreements*".

2. The s 75(8) application is brought principally because Mr Warwick van Breda, who deposed to the founding affidavit on behalf of the applicant, held directorships not only in the respondent but also in the applicant at the time the lease agreements were allegedly signed. He was also a director of certain upstream companies of the applicant at the time the lease agreements were concluded. [1]

3. In order to give some context to the matters which require consideration it may be useful to the mention a number of recurring themes raised by the parties.

4. The first is that the respondent denies that the main lease was signed when alleged- effectively claiming that it was a document manufactured by van Breda wearing two different directors' hats; one for the applicant and the other for the respondent.

---

[1] van Breda was also a director of SkyPark Capital (Pty) Ltd (*SkyPark Capital*), Navix Distribution (Pty) Ltd (*Navix*) and VBreda Corporate Finance (Pty) Ltd (*VBCF*). VBCF was a 100% shareholder of Navix (in which van Breda was also a director) which in turn was a 50% shareholder in SkyPark Capital. SkyPark Capital in turn was a 50% shareholder in the applicant. The other 50% shareholder of the applicant is the Pocot Trust which is unrelated to van Breda. However, the entire shareholding of VBCF is held by the van Breda Family Trust.

The applicant also contends that the respondent, through Mr Carl Muncer who was the respondent's other director, was aware of van Breda's directorship in the applicant and related entities and was also aware of their financial interest in the lease agreements (much of which the respondent also disputes through the affidavit of Muncer).

The applicant submits that there is no real or genuine dispute of fact but if the matter cannot be decided on affidavit, then these are narrow issues which should be referred to the hearing of oral evidence. The respondent argues that these are some of a number of irresoluble disputes of fact.

5. Secondly the applicant relies on the corporate structuring whereby the applicant and various other legal entities were interposed between van Breda, as director of the applicant, and its ultimate 25% shareholder which. it is reasonable to conclude is also van Breda as the effective controller of the assets held in the van Breda Family Trust.

Van Breda is one of the key controlling minds of the applicant and in the papers takes credit for devising the corporate structuring of the applicant's shareholding entities and the respondent's upstream special purpose vehicle which secured mezzanine finance for both the buyout of a major shareholder in the respondent manufacturing operations and in the company which owned the property in respect of which the contentious lease agreements now relate.

Suffice it at present, that the applicant therefore;

a. accepts that van Breda had a direct financial interest in the lease agreements by reason of his directorship in the applicant;

b. contends that any financial interest that he may have had in any of the upstream entities was indirect.

This is relevant to an understanding of the applicant's legal contention, made through van Breda, that it is entitled to relief under s 75(8) because all necessary disclosures were made regarding the applicant's direct personal financial interest in the lease agreements as a related party (due to van Breda's directorship in the respondent), but if any necessary disclosures by the entities upstream of the applicant were not made regarding their personal financial interest in the lease agreements (which is disputed by it) then this was only an indirect interest which s 75(5) is designed to exclude from consideration. [2]

6. While the applicant accepts that there was noncompliance with the requirements of s 75(5), it refers to this as a simple failure of "*de jure*" compliance on its part, contending that it had "*de facto*" complied with the disclosure requirements of the Act.

7. Unfortunately I am unable to agree with the proposition that s 75(8) involves asking a court for a simple indulgence to enable the so called *de facto* situation to be brought

[2] This is made abundantly clear in paras 25, 26, 31, 33.5 and 35.1 read with para36 of the applicant's heads of argument

into line with some purely formal legislative requirements. To do so would minimise the mischief which the section is intended to address.

As I hope to demonstrate later; however attractive such an apparently straight forward distinction may appear, it would reduce the purpose of the legislation to one requiring the simple ticking of boxes, an outcome which King IV in particular sought to discourage when compliance with the requirements of good corporate governance are considered. [3]

8. Another aspect which should be mentioned at this stage is that because, on the applicant's version, van Breda signed the lease agreements on behalf of the respondent, if he had "*a personal financial interest*" or knew that a "*related person has a personal financial interest*" in the transaction as contemplated in s 75(5), then such signing (without more) constitutes a breach of the statutory duty imposed by subsections (e) and (g) of that provision. By reason of s 75(7) such infringement would require an application to court under s 75(8).

---

[3] *The Corporate Citizen* by Prof Mervyn King.
The various King Reports and Code, culminating in the King IV Report on Corporate Governance in 2016 (effective from 2017) set out the standards of conduct which the corporate and financial world should reasonably expect of boards and directors of listed and unlisted companies as well as certain other entities. Where the underlying considerations meet the provisions of the Companies' Act or the common law in matters concerning the relationship between shareholder and management in private unlisted companies these expectations may be of assistance in deciding the appropriate yardstick of reasonableness by which to measure the conduct of directors and shareholders. The reason is that these are guidelines commissioned and adopted by the Institute of Directors in South Africa which has gone through four iterations in order to provide guidelines on sound corporate governance. Irrespective of whether the company itself adopted the guidelines (as was the case in *Organisation Undoing Tax Abuse and another v Myeni and others* [2020] 3 All SA 578 (GP) at para 34), I am of the view that these are now well established and accepted principles, which the courts are entitled to look to as indicating the standard which the commercial and financial world consider is reasonably to be expected of a director. It is for the other party to produce satisfactory testimony to gainsay it.

van Breda also claims to have signed a board resolution on 22 May 2017 authorising him to conclude the transaction[4]

9. Section 75(5) (e) and (f) provide that a director in such situations

"(e) must not take part in the consideration of the matter …;

(g) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board."

Section 75(7) reads:

"A decision by the board or a transaction or agreement approved by the board, or by the company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to a director only if —

(a) it was approved following disclosure of that interest in the manner contemplated in this section

(b) despite having been approved without disclosure of that interest, it

(i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or

[4] The board minute also authorised van Breda to sign any subsequent amendments to the agreement and recorded that the board ratified all actions van Breda may have already taken in relation to the lease in question

(ii) has subsequently been declared valid by a court in terms of subsection (8)."

10. It is common cause that neither the purported board resolution nor the lease transaction or agreements were approved or subsequently ratified, as provided for in ss 75(7)(a) or (b)(i)- hence the need for the present application

The respondent has refused to abide by the lease agreements on the grounds that van Breda was conflicted and the agreement is tainted *inter alia* by reason of his failure to make proper disclosure and his breach of the provisions of ss 75(5)(e) and (g).

11. Accordingly, if van Breda had a personal financial interest or knew that a related person (as defined in s 1 and extended by s 75(1)(b)) had a personal financial interest in the transaction then the agreements, and if applicable the board resolution, can only be binding on the respondent if the court, exercising its discretion, so declares in terms of s 75(8).

Section 75(8) reads:

> *"A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board, or shareholders, as the case may be, despite the failure of the director to satisfy the disclosure requirements of this section."*

I will return to the other relevant provisions of the Act.

THE ISSUES

12. A number of preliminary issues were raised but have fallen away. One concerns the late filing of affidavits.

13. Aside from the issue of whether van Breda had a personal financial interest or knew that a related person had a personal financial interest in the transaction it is evident that the applicant, on its own version, was obliged to approach the court in order to enforce the lease agreements in the face of the respondents' repudiation of its terms (based on an alleged breach of the requirements of s 75(5)(e), (g) and (7)).

14. In addition the respondent contends that the lease agreements are invalid because van Breda also breached the terms of s 75(5)(a) and (b), which provide that a director who has a personal financial interest or knows that a related person has a personal financial interest in the transaction,

> *(a) must disclose the interest and its general nature before the matter is considered at the meeting;*
>
> *(b) must disclose to the meeting any material information relating to the matter, and known to the director;*

However, van Breda disputes that he failed to make these disclosures to the respondent, which in the present context it correctly understands to be a disclosure

which was required to be made to at least Muncer, the only other director of the respondent at the time.

15. Numerous issues have been raised by both parties. However many fall away in light of certain key issues which appear to be determinative of the case. The key issues are:

    a. Whether van Breda had a direct personal financial interest in the transaction, or knew that a related person had such an interest;

    b. What disclosures was van Breda required to make?

    c. Whether there is a dispute of fact which cannot be resolved on paper in regard to whether the required disclosures were in fact made.

    d. whether the respondent was prejudiced or potentially prejudiced, by any failure on the part of van Breda to make the necessary disclosures, and if so whether the consequences of such prejudice are relevant

       The reason the court considers this to be a sufficiently significant aspect to require separate treatment, in the circumstances of the case, will be explained later.

    e. The considerations which should be taken into account, having regard to the facts of the case, in order to determine whether or not the court should

exercise its discretion in granting the relief sought under s 75(8) and whether it should do so.

This will include whether a party is obliged to make a proper disclosure of all relevant information to enable a court to properly exercise its discretionary power to grant relief in appropriate cases.

16. In order to appreciate why these are the only issues which require consideration in the present case it will be useful to identify the relevant facts which are not in dispute.

In doing so the court stresses that it is the unique circumstances of each case which may be determinative of the facts which must be placed before the court and the considerations which require analysis and resolution by the court. No one size fits all.

UNDISPUTED FACTS

The facts set out in this section are common cause or not in dispute.

17. Initially a Mr Panaino and Mr Joseph were the joint beneficial owners of; both;

    a. a company which conducted the business of manufacturing hydraulic tailifts.

    This company was initially registered as Skyjack Tailifts (Pty) Ltd (*Skyjack)*

As appears later, this business and its assets were ultimately transferred into the hands of the respondent

b. another company which owned the property from which that business was being conducted at the time.

The property owning company was initially registered as 2013/089896/07 (South Africa) (Pty) Ltd. The applicant refers in its papers to this company as "*SA744*"

18. Subsequently, a consortium of six investors registered a company named Sky Investment Holdings (Pty) Ltd (*Sky Holdings)* to acquire Panaino and Joseph's entire interest in the property as well as the tailift business. [5]

The investors included van Breda through one or more of his entities.
It also included Micron Investment Holdings (Pty) Ltd (*MIH)* which acquired a 51% shareholding in Sky Holdings.

19. The property which had been owned by SA744 was acquired by Micron Engineering (Pty) Ltd (*Micron)* which was a subsidiary of MIH.

