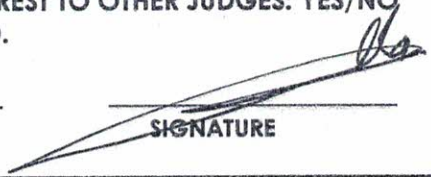




IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: A647/16
Court *a quo* (GP):11780/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>23 MAY 2019</u> DATE  SIGNATURE	

In the matter between:

CONCORDE TRAVEL (PTY) LTD

FIRST APPELLANT

REGISTERED NO: 1999/ 005902/07)

BIDTRAVEL (PTY) LTD

SECOND APPELLANT

And

TRAVEL TODAY (PTY) LTD

RESPONDENT

JUDGMENT

MAVUNDLA, J;

- [1] The appellant appeals to this Court, with the leave of the court *a quo*, against the whole of the judgment and order issued with costs by Sikhwari AJ on the 1 April 2016.
- [2] The issue to be determined in this appeal is whether:
 - 2.1 The order is appealable;
 - 2.2 As a result of the franchise agreement, there existed contractual relationships to which the plaintiff was a party resulting in the second defendant being in law obliged to render a statement of account to the plaintiff.
- [3] For purposes of ease and convenience the parties shall be referred to as in their respective names and or as cited in the court *a quo*, bearing in mind that *in casu* the first and second appellant were the first and second defendants respectively and the respondent the plaintiff.
- [4] It is common cause that on 4 August 1999 Travel Today (Pty) Ltd and Concorde Travel (Pty) Ltd concluded what is effectively a franchise agreement which permitted Travel Today (Pty) Ltd to operate the business of a travel agent as part of the Concorde Group (the franchise agreement).

- [5] Although Concorde Travel (Pty) Ltd was deregistered on 2 April 2004, the agreement defines the principal as the first defendant. The defendants accepted that the second defendant was the party to the agreement and that it would be the liable party in so far as the plaintiff proved its claim against the first and or second defendant.
- [6] The franchise agreement effectively permitted the plaintiff to operate the business of travel agent as part of the Concorde Group (the franchise agreement). The franchise agreement provided that the plaintiff would be entitled to participate in the payment of defined overrides, pro rata to its turnover, for certain products. The franchise agreement also provided for the use by the plaintiff of the Galileo Southern Africa (Pty) Ltd (Galileo) computer system as the reservation system used by the second defendant.
- [7] In the court *a quo* the plaintiff sought an order that the defendants render it an account for the period 1 April 2006 to 3 March 2010 setting out the amounts allegedly paid in respect of the overrides by Galileo to the Concorde Group of companies and or the second defendant for the use of the Galileo computer system.
- [8] The defendants denied that it was a term of the franchise agreement that the second defendant would make payment to the plaintiff for the

use by the plaintiff of Galileo's computer system. It was also denied that there was an agreement concluded between the second defendant and Galileo for the payment of overrides and, accordingly, no payments were in fact made by Galileo to the second defendant in respect of overrides. Further, the defendants alleged that the payments made by Galileo to the second defendant were made as technology subsidies, which subsidies did not qualify as overrides as defined in the franchise agreement. As a result, the defendants sought an order that the plaintiff's claim be dismissed, with costs.

- [9] In respect of the question of appeal ability of the court's decision, it was submitted, quite correctly so, on behalf of the appellants that the court *a quo* pronounced finally upon the legal relationship between the parties and the obligation on the part of the first defendant and the second defendant to the plaintiff. In the matter of *Marsay v Dilley*¹ the Appeal Court *per* Corbett CJ held that the general applicable principle in regard to appeal ability of the court's decision is that where the trial court has under competent procedure (such as an application under Rule 33(4)) made an order which has the effect of being a final decision (i.e. one which cannot be corrected or altered or set aside by the trial

¹ 1992 (3) SA 944 (AD)

Judge at a later stage of the trial and the decision is definitive of the rights of the parties and has the effect of disposing of a substantial portion of the relief claimed by the plaintiff in the main action, then the order is a judgment (as understood in section 20(1) of the Supreme Court Act 59 of 1959 now section 16(1) of the Superior Court's Act 10 of 2013) and is appealable, despite the fact that the main action has not been concluded. *Vide* also in this regard a recent and as yet unreported judgment in the matter of *SA Eagle Versekeringsmaatskappy Bpk v Harford*².

