

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: A1070/2010

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

10/10/2012

DATE

SIGNATURE

In the matter between:

KAGISO GERALD BODIGELO

APPELLANT

and

PUBLIC INVESTMENT CORPORATION LTD

RESPONDENT

JUDGMENT

MAVUNDLA J:

The appellant appeals, with the leave of the Court *a quo*, against the whole judgment and order of Msimeki J, delivered on 2 July 2010, in terms of which the [appellant's] claim against the respondent for

payment of an amount of R2, 345, 534. 00 was dismissed with costs.

[2] It is common cause that the appellant was in the employ of the respondent. The appellant was employed by the defendant as a junior manager; private equity and corporate finance with effect from 12 January 2004. He was promoted to a post of senior manager; private equity and corporate finance with effect from 1 December 2006. He was nominated and appointed by the respondent as a non-executive director on the board of directors of each of the following companies:

- 2.1 DCD-Dorbyl ((Pty) Limited ("Dorbyl");
- 2.2 Blue Label Investments (Pty) Limited;
- 2.3 Kulungile Metals Group (Pty) Limited;
- 2.4 Global Roofing Solutions (Pty) Limited.

[3] It is also common cause that the aforesaid four companies paid individually director's fees and bonuses the sum total which amounted to R2, 345, 534. 00 in respect of the appellant's directorship in these companies. The aforesaid amount was appropriated by the respondent. It is this sum total amount appropriated by the respondent that the appellant claimed, contending that it was paid to him and the respondent had no basis to appropriate it to itself.

[4] The respondent, in its plea, pleaded, *inter alia*, that the appellant, when he was appointed as, and performed his functions and duties as a nominee non-executive director of the said respective companies, was performing his functions and duties as a manager: private equity and corporate finance and employee of the respondent, as such was not entitled to receive the aforesaid amounts for his benefit, because he was not entitled to additional remuneration in addition to that which he was entitled to as set out in the written contract of employment concluded between the parties on 5 July 2006, attached to the particulars of claim as annexure "POC1".

[5] In the matter of *Imprefed (Pty) Ltd v National Transport Commission*¹ the Appellate Court said :

"At the outset it need hardly be stressed that:

'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issue upon which reliance is to be placed.'

(*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082.)

This fundamental principle is similarly stressed in Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd at 113:

'The object of pleading is to ascertain definitely what is the question at issue between the parties; and the object can only be attained when each party states his case with precision.

The degree of precision obviously depends on the circumstances of each case. More is required when the claims are based upon the provisions of a detailed and complex contract, in which numerous clauses confer the right to additional payment in differing circumstances – a contract, moreover, in which such payment are to be determined, calculated and claimed in different ways depending on which clause is relied upon. In addition, as already pointed out, the contract may choose to base the cause of action on some

¹ 1993 (3) SA 94 (AD) at 107C-H.

common law ground (breach of contract, enrichment or delict) quite unrelated to any additional payments for which the contract provides. Particularly in this context, it goes without saying that a pleading ought not to be positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some later stage—in this case as the last possible moment—be relied upon. As it was put by *Milne J in Kali v Incorporated General Insurance Ltd 1976 (2) SA 179 (D) at 182A*:

‘...a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.’

- [6] The crisp point to be decided in this matter, in my view, is whether the appellant when he performed his duties to the companies nominated to as a non-executive director, did so as an employee of the respondent, and if so, was he not entitled to receive the director's fees and bonuses paid by the relevant companies, and whether the respondent was entitled to appropriate for itself such director's fees and bonuses intended for the appellant.

[7] I am conscious of the forceful submissions made by counsel for the respective parties. The mere fact that I am not pertinently referring to their respective submissions in this judgment does not necessarily mean that I have completely ignored same.

[8] It is common cause that the respondent did not have a policy entitling it to retain the director's fees and bonuses paid by a company to which a person had been nominated to as a non-executive director. The Sibaya policy document on this issue did not exist prior to September 2006. It is also common cause that the appellant was not subject to *Public Service Act* No. 103 of 1944. It is also common cause that the contract of employment of the parties did not regulate nor address the issue of director's fees and bonuses.² It however needs to be noted that the respondent did not plead entitlement to appropriate for itself the director's fees and bonuses because of the Sibaya policy document.

² Vide paginated page 420 line 20- 421 line 1 of the judgment.

[9] It is common cause that at the commencement of the trial, the Court directed that the main issue to be decided and proceeded with, was whether the board fees and bonuses received by the respondent (as the director's fees and bonuses for the Appellant) should be paid to the appellant or respondent. The matter per agreement proceeded only on the merits and on the narrow issues identified by the Court.

[10] The Court a quo found that the appellant was (i) nominated by the respondent to the non-executive directorship of the receptive companies; (ii) was acting as an employee of the respondent in his directorship; and (iii) as such was not entitled to receive the respective director's fees and bonuses over and above his agreed remuneration.

[11] It is trite that an employee owes fiduciary duty to his or her employer and must not act against the interest of the employer. He or she cannot earn for himself or herself secret profits in the course of his employment without the consent of the employer.

The employer may claim for himself such secret profits earned by the employee; *vide Ganes and Another v Telkom Namibia Ltd* 2004 (3) SA 615 (SCA) at 626 paragraphs [25], [26].

[12] It is common cause that the appellant was nominated to the relevant companies by the respondent as the non-executive director. It is also common cause that the relevant companies paid director's fees and bonuses to their respective non-executive directors with the full knowledge of the respondent. *In casu*, it is not the respondent's case that the director's fees and bonuses were secretly earned in breach of his fiduciary duty.³ The principle flowing from the *Ganes* matter referred to herein above, does not come into play.