The founding affidavit reveals that Micron was a wholly owned subsidiary of MIH but it does not identify who the beneficial shareholders of MIH were at the time. The

[5] Sky Investments changed its name to Lift SA (Pty) in February 2019. The parties however continued to refer to it in the papers as Sky Investments.

SAFLII

indications are that it may have included one or more of the other shareholders in Sky Holdings with or without an outside funder holding shares as security. I believe that this should have been covered in the papers since the real issue concerns whether or not the structuring of funding for the acquisition of the property in which the respondent conducted its manufacturing operations should have been disclosed to Muncer so as to enable the respondent to consider whether it should acquire the property itself or through a special purpose vehicle. The applicant acknowledged in its founding affidavit that such an acquisition by the respondent was a corporate opportunity but simply submitted that it would not have obtained funding from its commercial bank.

This obfuscates the point that the availability of mezzanine funding and its structuring to enable the acquisition of the property either was or was not a corporate opportunity and if it was, whether the failure to disclose its details to Muncer falls within the s 75(3) net. It also assumes that a failure to make a necessary disclosure is justified if the director concerned believed that the company cannot take it up, rather than to leave it to the neutral directors to make that determination once apprised of all the relevant details.

20. The only evidence placed before the court as to the factors which resulted in Sky Holdings not being established as the holding company for both Skyjack (the tailift manufacturing company which was later consolidated into the respondent) and SA744 (the property owning company), was that Panaino and Joseph had bound themselves to personal suretyships in order to fund the purchase of the property by SA744. The intercession of Micron enabled their release from these suretyships.

21. These transactions occurred in about 2014. It is necessary to stress that at the time the property came to be owned by Micron, the business continued to be owned by Skyjack, albeit that its beneficial shareholders were the six investors through Sky Holdings. It is also significant that the overwhelming majority shareholder in Sky Holdings, MIH with its 51% interest, was also the beneficial owner of the property through its shareholding in Micron and that Skyjack and Micron shared the same managing director at the time the first five year lease for the premises was concluded between them. [6]

22. Skyjack's only business competitor was Ratcliff Tailifts. It was owned by Motrade 405 (Pty) Ltd.

    Muncer was the sole beneficial shareholder of that company.

23. In 2015 Sky Holdings acquired Muncer's entire shareholding in Micron in consideration for which he received a 10% shareholding in Sky Holdings. It will be recalled that Sky Holdings was the holding company of Skyjack.

    Pursuant to this acquisition and as a consequence of certain other structured transactions MIH's shareholding in Sky Holdings was diluted to 35% while van Breda's interest through VBCF remained at 15% and Muncer continued to hold his 10%.

---

[6] Founding Affidavit para 20 read with para 18

SAFLII

24. The respondent was then incorporated for the purpose of consolidating the hydraulic tailift manufacturing businesses of Skyjack and Motrade into one enterprise. From the date of its registration on 2 June 2015 the only directors of the respondent were van Breda and Muncer.

25. Of importance is that Motrade only represented 10% of the value of the Sky Holdings business (if regard is had to Muncer's pay-out for his interest in it) while 90% of Sky Holding's value remained attributable to Skyjack (i.e. the original business acquired together with the property by the investors of Sky Holdings and SA722).

The founding affidavit is silent as to how Skyjack and Motrade were consolidated into the respondent. Van Breda says only that the intention to transfer the businesses out of the respective companies into the respondent could not take place initially, *inter alia*, because of existing overdraft facilities which each enjoyed in its own name and the trademark and patents each held separately. [7]

Without clarity (which ought to have been provided by the applicant), it appears that until these difficulties were resolved Skyjack and Motrade continued to own their respective tailift manufacturing businesses.

It is however evident that at the time relevant for the purposes of the case, both parties accept that the businesses had been transferred into the respondent.

---

[7] Founding Affidavit para 29

26. In anticipation of the consolidation which was devised and overseen by van Breda, *Micron* (as the owner of the property from which the businesses were operating) then concluded a lease agreement with the Respondent.

This was on 22 September 2015.

In terms of the agreement;

a. The lease was for a period of five calendar years commencing from August 2015 and terminable on 30 days written notice;

b. Monthly rental was R140 000 ex VAT;

c. The property would be used to conduct the respondent's business;

The lease was signed by van Breda on behalf of the respondent.

27. In October 2015 MIH wished to sell its entire 35% shareholding in Sky Holdings and dispose of its interest in the property leased by the respondent which it held through Micron.

The disposal of MIH's interest in the business (via Sky Holdings) which coincided with its disposal of the property reveals the way in which the interest in the business continued to be umbilically linked to the property.

SAFLII

28. SkyPark Capital (see footnote 1) was incorporated on 8 April 2016 and van Breda was appointed as one of its directors.

    Muncer admits that sometime in 2017 and after having pledged his shares and signed an agreement in terms of which he subordinated his claims against Sky Holdings so that a loan of R17 million could be obtained to enable the exit of the other shareholders from Sky Holdings. He claims that later in 2017 he understood from van Breda that the lease which the respondent had with Micron would be taken over by a new lessor, not that any *new* lease would be needed or that the applicant would acquire an equity stake in the property from which the business was conducted or that SkyPark Capital "*would sit behind*" the applicant.[8]

29. From this point onwards in the chronology there are material disputes as to whether the main agreement was signed on the date alleged by the applicant, whether Muncer was even aware of the existence of the main agreement at any relevant time, and whether he was told about the beneficial shareholdings that van Breda held in SkyPark Capital or in the other related entities.

30. There are however some material concessions made by the applicant.

31. The first series of concessions made by the applicant are that;

---

[8] Answering Affidavit paras 28 to 38

a. no formal board meeting was called in terms of s 73 read with s 75 (5) for the purpose of considering the conclusion of either the main lease, its subsequent addendum or "*for Van Breda to make any statutorily required disclosures.*"[9]

b. the provisions of s 75 (5) were not complied and there was no subsequent ratification in terms of s 75 (7) (b) (i). [10]

c. Muncer did not sign any board resolution regarding the conclusion of the main lease agreement nor did he sign it as a witness.

d. on the same date as the applicant purportedly concluded the main lease with the respondent (i.e. 22 May 2017) van Breda had signed a written resolution passed by the shareholders of Sky Holdings recording that its wholly owned subsidiary, being the respondent, intended to conclude a lease in respect of the property with SkyPark Capital as lessor- not with the applicant. In fact no document other than the alleged main agreement made mention of the applicant as the lessor or owner of the property at that time.[11]

32. Secondly, it cannot be gainsaid that factually, and irrespective of Muncer's knowledge;

---

[9] Applicant's Heads of Argument para 33.7 and Founding Affidavit, para 58.
[10] See also Applicant's Heads of Argument para 32 and Founding Affidavit para 175.2
[11] Annexure FA7 to the Founding Affidavit. At that stage (i.e. on 22 May 2017) Sky Holdings' only shareholders were claimed to be Simat Management Services (Pty) Ltd and VBCF – see shareholders' signatures to p2 of Annexure FA7. Singularly absent are the signatures of the other shareholders in Sky Holdings, namely Muncer and Alistair Meyer who each allegedly held a 10% stake (see paras 45 and 64 of the Founding Affidavit). See also Founding affidavit at para 66.1

a. the property was acquired by way of a sale of the asset out of Micron to the applicant;

b. the applicant's shareholders at the time were SkyPark Capital and the Pocot Trust; [12]

c. van Breda and Glass were directors of both the applicant and SkyPark Capital ,

33. Furthermore, van Breda does not contend that Muncer was given the sale agreement concluded between Micron and the applicant, let alone any of the agreements relating to the mezzanine financing procured by van Breda and Richard Glass or those relating to the Pocot Trust which resulted in the Pocot Trust acquiring a 50% shareholding in the applicant.

The applicant claims, through van Breda, that at that time Glass had been appointed as an agent by the respondent to secure tenancy for it. Under ordinary rules of the fiduciary duty owed by an agent to its principal, Glass had a duty to disclose to the respondent (in the persons of both Muncer and Meyer) the circumstances under which he was able to take a benefit out of the mezzanine funding rather than enable the respondent to itself secure the benefits of tenancy through the available option of acquiring ownership of the property itself or through a special purpose vehicle as he and van Breda were doing.[13]

---

[12] Both Sky Park Capital and the applicant were incorporated on the same date- 8 April 2016. Founding affidavit paras 39 and 41

[13] Founding Affidavit at para 36. See *Transvaal Cold Storage Company Ltd v Palmer* 1904 TS 4 at pp 20 and 33 and *David Trust v Anglo Insurance Co Ltd* 2000(3) SA 289 (A)

34. A facet which only revealed itself after several re-readings of the applicant's papers is that the scheme devised by van Breda could have been a simple buy out of shareholders' interests[14]. But van Breda claims that he structured the transaction so that they acquired all MIH's shares in only Sky Holdings while. It is strange that Micron did not continue to hold the property since the new investors could simply replace the MIH shareholders in the holding company of Micron. The reason why the property was taken out of Micron and put into the applicant is not explained.

35. Bearing in mind that the sale agreement for the property was concluded in November 2016 there are three indisputable features which strike one

Firstly: Although van Breda stated in his affidavit that the applicant purchased the *"letting enterprise"* of Micron and the agreement itself is so headed, there was only one property and one lease involved; namely the property on which the respondent's business was being conducted and the lease concluded in September 2015 between Micron and the respondent[15]. Aside from this observation nothing else turns on the wording as it may have been selected so that the transaction would not be regarding for tax as part of a business of buying and selling properties.

Secondly: In relation to appreciating whether any commercial rationale existed for the respondent to conclude a lease with the applicant when the existing lease with Micron

---

[14] Founding Affidavit para 35. It is evident from this paragraph that MIH wanted to dispose of all its interests in both the property owning company (Micron) and the manufacturing business. The way it is phrased suggests only that MIH wanted to exit Sky Holdings and have Micron sell the property. However as appears earlier, MIH was the sole shareholder in Micron.