- [10] The court *a quo*, tersely put, essentially ordered the defendants to, *inter alia*, account to the plaintiff, which order is definitive, although not dispositive of all the issues. It was conceded by the defendants, that the order will lead to a just and prompt resolution of the real issues between the parties as envisaged in section 17(1) (c) of the Superior Courts Act. The parties are *ad idem* that the order is appealable and therefore the only remaining issue is whether as the result of the franchise agreement, there existed contractual relationships to which the plaintiff was a party resulting in the second defendant being in law obliged to render a statement of account to the plaintiff.

² 17 March 1992 (2) SA 786 (A)-E.

[11] At the hearing the plaintiff called two witness and the defendants called one.

11.1 the plaintiff's first witness, Mr Clive Heighway (Heighway), had been employed by Galileo over the period 2006 until the beginning of 2010 as a key accounting manager. During his evidence he provided a bundle of documents in response to a *subpoena duces tecum*, which was marked as Exhibit A.

11.2 He testified that Galileo, when it decided to move into a platform independent mode, then instead of supplying technology, which meant software line connectivity and software application, which is quite expensive, negotiated that the customer could be supplied with a revenue based or whatever they had in their agreement now replaced technology. Whatever money would be paid on the basis of productivity measured in sectors. It was to supply them with the actual funds. In total during the period 2006 to 2010, Galileo paid to Bidtravel an amount of R118 million.

11.3 the plaintiff's second witness, Mrs Magda Pretorius (Pretorius), is a shareholder and director of the plaintiff.

- 11.4 The defendant's witness, Mr Dawood Tangari (Tangari) was employed by the second defendant from approximately 1993 to 2007 as the financial accountant; IT manager; IT director and managing director. He is currently the IT director of Bidtravel Group.
- 11.5 Tangari testified that "in the context of override to products, leaving aside the Galileo subsidy for the time being, the plaintiff received the payments as it was entitled to from Concorde... As would be standard practice they would have paid all their franchisees according to this. The benefit would assume to individual Such as South African Airways is; that payment of override commissions is an incentive to the travel agent to buy their product... so that everybody made money out of it. He was substantially in agreement with the summary of Heighway.
- 11.6 According to Tangari, the subsidies paid by Galileo were not limited to technological support, but there was also an element of bonus. When there was a change from Turnkey to platform independent, the second defendant rolled out computer software and hardware to its subsidiaries,

contending that the plaintiff and other Concorde franchisees were not subsidiaries and were not using any proprietary systems of the second defendant. However, the plaintiff and Concorde franchises and others assisted in generating income for the second defendant.

[12] It was submitted on behalf of the defendants that in order to succeed with a claim of debatement, the plaintiff had to allege and prove that it has either a contractual or statutory right thereto and that the other party stands in a fiduciary relationship to it, entitling it to such a statement and debatement and referred the court to the following decisions: *Rectifier and Communication Systems (Pty) Ltd B Harrison and Others*³; *Absa Bank Bpk v Janse Van Rensburg*.⁴

[13] In its pleadings the plaintiff's case was that as a result of the franchise agreement, the Bidtravel/ Galileo agreement, there existed contractual relationships to which the plaintiff was a party resulting in the second defendant being entitled to participate in the expense subsidies. obliged to render to it a statement of account. It was also Pretorius's evidence that those agreements were the source of the plaintiff's entitlement to participate in the expense subsidies.

³ 1981 (2) SA 283 at 286c-h; 287J-288.

⁴ 2002 (3) SA 701 (SCA) at 708 para 15.