[13] The appellant had to establish the cause of action. It is not in dispute that he was a non-executive director to the four companies, with the approval of the respondent, who fully knew that there are director's fees and bonuses to be paid to the

³ *Vide Ganes and Another v Telkom Namibia Ltd (supra)* at 627E-F].

appellant. In my view, the appellant had *prima facie* established the cause of action. In the circumstances, the respondent bore the *onus* to prove on a balance of probabilities its defence to the plaintiff's claim. The defence pleaded was that, the appellant acted as an employee in the respective directorship in the four companies and was not entitled to the director's fees and bonuses. The respondent, in my view, had to prove that it was entitled to appropriate for itself the aforesaid amount. It is common cause that, there was no written agreement placed before the Court a quo to show that the parties had specifically agreed that the appellant would be acting in the nominated directorship, strictly as an employee and would not be entitled to the director's fees and bonuses.

[14] In law, the respondent, as a nominee director could not have been acting as an employee of the respondent, although having been nominated by the latter. In this regard the position was, with

respect, eloquently stated by Margo J in the matter of *Fisheries Development Corporation v AWJ Investments*⁴ as follows:

"The director's duty is to observe the utmost good faith towards the company, and in discharging that duty he is required to exercise an independent judgment and to take decisions according to the best interests of the company as his principal. He may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principal. He cannot therefore fetter his vote as a director, save in so far there may be a contract for the board to vote in that way in the interests of the company, and, as a director he cannot be subject to the control of any employer or principal other than the company."

- [15] On the strength of the Margo J's cited authority herein above, the appellant, although nominated by the respondent to the respective directorship, could not have been acting in such directorship as an employee of the respondent. He owed fiduciary duty not to the respondent but to the respective companies to which he was directly accountable by virtue of his non-executive directorship. In

⁴1980 (4) SA 156 (WLD) at 163D-H.

my view, the Court a quo misdirected itself in its factual finding and in law when it held that the appellant acted as an employee of the respondent in the respective companies.

[16] If the appellant was not serving in the relevant companies as an employee of the respondent, as I have found, it stands to reason that the respondent had no legal basis to appropriate to itself the director's fees and bonuses that was intended for the appellant.

The *onus* rested on the respondent to prove its right to entitlement of the director's fees and bonuses.

[17] It is significant to note that Dorbyl paid the non-executive director's fees and bonuses after deductions of PAYE with an IRP5 tax form.⁵ It brooks no argument that the respondent, as a legal entity, is not subject to PAYE tax deduction. Neither can the respondent, in my view, be legally entitled to retain an employee's moneys coming from outside source already having been subjected to PAYE tax deductions. There is no legal basis for the

⁵ Vide paginated page 397 of the Court a quo's judgment.

respondent, in my view, to have appropriated for itself the respective director's fees and bonuses.

[18] It is common cause that the relevant amounts were paid by the respective companies as the director's fees and bonuses, and nothing else. In my view, the Court *a quo*, misdirected itself in finding that the appellant was not entitled to the director's fees and bonuses, when such moneys were paid precisely as such. It was for the respondent to place evidence showing that it was entitled to appropriate to itself such amounts. In this regard, there was no evidence at all placed before the Court *a quo*.

[19] In my view, this Court is at large to set aside the decision of the Court *a quo* in so far as it has misdirected itself.⁶ In my view, the Court *a quo* should have found that the defendant has not, on a

⁶ *Vide Ndlovu v AA Mutual Insurance Association Ltd* 1991 (3) SA 655 (ECD) at 659E-F; *Transnet Ltd t/a Metrorail and Another v Witter* 2008 (6) SA 549 (SCA) at 549D; *Vide Ganes and Another v Telkom Namibia Ltd (supra)* at 625 H.

balance of preponderance of probabilities, discharged the *onus* resting on it to show that the appellant was not entitled to receive and keep for himself the director's fees and bonuses, and that it was legally entitled to appropriate for itself the said director's fees and bonuses. The Court *a quo* should have dismissed the defence of the respondent and found in favour of the appellant.

[20] It is common cause that the appellant in the Court *a quo* was represented by senior counsel assisted by a junior counsel. I am of the view that having regard to the fine point in issue and the amount involved, the matter deserved the attention of both senior and junior counsel. The appellant was entitled to the costs of the trial inclusive the costs of the aforesaid two counsel.

[21] In the result, I make the following order:

1. That the appeal is upheld with costs of two counsel;
2. That the decision of the Court *a quo* of 2 July 2010 is set aside and substituted with the following order:

"That judgment against the defendant is made for:

- (a) Payment in an amount of R2 345 534, 00;
- (b) Interest on the aforesaid amount of R2 345 534, 00 at the rate of 15,5% per annum a *tempore morae* to date of payment;
- (c) Costs of suit which shall include costs of two counsel."


N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

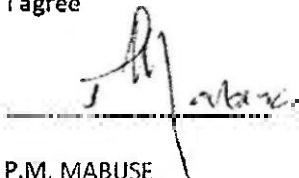
I agree



E. M. MAKGOBA.

JUDGE OF THE HIGH COURT

I agree



P.M. MABUSE

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 10 OCTOBER 2012

APPELLANT'S ATT : FLUXMANS INC

C/O FRIEDLAND HART & PARTNERS

APPELLANT'S ADV : ADV I.A.M. SEMENYA SC

RESPONDANTS' ATT : WERKMANS INC

C/O MABUELA ATTORNEY

RESPONDANT'S ADV : ADV P L MOKOENA SC