[15] Founding Affidavit, annexure FA5 clauses 1.2.13 and 1.2.18.

still had over three years to run, the following provisions of the agreement between Micron and the applicant are significant;

a. clauses 1.2.16 ("*possession date*"), 1.2.29 ("*transfer date*") read with clauses 3 and 8 provide that the purchase price in its entirety (R13.5 million) is to be paid against transfer and that possession is only to take place on transfer;

b. clause 17 provides that with effect from the date of possession (i.e. when transfer takes place) Micron will cede to the applicant all its rights, title and interest in and to the lease it has with the respondent

In other words, the applicant would simply take over the lease Micron had with the respondent. There is nothing to suggest that at that time there would be any delay in providing the guarantees or in effecting transfer

Thirdly: Clause 18 contains a confidentiality clause, the terms of which are disconcerting bearing in mind the interest the respondent had in the property and the dispute between van Breda and Muncer as to the nature of the disclosures, if any, which van Breda alleged he had made to the respondent.

The salient provisions in clause 18 read:

"Confidentiality and Press Release

18.1 The parties shall keep the fact of the conclusion and details of the terms and conditions of this Agreement in the strictest confidence and shall not

divulge the same to any third party save to the extent that the parties may be required to do so at law and/or to give effect to the implementation of the terms of this agreement"

(emphasis added)

36. The final set of material concessions commences with the statement by van Breda that he wished to *"find a landlord that would be amenable to invest in the property to enable the further growth of the Respondent"* [16].

This admission reveals van Breda's own appreciation of the fact that the property remained a necessary adjunct to the business conducted by the respondent.

The admission is relevant in determining whether the acquisition of the property by the respondent through mezzanine financing was a corporate opportunity or whether, as the applicant blandly alleges in its founding affidavit, *"there was no possibility of the Respondent purchasing the property".*

Moreover the conclusion reached by van Breda is based solely on the allegation he makes that *"the Respondent's commercial bank was not willing to grant funding for the purpose of property acquisition to a newly incorporated owner-occupier entity".*[17]

This statement is relevant for two reasons;

---

[16] Founding Affidavit para 37
[17] Founding Affidavit para 37

a. It constitutes an admission that van Breda was aware of the symbiotic relationship that factually existed between ownership of the property and the business of the respondent as well as the obvious advantage which the respondent could obtain if a transaction was be structured whereby it could control the property either directly or indirectly through a special purpose vehicle (as van Breda concedes he did in the establishment of Simat Management Services (Pty) Ltd (*Simat*);[18]

b. It demonstrates that van Breda has sought to skirt the issue. The issue is not whether a commercial bank would grant funding. It is why he did not disclose to the respondent, in the person of Muncer, that mezzanine financing was being sought by him and Glass or was being made available and the structure which could facilitate it for the benefit of the respondent without having to approach a commercial bank.

37. Furthermore it is apparent from Van Breda's own affidavit that he did not disclose the nature of the proposals and financial structuring pursuant to which he and Glass together concluded the initial deal to acquire a 100% interest in Micron or, equally significantly, he did not approach Muncer when, by his own admission, the initial sale agreement would have fallen through when an investor had withdrawn and he and Glass were the only ones remaining with little or no investment capital of their own[19].

---

[18] Founding Affidavit at para 45. Simat was the special purpose vehicle which acquired inter alia MIH's entire shareholding in Sky Holdings. Simat did not however acquire MIH's 100% shareholding in Micron, although Micron's only underlying asset as disclosed by the applicant was the property.

[19] Founding Affidavit para 37 where van Breda states that: "*I was not in a financial position to purchase the property from Micron because I was, at that time, in the process of acquiring the original investor's shares in Sky Investment*"

This then required a new funder to be found on other terms.

38. These aspects become relevant when considering whether the need to write up a lease in the name of the applicant as lessor for a period of 10 years (and in terms of the later addendum to commence from the date when transfer of the property was to take place) had more to do with the terms of the mezzanine finance, and presumably the new investor (the Pocot Trust), as well so as to enable van Breda and Glass to acquire the property from Micron, than serving the respondent's interests concerning the property, the corporate opportunity MIH's divestment presented to the respondent and the use made by van Breda (and for that matter Glass) of the respondent's corporate information.[20]

39. It therefore follows that if s 75(5) is concerned with the fiduciary duty of a director to disclose the details of a corporate opportunity to all the neutral directors and if the availability of mezzanine funding was a corporate opportunity (which I will travers later) then, on the papers before the court there is both an admission that mezzanine finance was available and that there was a failure to disclose material facts about the opportunity sufficient to enable the neutral director to make an informed decision to take up this opportunity for the respondent or reject it.[21]

---

[20] Van Breda claims that the addendum was necessitated by Micron misplacing the approved building plans and failing to obtain certificates of compliance. Founding affidavit para 82

[21] See s 75(5)(b). I would suggest that in practical terms this means the full disclosure of all pertinent facts about the opportunity which is known to the director.
In *Trinity Asset Management (Pty) Ltd And Others v Investec Bank Ltd and Others,* 2009 (4) SA 89 (SCA). Farlam JA at para 32 applied the test set out in *Garvie v Axmith* [1962] OR 65 (31 DLR (2d) 65 where in relation to a shareholders notice the Ontario High Court said that: *'the notice to shareholders must contain such particulars as will permit them to exercise an intelligent judgment upon the proposition'*

In *Kerrigan v Unity Savings Association* 317 N.E. 2d 39 (Ill. 1974) at 43 the Illinois Supreme Court held that the:

"corporation or association must be given an opportunity to decide, upon a full disclosure of

This would then leave outstanding only three questions, all of which are ultimately resoluble as matters of law. They are:

a. whether the provisions of s 75 (5) imposed a fiduciary duty on van Breda to disclose to Muncer the structuring of the finance that was available for the acquisition of the property, which would have included the availability of mezzanine financing, so as to enable the respondent to consider acquiring the property whether directly or through the intercession of an entity in which it had a significant interest. This covers the corporate opportunity aspect;

b. whether an offending director can claim that the company was not able to exploit the opportunity. This is referred to in some other jurisdictions as a defence of corporate incapacity"[22];

c. irrespective of the answer to (b) whether the court should exercise its discretion in favour of validating the lease agreements under s 75(8).

40. It is however best to start with an overview of s75(3) and its related provisions

---

pertinent facts whether it wishes to enter a business that is reasonably incident to its present or prospective operations".

While there is criticism of the line of business test adopted, even if it did not apply to small private corporations, Prof Robert C Clark *Corporate Law* (1986) at para 7.5.1 suggests that in the case of "close corporations" (the corollary of a public corporation) two of his proposed guidelines fit in well with our own underlying concepts of a duty to disclose as expressed in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1923 AD 155 and our law which has applied *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 in relation to corporate opportunity . They are:

"(1) If the disputed opportunity is functionally related to the corporation's business, then, whether or not it is necessary or of special value, the individual participants may not take it.

(2) If the corporation has an interest or expectancy in the opportunity, the individual participants may not take it."

[22] See Prof Robert C Clark *Corporate Law* (1986) at para 7.5.2

OVERVIEW OF SECTION 75(3) AND RELATED PROVISIONS

41. The following provisions of s 75 are relevant to the issues before the court:

75. Director's personal financial interests. —

(1) In this section—

(a) ....

(b) "related person", when used in reference to a director, has the meaning set out in section 1, but also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is a member.

(3) If a person is the only director of a company, but does not hold all of the beneficial interests of all of the issued securities of the company, that person may not—

(a) approve or enter into any agreement in which the person or a related person has a personal financial interest; or

(b) as a director, determine any other matter in which the person or a related person has a personal financial interest,

unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.

(4) At any time, a director may disclose any personal financial interest in advance, by delivering to the board, or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.

(5) If a director of a company, other than a company contemplated in subsection (2) (b) or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director—

(a) must disclose the interest and its general nature before the matter is considered at the meeting;

(b) must disclose to the meeting any material information relating to the matter, and known to the director;

(c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;

(d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c);

(e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c);

(f) while absent from the meeting in terms of this subsection—

(i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and

(ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and

(g) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.

(6) If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.

(7) A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to the director, only if—

(a) it was approved following disclosure of that interest in the manner contemplated in this section; or

(b) despite having been approved without disclosure of that interest, it—

(i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or

(ii) has been declared to be valid by a court in terms of subsection (8). [Sub-s. (7) substituted by s. 48 (b) of Act No. 3 of 2011.]

(8) A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board, or shareholders as the case may be, despite the failure of the director to satisfy the disclosure requirements of this section.

42. One of the legal issues raised by the applicant is whether a director only has to disclose a *direct* personal financial interest that he or she may have in the transaction or a *direct* personal financial interest that the director knows a related person has in that transaction.

The applicant contends that an indirect financial interest is insufficient to attract an obligation to make a disclosure under s 75(5)

A consequential legal issue raised by the applicant is that a related person in the context of the present case is limited to a company in which the director is also a director.

43. These two arguments require a consideration not only of certain other specific sections of the Act which are immediately relevant but also the mischief which the legislature sought to address.

44. The first provision of relevance is the section 1 definition of "*related*".

This arises because s 75((1) itself extends the meaning of a related person beyond that provided for in s 1 as read with ss 2 (1) (a) to (c)

Section 1 defines *"related":*

"when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2 (1) (a) to (c)"

Sections 2(1)(a) to (c) provide:

"2. Related and inter-related persons, and control. — (1) For all purposes of this Act—

(a) an individual is related to another individual if they—

(i) are married, or live together in a relationship similar to a marriage; or

(ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;

(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and

(c) a juristic person is related to another juristic person if—

(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);

(ii) either is a subsidiary of the other; or

(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).

(emphasis added)

In order to determine whether a person controls a juristic person or its business regard must be had to subsection (2) of s 2.

Section 2(2) provides that:

(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if—

(a) in the case of a juristic person that is a company—

(i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3 (1) (a); or

(ii) that first person together with any related or inter-related person, is—

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(bb) *has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;*

(b) *in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation;*

(c) *in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or*

(d) *that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c)*

(emphasis added)

The reference in s 2 (2)(a)(ii) to an *"inter-related person"*:

"when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships such that two of the persons are related in a manner contemplated in section 2(1), and one of them is related to the third in any such manner, and so forth in an unbroken series"

This is in terms of the definition of *"inter-related"* which is to found in s 1.