[14] The Court *a quo* found that the fact that the relationship between the plaintiff and the second defendant is contractual does not oust the fiduciary nature of the relationship. It was submitted on behalf of the defendants that this conclusion by the trial court is correct but effectively in context amounts to the fact that the plaintiff had not established a contractual basis for the second defendant to render an account to the plaintiff. The plaintiff did not plead that a fiduciary relationship existed between it and the second defendant which obliged the latter to render an account to the plaintiff. Although there are cases in which a party may expand the issue on pleadings by manner in which they conduct the proceedings, or by way of amendment, *in casu*, the amendment was sought only during the application for leave to appeal, and same has not been formally brought nor granted. It is for the parties to identify the issue of dispute and for the court to determine that dispute; in this regard relying in the matter of *Fischer and Another v Ramahlele and Others*⁵; *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others*⁶.

[15] It was further submitted that in the absence of any contractual basis for an accounting by the second defendant, the court *a quo* erred in finding

⁵ 2014 (4) SA 614 (SCA) at para 13 and 14.

⁶ 2016 (3) SA 317 (SCA) at para 24.

that "there existed a fiduciary relationship between it and the plaintiff based on trust. It has all the material elements of fiduciary relationship."

- [16] It was further submitted that the plaintiff failed to prove that a fiduciary relationship existed between it and the second defendant that the second defendant stood in a position of confidence involving a duty to protect the interest of the plaintiff.
- [17] It was further contended on behalf of the defendants that it was not available to the court *a quo* to determine the plaintiff's entitlement to a statement and debatement of the account on the basis of a so called fiduciary relationship in circumstances in which that legal entitlement was neither alleged nor proven.
- [18] It was further submitted on behalf of the defendants, relying on the authority of *McDonald v Young*⁷ that the plaintiff had itself negotiated for segment discount, therefore the plaintiff could not rely on the Bidtravel / Galileo agreement in support of override commission, particularly regard being had to the fact that these segments would not result in any payment being made by Galileo to the plaintiff, but rather in reduction of the plaintiff's lease fees for the Galileo software.

⁷ 2012 (3) SA 1 (SCA) at para 23

[19] It was further submitted that the defendants were not parties to the plaintiff/ Galileo agreement and derived no right or obligations therefore. The agreement was therefore of no assistance to the plaintiff in proving its claim, so it was contended for the defendants. Neither the franchise agreement nor the plaintiff/Galileo agreement contained an express term that obliged the second defendant to make payment to the plaintiff for the use by the plaintiff of the Galileo computer system; nor to render an account to the plaintiff for anything other than the actual overrides/ products expressly defined in the franchise.

[20] It was further submitted that whereas in the particulars of claim the plaintiff pleaded that the second defendant had acted as an agent for and on behalf of, *inter alia*, the plaintiff when concluding the Bidtravel / Galileo agreement and receiving the overrides, the resultant allegations being that the second defendant was obliged to render an account to the plaintiff for the amounts the second defendant received from Galileo pertaining to the overrides from Galileo:

20.1 the Bidtravel / Galileo agreement did not include the Concorde Group or the second defendant, the plaintiff sought to circumvent this difficulty by relying on the Bidtravel / Galileo agreement, by relying on the document headed "Quotation-Hardware and

Software” which form the integral part of the agreement number Bid/069 which identified the Bidtravel / Galileo agreement;

20.2 The hardware and software quotation is dated 27 July 2006 and recorded an agreement between Galileo and Bidtravel (the latter purporting to be acting on behalf of the Concorde Franchisees contract to Concorde—one of which is the plaintiff defined with Galileo Code 3RI) for service to be installed and rendered at the various branches sites from 1 April 2006.

[21] Without traversing the rest of the points raised by the defendants, it suffices to state that they submitted that the decision of the court *a quo* stands to be set aside and the plaintiff’s claim be dismissed with costs.

[22] On behalf of the plaintiff it was submitted that it is not in dispute that the plaintiff through its efforts generated an income to the second defendant. Other entities (not subsidiaries of the second defendant) have also through their efforts generated an income to the second defendant. Absent the plaintiff’s efforts the second defendant would receive less. The reading of the two agreements in question made it clear that the plaintiff is entitled to receive payment and, thus an account.