45. Henochsberg points out that individuals and juristic persons are related, and juristic persons are related to juristic persons, if there is control or either juristic person is a subsidiary of the other juristic person and concludes that the *"possible applications are almost endless"*.

The possible applications are further extended by s 2(2)(d) which adds that control will also arise *"if a person has the ability to materially influence the policy of the juristic*

person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to above"[23]

46. In the present case van Breda, as a director of the respondent, had a personal financial interest in the main agreement and the addendum because he was both a director of the applicant and a person who controlled both it, the intermediate, penultimate and ultimate beneficial owners of shares in the applicant by reason of the extended meaning given to the term "*control*" in s 2(2) (c) and (d). The reason is that:

    a. SkyPark Capital together with the Pocot Trust are equal shareholders in the applicant;

    b. Navix together with Glasshouse are equal shareholders in SkyPark Capital;

    c. VBCF is a 100% shareholder in Navix

    d. The Van Breda Family Trust is a 100% shareholder in VBCF,

    and van Breda makes no bones about materially influencing the policy of each of these entities in the manner envisaged by s 2(2)(d).

47. The next provision relevant to understanding the scope of s 75(5) is the s 1 definition of the term "*personal financial interest*".:

    "personal financial interest", when used with respect to any person—

    (a) means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed; but

    (b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002), unless that person has direct control over the investment decisions of that fund or investment;

---

[23] Henochsberg on the Companies Act 71 of 2008, s 2

48. There is a view that by only allowing for a *"direct"* financial interest the legislature has limited the applicability of the common law by excluding from the purview of s 75(3) a director who has only an indirect interest in the transaction. However Davis J in *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another* 2015 (6) SA 338 (WCC) held that the common law has not been excluded in relation to determining whether a director is obliged to make a disclosure. I will return to this later.

49. Three of the terms contained in the definition of personal financial interest require further consideration. They are "*direct*", "*material*" and "*interest ... of a(n) economic nature*".

50. The word "*direct*" cannot be taken out of the context of the definition as read with s 75. It must therefore include the obligation to make a disclosure if the transaction under consideration involves a related person (as defined) which itself has a personal financial interest (which by definition requires the interest to be a direct and material one).

In other words, the old phraseology used for instance in s 234 of the old Companies Act, which dealt with the duty of a director to disclose an interest in a contract, brought within its purview "*a director ... who is in any way, whether directly or indirectly, materially interested in a contract ....* (to) *... declare his interest ...* ".

It is evident that under the old Act there was a need to include an indirect interest because the framework of the section did not itself include a related person or provide an extended meaning to "*control*".

The introduction of these concepts within the context of s 75 of the present Act, which includes knowledge by the offending director of the interest which a related party has in the transaction or proposed transaction, adequately describes the extent of the "*indirect*" financial interest which the old Companies Act envisaged.

It is therefore not helpful to observe that provisions dealing with this topic in the company legislation of other jurisdictions retain the terminology "" *directly or indirectly*" when describing the interest which a director has in a transaction, or one proposed, that will trigger a requirement to disclose. [24]

It may well be that the term "*direct*" is to be interpreted by reference to the exclusion from the definition of "*personal financial interest*" of any interest held in a unit trust or collective investment scheme, This would be a strong indication that a director's shareholding in another company which has an interest in the transaction under consideration will amount to a " *direct*" personal financial interest requiring the director to make the required disclosures and exclude himself or herself from taking part in the deliberations as required under s 75(5).

It also provides a strong indication that where the director knows that a company is related to another company by reason of directly or indirectly controlling it, as provided for in ss 2(1)(a) to (c), then if the controlling company has a financial interest in the transaction, the director will be subject to the prescripts of s 75(5). Indeed this is the only way to make sense of the reference to "*direct*" in s 75(3) yet harmonise it, as one must, with the continual reference to "*directly or indirectly controls*" in the context of the definition of a related person, let alone an inter-related person.

It is unnecessary for present purposes to go any further than to find that a shareholding in a company which has a financial interest in a transaction meets the requirement for holding a direct financial interest if such shareholding is held by the director concerned or the director knows that a related person has a shareholding in a company which has a financial interest in the transaction. Earlier I indicated the shareholding structure between each of the inter-related parties in which van Breda was a director and in particular of the applicant, Navix, VBCF, Sky Holdings and Simat, which van Breda states was the special purpose vehicle used for funding purposes in relation to acquiring the MIH shareholding and presumably the property now owned by the applicant. [25]

---

[24] See United Kingdom's Companies Act of 2006 (ss 177(1) and 182(1))
[25] Founding Affidavit para 45

In the present case van Breda admits that he was responsible for the creation of the structures including the respondent, SkyPark Capital, Navix, VBCF and was a director of each, which *a fortiori* imputes that these related parties possessed through him, the requisite knowledge contemplated by s 75(3). The provisions of ss 2(2)(a)(i) or (ii) and (d) read together with the definition of an "*inter-related person*" in s 1 are of application.

Insofar as the ultimate beneficial shareholder of VBCF is concerned, which is the vanBreda Family Trust, an application of the s 1 definition of an "*inter-related*" read with s 2(2)(c) and with or without the provisions of s 2(2)(d) establish the necessary connection for the purposes of s 75(3). I believe a convenient shorthand in relation to *inter-vivos* trusts is to ask if the individual concerned has control over the assets in the Trust, either in the form of deciding who the beneficiaries are or how its assets are to be dealt with or distributed and whether overtly or through side letters.

Once again van Breda would fall within the s 75(3) net via the vanBreda Family Trust.

51. The word "*material*" is defined in s 1 as follows:

> *'material', when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is*
>
> *(a) of consequence in determining the matter; or*
>
> *(b) might reasonably affect a person's judgement or decision-making in the matter;*

It therefore bears an extended meaning.

52. The term "*interest of an economic nature*" is to be contrasted with a purely pecuniary interest and includes one that can be turned to economic value. It expressly includes an economic interest or an interest to which a monetary value can be attributed.

In Mthimunye-*Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another* 2015 (6) SA 338 (WCC) Davis J referred to the broader scope of the statutory definition.

An Australian case which came before its court of first instance defined the term broadly. However it is a lengthy judgment (over 2500 pages) which was overturned in part on appeal, although the majority upheld the High Court findings on breach of fuduciary duty. I mention it because this is the only case I could find which applied the meaning to be ascribed to the term in the context of a refinancing scheme. [26]

53. The mischief which s 75(3) sought to deal with is clear. A director is obliged to make disclosure where he is conflicted. Whereas a failure to make proper disclosure rendered the offending transaction voidable under common law[27], s 75(3) makes it *ipso facto* void unless a court exercising its discretion declares the transaction valid.

54. The legislature would have been astute to realise that interposing a single juristic person or a multiplicity of them between the conflicted director and the entity in which he has a personal financial interest in a transaction affecting the company would be a simple stratagem to evade the mischief which the legislature sought to address.

It is for this reason that the provisions dealing with related persons (and by legislative extension inter-related persons), the control of a juristic person for purposes of determining who is a related person or inter-related person as well as the broad definition of "*personal financial interest*" must be interpreted with reference to the underlying common law principles relating to the fiduciary duty owed by a director to the company. It is evident that the legislature did not intend to curtail the common law but rather to give it teeth because of the opprobrium which it considered such conduct should attract.

This is particularly so when regard is had to the heightened interest the Companies Act displays in the relationship between shareholders and the management of a

---

[26] The Bell Group (in liq) v Westpac Banking Corporation (no 9) (2008) 70 ACSR1; Wespac Banking Corporation v Bell Group Limited (in liq) (no 3) (2012) 89 ACSR

[27] E.g. *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* (2020) ZASCA 17 at para 16.

company through its board of directors[27], and in certain sections other persons in management (see ss 76(1) and 77(1)). The heading to the Chapter in which section s75 is contained is unambiguously titled "Governance *of Companies*"

55. Perhaps a final observation when comparing s 75 with other provisions dealing with the relationship between the shareholders and management of a company is that Section 75 deals exclusively with a conflicted director whereas s 76 deals more broadly with the standard of conduct required of a director and certain other levels of management.

Moreover s 76 covers not only instances of conflict of interest (such as those enumerated in s76(1)(a) and (b)) but also the duty of care and diligence as covered in s 76(3) and (4).

Section 77 again applies not only to directors but extends to certain other office bearers. It covers liability for breach of fiduciary duty (subsection (2)(a), negligence (subsection (2)(b)) and fraud or a failure to comply with certain statutory protective measures for the benefit of investors and creditors among others (subsections (3) and (4)).

The fact that s 75(3) is limited to directors whereas ss 76 and 77 includes in their net other members of management including eth prescribed officer (in the case of s 77) indicates that an interpretation of s 75 cannot be unduly restricted by the instances enumerated in ss 76 and 77 which may cover situations of conflict of interest. Clearly the conduct expected of directors is more exacting than that for other members of management and one expects the provisions of ss 76 and 77 to be less extensive precisely because they also cover the conduct of management who are not directors.

56. I am therefore reluctant to accede to *Henochsberg's* view that s 75 must be informed by and perhaps limited to the breaches of fiduciary duty enumerated in s 76 with the common law filling in the gaps. I am uncomfortable to do so for another reason- the common law went only as far as to declare the transaction voidable at the instance

---

[27] Expressed *inter alia* in the safe harbour defence provided by ss 75(3) and 75(7)

of the aggrieved company. Section 75 effectively penalises a breach of its provisions by nullifying the transaction unless the conflicted director can convince a court to uphold the contract in the exercise of its discretionary powers.[28]

DOES S 75(3) IMPOSE A FIDUCIARY DUTY NOT TO MISAPPROPRIATE A CORPORATE OPPORTUNITY

57. The next legal question which arises is whether s 75 covers a duty on the part of a director to disclose the existence of a corporate opportunity.

Henochsberg at p 292(5) raises the possibility that s 75 does not expressly include all situations where the director has a conflict of interest. The authors have regard to the complimentary provisions of s 76 (2) which they contend do not expressly include the secret profit rule, the duty not to compete with the company or the duty not to misappropriate corporate opportunities. If that is the case, then it may be contended that a failure to disclose information regarding a breach of these duties by the director is not intended to be visited with invalidity under ss 75(3) or 75(5).

58. I am however satisfied that this is not so for the reasons set out in the following paragraphs:

59. As indicated earlier; while ss 76 includes breaches of a fiduciary duty it's provisions are directed not only at directors but also at those who the law has not previously treated as subject to the identical set of fiduciary duties to which directors are subject.

---

[28] It is not a penalty in the strict sense; just as any contractual remedy which enables a party to set aside a contract is not a penal provision. They are civil remedies which are considered appropriate to restore the status quo ante. This civil law remedy has been extended to cover the breach of a fiduciary duty by a director in the circumstances covered by s 75(3) and (5). It also be considered from the perspective of a shift of onus provided the requirements are met while the company itself elects to enforce it (i.e. not render it void) by acting in accordance with ss 75(7) or in terms of the proviso to s 75(3)- the distinction in application between the contract being voidable at the instance of the company under common law or being void if the company does not ratify (or approve) it under these subsections would be more of form; the effect would remain the same save for the incidence of onus.

In my view s 76(2) either independently or with reference to ss76(3) and (4) as well as ss 77(2) and (3) cover conflict of interest situations, which is a *specie* of the fiduciary duty obligations owed by a director.

Section 76 (2)(a) is concerned with the misuse of confidential corporate information which is aa asset of the company, not of a director or shareholder. This is also one of the underlying rationale in respect of attaching liability for insider trading. The section is explicit.

Section 76 is headed "*Standards of directors conduct*" and ss 76(2) and (3) provide that:

"(2) A director of a company must-

(a) not use the position of director, or any information obtained while acting in the capacity of a director-

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company; and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director-

(i) reasonably believes that the information is-

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

60. Section 76(2)(b) adequately covers situations where information comes to the knowledge of a director or certain identified members of management who have a duty to impart that information provided it is material to the company and is not in the public domain (see the qualifiers).

Such information by definition would include information about a corporate opportunity. The difference between the way s 75(3) and s 76(3) handle the non-disclosure of material information is that in the case of s 75(3) it is elevated to a conflict of interest by a director resulting in the voiding of a transaction if the director has a financial interest in it (or knows that a related party has such an interest) whereas s 76 imposes a duty to disclose which, even though it may amount to a conflict of interest for purposes of s 75, also constitutes a failure to disclose a corporate opportunity thereby rendering the director or member of management civilly liable under s 77(2) and to the extent not covered for damages under s 218 (2). It is to be noted that s 218(3) preserves the common law remedies such as the disgorgement of secret profits

61. Section 76(3)(b) read with s 76(4)(2)(a)(ii)(aa) appears to deal directly with a breach of the corporate opportunity rule.[29]

---

[29] S 76 (3):

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director¬

(a) ...

(b) in the best interests of the company;

62. Section 77(2) pertinently deals with a failure to disclose under s 75 as the breach of a fiduciary duty.

The provision reads:

> *(2) A director of a company may be held liable*
> *(a) in accordance with the principles of the common law rel ating to breach of a fiduciary duty, for any loss, damages o r costs sustained*
> *by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) (a) or (b);*

63. If s76(2) does not cover these situations then s 75(5) (and s 75(3)) do not exclude a common law fiduciary duty not to misappropriate a corporate opportunity.[30]

Section 76(4):

> *(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company-*
>
> *(a) will have satisfied the obligations of subsection (3) (b) and (c) if-*
> *(i) the director has taken reasonably diligent steps to become informed about the matter;*
> *(ii) either-*
> *(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or*
> *(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and*
> *(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company;*

[30] The question may however arise whether the shift of onus (and possibly the statutory voiding of the offending transaction- see ftn 27 supra) affects the obligation to approach a court under s 75(8).

DOES S 75(5) INCLUDE FAILING TO DISCLOSE A CORPORATE OPPORTUNITY

64. Company law recognises two broad categories of director's duties.[31]

The one is the fiduciary duty he or she owes to the company. [32]

The other is the duty of care and skill (sometimes referred to as care, skill and diligence).[33]

65. The fiduciary duties of directors under the common law are well understood and are *sui generis.* [34]

66. A director has a fiduciary duty to prevent a conflict of interest arising between his or her own interests and that of the company's. Conflict of interest is an umbrella term which includes a duty to disclose any interest in a contract with the company, a duty to account for secret profits, a duty not to improperly compete with the company and most importantly for present purposes a duty not to misappropriate corporate opportunities. [35]

67. This is all part of the common law pertaining to corporations. It has always been recognised that company law legislation can never be a complete codification of the common law of corporations. On the contrary company law legislation is dependent on the survival of common law concepts applicable to corporations.

---

[31] . Cilliers and Benade *Corporate Law* (3rd ed) paras 10.08

[32] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1923 AD 155 at 159 which dealt with misappropriating a corporate opportunity. See also the well-known corporate law case of *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 which was expressly applied and adopted in *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) at para 31. See also *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) at para 18 to which I will return

[33] *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) at 165. See generally *Corporate Law* (3rd ed) paras 10.31

[34] *Robinson* at 177 and 199

[35] See Bellairs v Hodnett 1978 (1) SA 1109 (A) at 1126-1132. See also Robinson at 168, 179-180 and 200 and Da Silva at paras 18 to 20 *Corporate Law* at para 10.14 to 10.29; *Henochsberg on the Companies Act* 61 of 1973(4th ed 1985) (vol1) p 391-393 (on s 248); Henochsberg *on the Companies Act 2008* at p 292(5) (on s 76)

68. As with all Companies Acts which preceded it, the present Act is not "*a code of company law as a whole*". [36]

The rich history of corporate law which developed under the common law remains the bedrock (albeit a continually evolving one) and, as with all legislation, the Act Is not presumed to alter the common law unless done so expressly or by necessary implication. Of course the Act has introduced significant new concepts into company law, not the least of which is to have regard to the interests of employees, to further constitutional values, to afford companies which encounter economic hardship an opportunity in appropriate circumstances to recover under a business rescue procedure, and, of relevance to the present case,, dealing more incisively with the consequences of a failure to respect the nature of the relationship between management on the one hand and the shareholders and the interests of the company on the other.

Nonetheless company law remains a fusion of Statute law and common law principles, with the former taking precedence in case of conflict.

69. The duties of directors in the context of the governance of companies are to be found in ss 75, 76 and 77. [37]

These sections address the same concerns, albeit framed from the perspective of either fiduciary duty or the duty to exercise skill and care, even if expressed in various fashions. Some express underlying concepts such as the proprietary right or interest which may attach to the corporation itself to the exclusion of any individual director.

70. Returning to the relationship between the Act and the common law, Davis J put it this way in *Mthimunye-Bakoro*:

---

[36] Cilliers & Benade *Corporate Law* 3rd ed para 2.03 in describing the application of the previous Companies Act of 1973 and the common law.

[37] These sections fall under Part F of the Act, which is headed *"Governance of Companies".* Not unrelated conceptually is the concerns which s 45 address. S 45 is concerned with providing financial assistance to a director which may take the form of providing a guarantee.

"the common law … save for express legislative exclusions, remains the structure of company law upon which the superstructure of the Act rests."

In that case the court considered that it mattered not if the breach of duty was not expressly covered by s 75 since it would be covered by eth common law which, if my understanding is correct, was to be read into the legislation even if it could be argued that its consequences were more severe than previously expressed.

It is unnecessary to express a view in relation to any perceived lacuna in s 75(3): In my view the mere fact that s 75(3) does not refer to the misappropriation of a corporate opportunity in so many terms or expressly uses the term breach of a fiduciary duty does not mean, reading its provisions together with the common law and the mischief which it and ss 76 and 77 deal with, that s 75 is not concerned with the question of a conflicted director; which would include one who misappropriates a corporate opportunity.

I accordingly respectfully agree with the view taken by Davis J in *Mthimunye-Bakoro* albeit from a different perspective that s 75(3) covers issues involving the fiduciary duty owed by a director arising from a conflict of interest. The court said:

> *"Given the breadth of the definition of personal financial interest … she could not, by virtue of the provisions of the Act, or alternatively the common law, be permitted to participate in meetings regarding her suspension. There could be no rational basis for suggesting that a person who faced suspension had no conflict of interest and could deal with the matter impartially, without taking her own interest into account and only taking account of the company's interest.'*

71. An outstanding question might be whether the duty not to misappropriate a corporate opportunity is excluded by the wording of s 75(3).

72. In my view where a director engages in a transaction where he or she has effectively usurped a corporate opportunity for personal financial advantage through extracting dividend income or other economic benefits via another company then the requirements of a direct personal financial interest (as these terms are broadly defined) in respect of the matter to be considered is satisfied

WHETHER THE ACQUISITION OF THE PROPERTY BY THE RESPONDENT WAS A CORPORATE OPPORTUNITY

73. It is evident from the facts alleged by van Breda on behalf of the applicant that the initial acquisition of Micron and Skyjack was part of a composite transaction for the acquisition of the manufacturing business and the property on which it was being conducted. It is equally clear from an analysis of the undisputed facts that the acquisition by the investors in Sky Holdings of the business was dependent on the acquisition of the premises from which its operations were being conducted

74. I am satisfied that in order to achieve this objective with the difficulties presented by the then existing suretyships, the property was acquired as an asset out of SA744 by Micron (a vehicle created for this specific purpose by Sky Holdings and its shareholders) while Sky Holdings retained the tailift business through Skyjack; the only difference being that the six investors had now acquired all the shares which had previously been held by Panaino and Joseph in Sky Holdings.

75. The point which should be emphasised is that at the time of this early transaction it is self-evident that the business and where it was operated from were integrally linked for the benefit of the manufacturing company itself, i.e. Skyjack and its shareholders-

not for the benefit of the property or whichever corporate vehicle was used to house it in.

While the papers do not expressly say so, sound commercial risk and tax strategy considerations would have led to the initial hiving off into two separate legal entities of the business operations from the premises on which they were being conducted.

76. Sound commercial (including tax) considerations, having due regard to such debt obligations as Micron or MIH assumed to facilitate the acquisitions, would have been taken into account by the shareholders of Skyjack (which included MIH as a 51% shareholder at the time) in determining the terms of the lease agreement, including the duration and rental to be paid, as between it and Micron for the benefit of the manufacturing business.