[23] The agreement was the result of Galileo (a division of South African Airways) bringing about a new dispensation in terms of which it would financially assist the travel agency. Galileo would no more provide a so-called "turnkey solution" to the industry in terms of which computer hard-and software and connectivity were made available at the expense of Galileo. The new dispensation (called "Platform independent") (regulated by the July 2008 agreement in respect of second defendant) would put money into the pocket of various entities within the travel agency industry. There were two provisos laid down by Galileo, i.e. that agents should utilise the Galileo Booking System (not e.g. Amadeus System) and also provided it brings enough business. The threshold was laid down in that regard.

[24] The Court *a quo*, held that:

"[11] the plaintiff relied on the existence of a contract between itself and the second defendant, the fact that the relationship between the plaintiff and the second defendant is contractual does not oust the fiduciary nature of the relationship. Each case is determined on its own merit."

[25] It is now trite that a court of appeal is reluctant to upset the findings of the trial court, which is in a better position to estimate what is probable or improbable, *inter alia*. The court of appeal will only reverse the trial court's findings where the reasons for its findings are unsatisfactory; *vide Rex v Dhlumayo and Another*.⁸

[26] I must hasten to point out that clause 12 of the agreement between first defendant and plaintiff dated 29 July 1999, attached as annexure A to the pleadings provides, *inter alia*, that:

"subject to the provisions of clause 12.2 and 12.3 the associate shall be entitled to participate in respect of certain products which such overrides relate to pro rata to the associate's turnover in respect of such products if-

12.1.1 the associate meets its target in respect of such products;

12.1.2 the third parties who undertake to pay overrides to the Concorde group of companies in respect of such product in certain circumstances, agree thereto;

12.1,3 The principal shall be entitled, at any time, to terminate the association's participation in all or any overrides if the

⁸1948 (2) SA 677 (A).

associates' turnover in respect of the products to which such overrides relate or the associate's other acts or omissions are such as to prejudice the payment of any overrides, or the amount of payment of any override, to the Concorde group of companies. In the event of such termination, the associate shall not be entitled to any compensation whatsoever."

[27] In my view, clause 12.3, implicitly mean that the associate's turnover in respect of the products to which such overrides relate should be such that they enhance positively the payment of overrides to the Concorde Group of companies. Put differently, the associate's turnover must reach a certain minimum threshold to enable payment of any overrides to the Group of companies. This interpretation accords with the contextual interpretation as advocated in the matter of *Lis v Jungers*⁹, and correctly relied upon by the court *a quo* namely that: "a legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without

⁹ 1979 (3) SA 106 (A) at page 120D-F.

sufficient attention to the contextual scene.” *Vide Jaga v Dönges NO and Another*.¹⁰

[28] I am mindful of the contention of the defendants that in its pleadings, the plaintiff did not allege:

- (a) his right to receive an account, and that the basis of such right, whether by contract or by fiduciary relationship;
- (b) any contractual terms or circumstances having a bearing on the account sought;
- (c) the defendant’s failure to render an account; *vide Field and Another NNO v Compuserve (Pty) Ltd* 1991 (4) SA 490 (ZHC) at 495B-C where *Doyle and Another v Fleet Motors P.E (Pty) Ltd* 1971 (3) SA 760 (A) -is cited. The court *a quo* was very much alive to the principle referred to herein above.

[29] I am inclined to agree with the submission made on behalf of the plaintiff *in casu*, relying on the decision of *Doyle & Another v Fleet Motors PE (Pty) Ltd*,¹¹ *inter alia*, that the basis of a right to an account whether by contract or a fiduciary relationship, there are other basis as well and also that: “In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require.” In my view, the following is apposite in this matter,

¹⁰ 1950 SA (4) 653 (A) at 662G-H.

¹¹ *Supra* at 763C-D.

as was held in the matter of *Brown & Others v Yebba CC t/a Remax Tricolor*¹² that:

“In the instant case it seems to me that practical justice does require that the debatement of the account and its sufficiency should take place at one hearing.”