77. Furthermore, sight must not be lost of the fact that Skyjack was the cash cow that would be used to settle any liabilities assumed by Micron or MIH arising from the fundamental objective of the transaction, which was to acquire the manufacturing business. Which entity would bear what liability and how that would be structured financially were matters of fundamental importance to Skyjack and its shareholders.

This conclusion is fortified by van Breda's statements in his affidavit that capital improvements were effected to the property from time to time for the purposes of Skyjack's business operations and later that of the respondent;

78. The ultimate beneficial co-owners of the property to which the lease agreements related and the ultimate beneficial owners of the business operated on the property were therefore at that stage umbilically linked.

79. Subsequently when the business of the main competitor in the industry was acquired and one or the other beneficial owner sold out its interest , it became necessary from a financing point of view to bring in other shareholders, secure financing by securitising the property from which the consolidated business was to operate and restructure the interrelationship between the property holding company and the business operated on it as well as those of its respective shareholders whose shareholding interests were affected.

It is evident that the property from which the business operated and the business operation itself continued to be regarded as a single enterprise structured in a way that would be mutually beneficial to the interests of all its shareholders.

80. Van Breda admitted that it was Glass who convinced the Pocot Trust to provide the other 50% investment in order to purchase the property out of Micron. There is no reason to believe that in the performance of his fiduciary duties as agent for the respondent in securing premises (as alleged was necessary by van Breda), Glass could not have convinced the Trust to invest directly with the respondent. Van Breda does not claim that either he or Glass could put up their own money.

The one thing that appears clear is that the transaction was enabled because van Breda could, with Glass' involvement, secure a stream of income from the respondent which van Breda admitted had acquired blue chip clients. [38]

The fact that eth respondent might only have been recently incorporated did not make it a risky proposition. It was no more than a consolidation of two companies which, on van Breda's own evidence had captured almost the entire tailift market in the country. If there were any impediments, then it ought not to have been difficult to

---

[38] Founding Affidavit para 36

delay the consolidation and restructure both manufacturing companies under a holding company.

At its most basic, in one way or the other the revenue stream generated exclusively by the respondent was determinative of the grant of funding and van Breda inserted a company in which he had an interest (as Glass also did) using the applicant as the intermediate vehicle to achieve this together with the investment of the Pocot Trust. But the source of the revenue to provide the Pocot Trust its return and enable the mezzanine finance and the repayment of the lenders or any other investors remained the respondent. It also appears evident that the main lease and later the addendum were used to securitise the income stream for a period of 10 years.

Again, at its most basic, van Breda has not indicated any value either he or Glass added to the transaction which resulted in the establishment of the applicant to house not only the Pocot Trust shareholder investment but also their interests through various upstream entities other than;

a. Procuring mezzanine finance and coming upon the Pocot Trust;

b. Ensuring that a ten-year income stream could be secured to service the funder loans and the Pocot Trust's returns as an investor by producing for them the main lease and subsequently the addendum.

Since van Breda failed to reveal any investment or contribution he or Glass was required to make, the inevitable conclusion is that everything was dependent on the continued income stream that the respondent's manufacturing business would produce and which could be siphoned out in the form of rentals to effectively pay for the property itself.

I have little doubt that not only the historic structuring but also the reliance on the respondent as the source of the revenue stream to effect the repayment of the mezzanine finance as well as providing a return on investment for the Pocot Trust

rendered the structuring of mezzanine funding and the introduction of Pocot Trust as an investor a corporate opportunity to be presented to Muncer as the neutral director on behalf of the respondent for its consideration.

The test of whether the director would understand the need to make such a disclosure for consideration by reason of the materiality to him or her of the financial interest as defined in s 1 in taking up the benefit for the applicant or the respondent before taking up the opportunity (through his various *alter ego* companies and the family trust) is considered to be a subjective one. [40]

In this regard it is necessary to profile both van Breda and Muncer.

The question of whether this was at the expense of the respondent or was a corporate opportunity which should have been made available to the respondent will be considered after that.

81. van Breda does not dispute that he holds an LLM degree in Economics and an LLB degree in law. It is not in dispute that he held himself out as a legal practitioner who worked for a London based multinational law firm "*and advised on large mergers, acquisitions and regulatory compliance including listings on the London and Johannesburg Stock Exchange*". He also has been involved in implementing turnaround strategies as managing director of several private companies. These details appeared on the website of one of van Breda's companies and was attached to the respondent's answering affidavit

van Breda describes himself as being at the forefront of initiatives involving the acquisitions, consolidation and structuring of Sky Holdings which it will be recalled was prior to the existence of Micron, the holding company of both the property owning company and the respondent. He explains that the transaction was a management buyout, in terms of which the applicant acquired the property from Micron and was complicated; involving securitizing shares to provide to the lending institutions with

---

[40] Henochsberg on s 75. See also *Wespac Banking* on appeal at 1988 per Drummond AJA (except perhaps where the decision was manifestly unreasonable or irrational per Lee AJA at 923)

the need to provide additional security because the respondent had only been in operation for eighteen months at the time.[40]

van Breda must therefore be treated accordingly. He is well versed in corporate and financial structuring and therefore would be alive to the possibilities of structuring a transaction for the benefit of the respondent whereby it could secure more directly the property through a structured finance transaction where the income stream of the business and its contracts generated could itself provide more direct securitization than a lease in the hands of the applicant.

The cash cow was the business itself and its virtual monopoly in the market. The applicant was relying on it indirectly through the extended lease it claimed to have while the respondent through the efforts of van Breda and his recognised skills may have achieved the same result for the benefit of the respondent directly.

82. Instead of a symbiotic relationship whereby the business could depend on the availability of premises through Micron for the ultimate benefit of the business objectives (the property was always an adjunct to benefit the performance of the business), it was being miked by van Breda and Glass through the creation of the applicant; where the Pocot Trust as the other shareholder could have a direct relationship with the respondent through the creation of its own special purpose vehicle in which to house the property. .

Prior to the sale of the property out of Micron, the respondent was a wholly owned subsidiary of Sky Holdings whose ultimate shareholders were engaged in the business of manufacturing hydraulic tailift and which had established Micron, owned by a major shareholder of Sky Holdings, to secure and protect the platform from which the business could operate *for and on behalf of* the business which fell into the respondent stable. It is also evident on the facts that as between Sky Holdings as the holding company and the respondent as the subsidiary operating company the

[40] Founding Affidavit paras 134.1 and 134.2

corporate opportunity in respect of securing and protecting the property for the benefit of manufacturing tailifts inured to the subsidiary company. [41]

83. Muncer is a professional engineer specialising in the manufacture, installation and operation of hydraulic tailifts on goods transport trucks.

He was only involved in the manufacturing operations of the business and left corporate structuring and financial structuring to van Breda on the basis that he would ensure the best interests of the respondent and act *bona fide* in his dealings with the shareholders of the respondent and Muncer as the other director.

84. The applicant provides no details of the structuring of the funding or the securitization required to obtain the mezzanine funding let alone the basis upon which the Pocot Trust came to invest in the applicant.

85. However it remains evident that van Breda subjectively had a direct material financial interest in securing the mezzanine finance and obtaining the ten year lease agreement which would effectively guarantee the required income stream to service debt through a structure which he could not otherwise have devised as a beneficial shareholder outside his existing 15% interest in the respondent and Sky Holdings .[42]

86. After the transaction he actually came to hold a 25 % stake in the property owning company and through Simat an increased shareholding above the 15% he had held in Sky Holdings- he now held or controlled through intermediate juristic entities 80% of Sky Holdings all effectively acquired on the back of the respondent's manufacturing business, since van Breda has not demonstrated otherwise. [43]

---

[41] See *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W)
See also Clark at para 7.8. At para 7.8.2 the author proposes a rule whereby the corporate opportunity is that of the subsidiary unless the parent company or a partially owned subsidiary can show by clear and convincing evidence that the opportunity" *would have a substantially higher value if taken and developed by the subsidiary".*

[42] Founding Affidavit at para 25. This was the position immediately prior to MIH wishing to exit

[43] This appears from the organogram attached to the Founding Affidavit as FA 6. It is attached to this judgment

87. There is another aspect which concerns the s 75(3) requirement that the director must have a "*personal financial interest*" in the matter to be considered at a board meeting. *Henochsberg* in dealing with the section is of the view that the common law rule relating to conflict of interest does not fall within the strict definition of that term.

88. In my view the provision should be understood to be composed of two separate parts; the first is the underlying and unexpressed common law which will determine when a disclosure is required to be made in our law and the other is the trigger which will void a transaction where the necessary disclosure has not been made- in other words that there must be an actual financial benefit which the director, or a related party to the director's knowledge, has obtained, Through his or her failure to disclose.

Any other reading would lead to the absurdity that a most egregious and wilful act directed against the interests of the company's financial interests or wellbeing will not have the consequence on invalidating the transaction so tainted. Conflict of interest is an aspect of the fiduciary duty of loyalty owed to the company by a director. It embraces self-dealing, matters of executive compensation and of course the taking of corporate or shareholder property by which is included the appropriation of a corporate opportunity.[44]

It would also, to a great degree, be a superfluous provision if instances of conflict of interest were intended to be excluded. It is difficult to imagine what equally egregious

---

[44] This is not necessarily an exhaustive list. Clark includes corporate action with mixed motives as an instance of conflict of interest (at para 4.1(4))

and wilful act by a director would be deserving of voiding the transaction where there was a financial benefit derived.[45]

As I understand it, the common law recognises two broad classifications with regard to rights and duties of directors; the one is the fiduciary duty towards the company and the other is the duty of care, skill and diligence. Any other duties of a director are limited to express requirements provided for under the Act and the terms of the company's Memorandum of Incorporation.[46]

Cilliers and Benade classify the following breaches as being implicated by a failure of the fiduciary duty owed by a director to the company; conflict of interest, exceeding limitations of powers, failure to maintain and exercise an unfettered discretion and a failure to exercise his or her powers for the purpose for which they were conferred.[47]

89. If the legislature is unclear, then unfortunately it was attributable in no small degree to the extensive panel beating that was required to the original legislation which necessitated a lengthy delay before its eventual gazetting. Nonetheless panel bearing could not iron out some of the foundational difficulties that arose when the responsible Ministry or Department choses to forego the formal appointment of a commission headed by an experienced commercial court judge or even legal practitioner and rather chose to have the process driven by outside expertise than

---

[45] *Mr Nakhjavani* referred to the following statement in S v Gardener 2011 (4) SA 79 (SCA) at para 97 where the the court said:

> "*When company directors deliberately withhold information material to the affairs of their company from the board of directors, there is, in the absence of an explanation for such conduct which may reasonably be true, an a priori case of fraudulent non-disclosure.*"

[46] Cilliers and Benade para 10.08

[47] Ib at para 10.14 to10.29

using it as a resource. It is unnecessary to repeat those judgments which have expressed concern about the drafting or the difficulties experienced in trying to fathom whether well understood practices such as the requirement of security for costs had been impliedly repealed or in carrying over features of the old Act which in practice had been abused without introducing appropriate remedial checks (particularly in relation to the initiation of business rescue)

90. I therefore have little qualms in imputing that the terms of s 75(3) focused on determining when a transaction would be void in cases of non-disclosure arising from the breach of a fiduciary duty (including a conflict of interest) while accepting that the underlying common law would identify when a duty to disclosure would ordinarily arise. In other words, it is only in those case where the director has obtained a personal financial benefit (as defined) that a breach of a duty to disclose as required by the common law in cases such as a conflict of interest would trigger the transaction itself being void unless a court otherwise directs.