- [30] In the matter of *Rellams (Pty) Ltd v James Brown & Hamer Ltd*¹³ the court held that: “The plaintiff’s cause of action is founded on a contract of agency with the defendant whereby a fiduciary relationship between them came about.....” “That a fiduciary relationship exist between a principal and agent leaves no doubt” (at 561A) and at 562A:” Their relationship is founded on a fiduciary relationship goes beyond the point where the plaintiff simply has to accept a correct statement submitted to it by the defendant; to hold otherwise would have the effect of vesting the defendant with a sole right to decide which transaction attracted commission and which not and of making it judge in its own case. The plaintiff as a party to a fiduciary agreement is entitled to know what transactions had taken place and the circumstances surrounding these transactions to decide whether or not to persist in its claim for an account and where necessary to assist it in debatement.”

¹² 2009 (1) SA 519 (D&CLD).

¹³ 1983 (1) SA 556 (NPD) at 560H-561A.

[31] *In casu*, the relationship between the plaintiff and the defendants is premised on a franchise agreement. In my view, such agreements by their very nature are, in a way, not dissimilar to those of a principal and an agent. The franchisee although it undertakes to conduct its business on the basis of franchise agreement commodity, it is bound by the principle of fiduciary duty as it is beholden to the franchisor. The contrary also attains in respect of the franchisor to the franchisee. I am in agreement with the authority in the matter of *Rellams (supra)* and accordingly, find that the defendants had a fiduciary duty to account to the plaintiff, who was an associate, thus entitled to know, belated so after the defendants initially tried to frustrate and refused to disclose whatever payments that were made by the Concorde group to all the associates. It is irrelevant that a fiduciary relationship was not specifically pleaded, but because of the nature of contractual relationship of the parties, the defendants were obliged to account to the plaintiff.

[32] The Court *a quo*, in my view, quite correctly held that the plaintiff joined the Concorde group of Companies for the sole purposes of making profit and benefitting from the advantage of being part of a chain of similar travel agency and to access goodwill and experts. The second defendant

also entered into a contract and with Galileo for the sole purpose of making profit for both companies; being the Concorde of Companies and Galileo. Galileo had great interest in the effective running of the travel agencies using its technology and the agencies were also benefitting from the subsidy in the software technology for the sole purpose of rendering effective and profit-making travel agency business. This relationship of Galileo and the second defendant was intended to achieve the same business objective.

[33] Accordingly, the findings of the court *a quo*, cannot be faulted nor disturbed. In the premises the appeal stands to be dismissed.

[34] It is trite that costs ordinarily follow the result. Both parties employed the services of senior counsel, befittingly so regard being had to the complexity of the issues *in casu*, as well as the magnitude of the potential quantum claim the plaintiff would have depending on the outcome of the debatement.

[35] In the result the following order is issued:

- 1 That the appeal is dismissed;
2. That the defendants are jointly and severally, the one paying the other to be absolved, ordered to pay the costs of

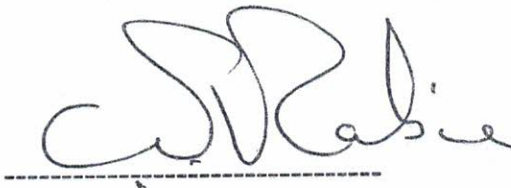
the appeal, such costs to include the costs of the employment of two counsel and or senior counsel where applicable.

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N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree

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C.P. RABIE J

JUDGE OF THE HIGH COURT

I agree

A handwritten signature in dark ink, appearing to be 'M. J. MOSOPA', written over a horizontal dashed line.

M. J. MOSOPA

ACTING JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 23 / 05 /2019

APPELLANT'S ADV : ADV. A.R.G. MUNDELL SC with ADV CL ROBERTSON

INSTRUCTED BY : GLN MARAIS INCORPORATED

RESPONDENTS' ADV: ADV. Q. PELSER SC

INSTRUCTED BY : SWANEPOEL & PARTNERS