91. I am therefore satisfied that both van Breda and the entities in which he had an ultimate interest both in relation to being a shareholder in the respondent's ultimate holding company and in the property owning company had a personal direct and material financial interest as defined in the Act of a financial or economic nature, or to which a monetary value may be attributed as also required by Act.

DEFENCE OF CORPORATE INCAPACITY

92. The applicant however contends that the respondent could not have taken up the acquisition of the property directly or through a special purpose vehicle such as Micron, because it was unable to procure finance form its commercial banker.

93. In my view it is irrelevant that the respondent could not obtain finance from its commercial bank. That was not the opportunity which presented itself. The opportunity which presented itself and which I have found to be a corporate opportunity for the respondent is the obtaining of the same type of mezzanine financing structure as was available to van Breda and the opportunity the Pocot Trust presented as an investor in order to procure the property for the respondent either directly or through a special purpose vehicle.

94. I have already found, on the applicant's own papers that it had not made any relevant disclosures to Muncer in regard to the availability of mezzanine finance, how it could be structured utilising the revenue stream generated by the respondent's operations or the introduction of the Pocot Trust as an investor which could facilitate it in acquiring or securing the property for its benefit (whether through a special purpose vehicle which could rent the property or more directly). There is no suggestion that the respondent would have been unable to step into the shoes of van Breda and Glass within the applicant company.

95. The applicant avoided this issue by claiming that the respondent could not have financed the acquisition because it did not have the facility available to do so through it commercial bank. Nor did van Breda- It the terms under which he could procure mezzanine finance and an outside investor in order for the respondent to continue operating from its premises to its advantage and using its assets or income stream for its own benefit that was the corporate opportunity which van Breda usurped for his own financial benefit through his various corporate and inter vivos trust structures.

96. More importantly, by effectively referencing only the interest in the rentals to be derived from the lease van Breda sought to minimise the disclosure issue to one exclusively of a duty to disclose that he had a direct and material financial interest in the lease agreement. This fitted in with his premise that that any other disclosures were not require because any other possible interest was indirect.

97. I am satisfied that the applicant has not demonstrated that the respondent, had it been properly informed of the nature of the mezzanine finance and the opportunity the Pocot Trust presented as an investor would not have taken up the corporate opportunity to acquire the property, even if through a special purpose vehicle.

98. This conclusion makes it unnecessary whether a director can escape the duty to make a proper disclosure if he or she does not believe that the company can take it up. I however would express a concern that this would be a way in which a director could bypass the responsibility of making a disclosure. Surely it is for the neutral directors of the company to be given the opportunity to make that decision at the time not for a court to ex post facto be told by a director as to whether he or she thought that the company would not take it up. As pointed out by Clark, and the view is apposite to the present case in a number of respects:

> *"If a new business opportunity is respectively so good that the fiduciary wants to take it up for himself, why can't he convince a bank or other investor of this fact in order to obtain financing for the corporation to take it up"* [48]

And again:

> *"a fiduciary who wants to take an opportunity that the corporation feels unable to exploit can simply seek the consent of the other participants"*

Where corporate incapacity comes into consideration is not at the stage of whether a disclosure had to be made, rather at the stage when a court decides whether it should exercise its discretion under s 75(8).

---

[48] Clark at para 7.5

99. I accept that in its papers the respondent engaged the applicant on the material and adverse financial consequences of the ten-year lease which it also alleged had not been in existence at the time but was only produced some years later. Nonetheless the balance of its attack was broad enough to include the submission that van Breda was conflicted and that he had ended up with a shareholding stake in the property owning company.[49]

The applicant understood that it was obliged to deal with the corporate opportunity presented by the availability of the property when MIH sought to sell its shareholdings or the asset[50]. The court had also engaged Mr *Fasser* on behalf of the applicant to deal with whether van Breda had not taken a corporate opportunity for himself.

100. The applicant sought to strike out numerous passages in the answering affidavit on the ground of irrelevancy, contending that the only issue was whether to validate the lease agreements based on what van Breda did or did not tell Muncer about its existence and his interest in obtaining rentals from it. One of the contentions is that the allegations that van Breda might have enriched himself in terms of wither the lease agreements or any other agreements or transactions was irrelevant to the determination of the core issue and that the other transactions relate to "complicated tangential and extraneous financial transactions concluded with a number of other juristic entities which either pre-date or post-date the conclusion of the lease agreements."

101. While the respondent may not have couched it position in its papers as the appropriation of a corporate opportunity it did allege conflict of interest and material and deliberate non-disclosures or concealment. For reasons that ought to be clear from the prior discussion, the application to strike out has no merit. That the applicant chose to strategise its papers on a narrow front and content itself that any corporate opportunity could not be taken up by the respondent is of its own making. The issues

---

[49] The respondent contended that the transaction whereby the applicant leased the property to the respondent was part of van Breda's scheme of self-enrichment at the company's expense, that either was "*double dealing*" in respect of the lease agreements and that this was "*part of a demonstrable pattern of gross abuse for personal gain.*" Answering Affidavit paras 40-41 and 59-61

[50] This was dealt with earlier in the judgment

which arose from what it did disclose, albeit by way of close analysis, concerned a conflict of interest in the form of the appropriation of a corporate opportunity. The applicant was obliged to address that head on and make full disclosure if it wished the court to exercise a discretion in its favour under s 75(8).

DISPUTES OF FACT

102. If I am incorrect then it is necessary to turn to the ground raised by the respondent that there was no disclosure of the main lease agreement until much later and that at best the addendum was put beneath a number of papers for Muncer's signature by van Breda without it specifically being drawn to his attention. It is also contended that the main lease agreement prejudices the respondent because it locked the respondent in for 10 years and has a number of other provisions less favourable than the Micron one.

103. One of the key dispute raised by the respondent remains whether the main lease agreement was in existence at the time the applicant alleges. I have already mentioned that another document signed by van Breda on the sane date as the he purportedly signed the main lease identified another party as lessor, not the applicant. There are also other curious features regarding the failure to explain why a ten-year lease was required when the Micron lease still had a substantial period to run and, in terms of the agreement referred to earlier, it could simply have been taken over. There was therefore another reason for creating the main lease agreement and then still later an addendum which effectively extends the lee yet further by altering its commencement date.

104. I agree with the applicant that it was obliged to bring the proceedings by way of motion and should not be prejudiced in doing so if a dispute of fact arises.

105. However, on the facts before me I am unpersuaded that the probabilities will be displaced by the hearing of evidence. The respondent has set up too many anomalies in the transaction and surrounding documentation for that to occur.

REMEDY

106. The court has a discretion to validate the lease agreements.

Each party has identified the factors it considers should be taken into account. They are set out in the foot note.[51]

I believe that there cannot be a *numerus clausus*, each case depending on its own facts.

107. In the present case I suggest that the following are relevant:

a. Did the applicant actually make the requisite disclosure in its court papers?

It can hardly be said that where the legislature requires proper disclosure when seeking relief an applicant remains reticent about the facts which should have been disclosed and which would have enabled the company to make an informed decision as to whether or not the corporate opportunity would be

---

[51] The applicant contends (at para 21 of the heads of argument) that there are only two categories of relevant factors. They are:

1.1. Factors that relate to (i) the disclosures that were (or were not) actually made to the board by the director in question, and (ii) the actual knowledge and conduct of the board, at the time that the transaction in question was concluded ('anterior factors'); and

1.2. Factors that relate to the conduct of the company, as well as the board, after the conclusion of the transaction in question was concluded ('posterior factors').

Adv Nakhjavani on behalf of the respondent submits (at para 46 of his heads of argument) by reference *inter alia* to S v Gardener 2011 (40 SA 79 (SCA) at para 97 (which considered that a director's deliberate failure to disclose material information amounted, in the absence of an explanation, to an *a priori* case of fraudulent non-disclosure) that the following factors should be taken into account:

1.1. the cumulative nature, gravity, extent and duration of non-compliance with the standards in section 75(5) by the director concerned;

1.2. the relative culpability of the director concerned, including whether non-compliance with the standards in section 75(5) was merely accidental, negligent, reckless or for any ulterior or improper purpose;

1.3. whether the prejudice to the company if the transaction is validated would be outweighed by the prejudice to the interested party if the transaction remained void; and

1.4. the interests of justice.

taken up by it. A failure to disclose relevant information under s 75(3) cannot be perpetuated in a court application under s 75(8) .[52]

In this case the applicant, through van Breda was obliged to make a full and frank disclosure of the structuring and terms of the transactions whereby he and Glass were able to end up taking over MIH's overall interests, the procure mezzanine finance and bring in an outside investor, including details of the securitisation, bonds if any, and the function the main lease agreement and addendum played in obtaining funding (whether in the form of debt or equity) and what they personally had to put in financially, if anything.

b. The nature of the relationship between shareholders. While the opportunity is that of the company the relationship between the shareholders would appear to play a role. A distinction is readily discernible between amorphous shareholders in a public listed company and a small or closely held private company

c. Whether there is any actual loss or prejudice to the company. Here the question of corporate incapacity may become relevant.

Here there was both loss and prejudice to the company. I should have added that the opportunity of having control over the property, as discussed earlier, was and had always been functionally related and umbilically linked to the respondent's business operations The respondent since its inception, at least in the form of its major business operating component (Skyjack) which suffices for present purposes, had historically enjoyed the synergies established by

---

[52] The court has dealt extensively with van Breda's wilful failure to make any disclosures regarding the structured financing that was available and its structuring so that the respondent could have control over the property through a special purpose vehicle or otherwise.
The court has also criticised the applicant's failure to place before it the same facts as should have been disclosed to Muncer, including the nature and structuring the of mezzanine financing and how the lease agreements were or could be used as part of the securitisation of the finance that as made available, and later the basis of the negotiations under which the Pocot Trust was prepared to invest in the applicant and the relevance of the structuring of the main lease, and later the addendum, in obtaining finance by way of debt, and equity in the case of the Pocot Trust.

that relationship. The respondent played the central role as the source of the revenue stream enabling the financing of the property itself, and providing security in one form or another for the payment of loans, the paying out of equity shareholders in the property owning company and effecting improvements to the property for its manufacturing needs[53]. The property represented the secure base from which it could conduct its manufacturing operations and historically had been acquired for that very purpose.

The respondent has been prejudiced by not being able to acquire control of the property despite its revenue stream being used by van Breda and Glass for their personal benefit. It has also been prejudiced by being locked into a ten year lease depriving it of the flexibility it had previously enjoyed of tailoring lease agreements to exigencies. It is to be noted that the lease it had with Micron did not have an option to renew. Van Breda in fact was prepared to state that " *Glass suggested a number of options to the shareholders of Micron that would allow them to realise their investment and ensure an alignment of interests between the respondent and the future landlord*" [54]

d. The degree of the breach of the fiduciary duty and the advantage obtained by the director. A mere oversight is one thing, which was the case the applicant has unsuccessfully sought to put forward: But that is a far cry from actually using the corporate's assets or the securitisation its stream of income can produce for one's own advantage and deliberately not informing the neutral directors of the financial leverage that could be secured. In the present case the failure to disclose amounts to a breach of the fiduciary duty owed by van Breda to the company and goes to the heart of the relationship between management and the company, shareholder and management, as well as corporate proprietary rights.

---

[53] Van Breda stated at para 36 that the respondent was able to "*secure several very large contracts with blue chip clients and, given the additional space to both manufacture and fit tail gates, it needed to continue to operate from the property that had been custom developed for this purpose*"

[54] Founding Affidavit at para 38.

e. Whether a lesser remedy should suffice. In other words, whether the company or other affected shareholders should be content with a civil remedy or one of the other remedies provided for under the provisions of the Act and which have already been mentioned.

Here one must weigh the opprobrium with which the conflicted director is regarded under the Act and whether the applicant should bear the consequences of its breach rather than have the company look to recover under a personal right with the risk that it will not recoup any damages. The difficulty in applying this is that the Act does not provide a ready mechanism for the same court to make an order for the disgorgement of profits, even if on a proper disclosure the amount was readily ascertainable or the taking over of the corporate opportunity[55]. But then it may be up to the applicant to tender return of the appropriated asset or account for the profits and pay them over provided the court is satisfied that a full disclosure has been made and a proper accounting tendered.

f. Whether the interests of other potentially affected parties should be considered.

Here I suggest the onus is on the applicant to join them if it does not then it must face the consequences.

In the present case Glass' position was equally culpable, although on the basis of the fiduciary duty owed by an agent to its principle.

Even if the mezzanine financier and the Pocot Trust were joined they would run the risk of being asked why astute investors such as them would not have

[55] The taking over of the corporate opportunity would be on an acceptance that it is to be treated as a corporate asset that has been misappropriated enabling the company to recover the appropriated asset or "business project" (see Clark at para 7.1 ftn 1 on the imposition of a constructive trust). The difficulty is that our law frowns upon a court making a contract for the parties, let alone where the other affected parties are not before it.

satisfied themselves that the respondent had not been offered the financial structuring itself. By writing into a document that van Breda warrants that he has made full disclosure gives them the right to pursue him but does not allow their interests in preserving any agreements they have. They took the financial risks and weighed them up when providing the investment or making the loan. There is no reason to now pass that risk onto an innocent respondent or its neutral shareholders.

Interests of justice may play a role but it does require certain parameters to be established within the context of a shareholder, management and corporate triangle and the mischief sought to be addressed in order not to become an unruly horse.

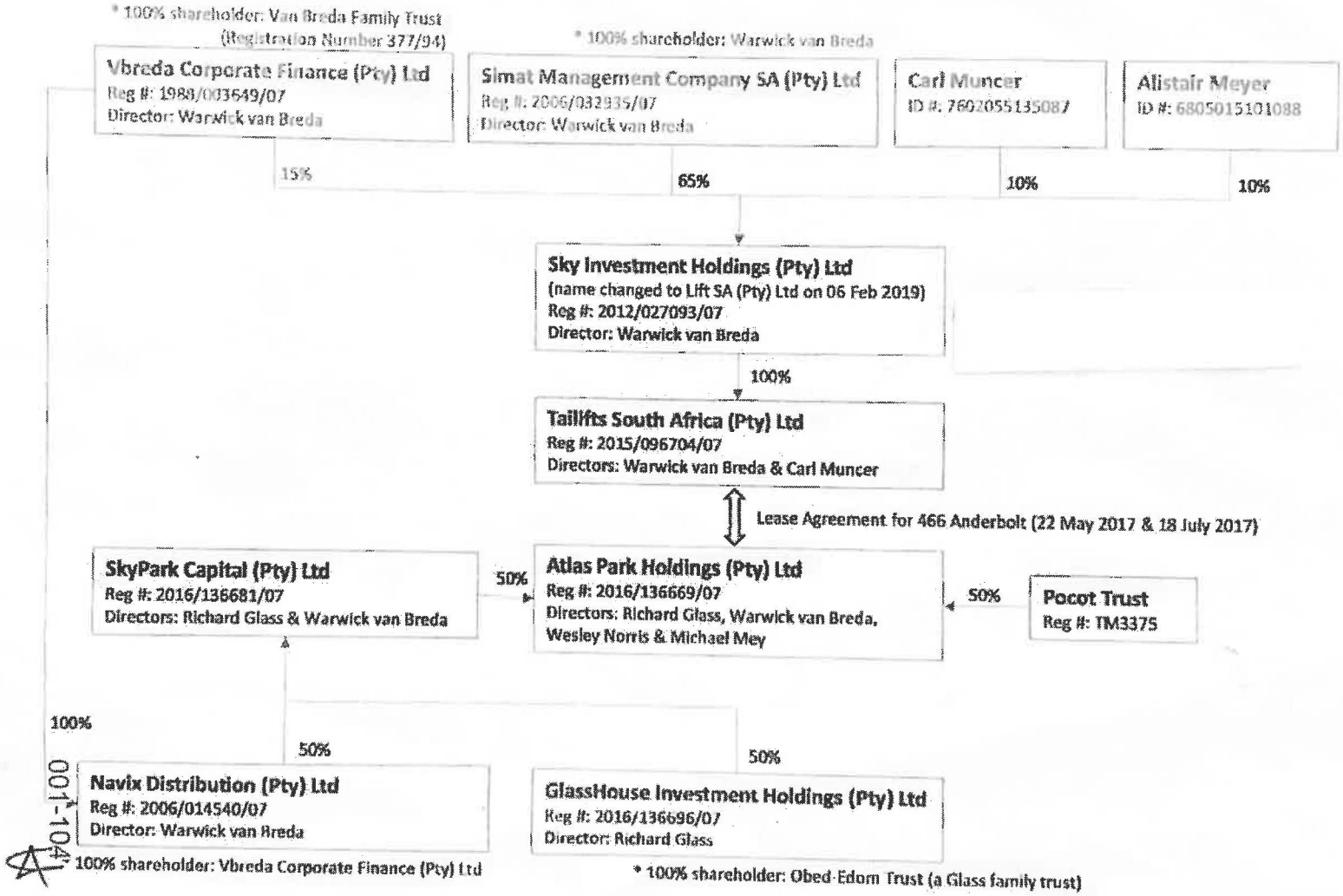
I should add that these considerations come to the fore because of the specific circumstances of the case. The issues that may have to be taken into account in another case where there has been a proper disclosure to the court, where repayment of profits or the return of the asset is tendered are likely to be weighed differently.

In the present case I consider that aside from not making a frank disclosure to the court, which of itself is a prime consideration because the court will not exercise a discretion where there are reasonable grounds to believe that it is being asked to come to a party's assistance blindfolded, the other key factors to be taken into account, which either aggravate or ameliorate the failure to disclose are;

a. the nature of van Breda's breach of his fiduciary duty;

b. that the breach amounts to a material and wilful non-disclosure for his own ends;

Atlas & Tailifts Group Structure (as at 22 May 2017 & 18 July 2017)



001-104

"FA 6"

001-104

c. the abuse of his position as director vis a vis Muncer and the clear interests of the respondent and the role of Glass who breached his fiduciary duty as agent,

d. the other potentially affected parties (who the applicant sought to argue in the striking out application are involved only tangentially) who are funders and corporate investors appreciative of commercial risk of default on payment (whether it be rental or loan interest since they have in effect no more than personal rights) and who elected to rely on undertakings given by van Breda rather than enquire about the respondent's position directly from its neutral director and who it was up to the applicant to have joined if it had a concern;

e. the real and substantial direct economic benefit van Breda gained through the corporate structures he devised which are dependent to a greater or lesser degree on the respondent's revenue stream as the source of the repayment of debt or equity.

It is for these reasons that the court dismissed the application with costs.

SPILG, J

Date of order:	17 January 2022
Date of judgment:	18 February 2022
Revised:	21 February 2022
For Applicant:	Adv E Fasser
	Wright, Rose-Innes Inc
For Respondent:	Adv SA Nakhjavani
	Werksmans Attorneys