THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 512/2022

In the matter between:

GRANCY PROPERTY LIMITED	**FIRST APPELLANT**
MONTAGUE GOLDSMITH AG (IN LIQUIDATION)	**SECOND APPELLANT**

and

DINES CHANDRA MANILAL GIHWALA	**FIRST RESPONDENT**
LANCELOT LENONO MANALA	**SECOND RESPONDENT**
SEENA MARENA INVESTMENTS (PTY) LTD	**THIRD RESPONDENT**
DINES CHANDRA MANILAL GIHWALA NO	**FOURTH RESPONDENT**
SHANTI GIHWALA NO	**FIFTH RESPONDENT**
KANTIELAL JERAM PATEL NO	**SIXTH RESPONDENT**
NARENDRA GIHWALA NO	**SEVENTH RESPONDENT**
KIRAN GIHWALA NO	**EIGHTH RESPONDENT**

Neutral citation: *Grancy Property Limited and Another v Dines Chandra Manilal Gihwala and Others* (Case no 512/2022) [2024] ZASCA 144 (23 October 2024)

Coram: SCHIPPERS, HUGHES and GOOSEN JJA and COPPIN and BLOEM AJJA

Heard: 25 and 26 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 23 October 2024.

Summary: Contract – breach – failure to acquire additional shares – disposal of shares – quantification of damages – whether highest intermediate value principle should apply – non-payment of dividends and interest – disgorgement of secret profit – whether *in duplum* rule should be developed – whether contempt of court proved.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Wragge AJ, sitting as court of first instance):

1 The appeal succeeds in part.

2 The order of the High Court dated 18 August 2021, in relation to the Spearhead proceedings (WCC case no: 15757/2007), in terms of which it dismissed the appellants' claim for the disgorgement of the secret profit made in respect of the unauthorised investment in Strand Property Investments or Scarlet Ibis Investments 52 (Pty) Ltd, is set aside and replaced with the following:

> 'The first defendant and the Dines Gihwala Family Trust, and the second defendant are declared liable, jointly and severally, to pay to the first plaintiff the sum of R3 million (R3 000 000.00), plus interest thereon at the rate of 15.5% per annum from 5 April 2007 to date of payment.'

3 Paragraph B1(a) of the High Court's order dated 18 August 2021, in relation to the Scharrig proceedings (WCC case no: 10547/2008), is set aside and replaced with the following:

> '1. The first defendant and the Dines Gihwala Family Trust, are declared liable, jointly and severally, to pay the following to the first plaintiff:
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> (a) The full economic benefit of one half of the Scharrig additional option shares, namely 3 679 754 shares at a price of R5.75 per share, minus the cost of these shares (R2.2918 per share) and any amount to which the first defendant and the Dines Gihwala Family Trust are entitled in terms of the Scharrig agreement;
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> (b) Interest on the amount referred to in paragraph (a) at the rate of 15.5% per annum from 25 January 2006 to date of payment.'

4 Save as aforesaid, the appeal is dismissed.

5 The first, second, and the fourth to eighth respondents shall pay 50% of the costs of the appeal, jointly and severally, the one paying the others to be absolved, which costs shall include the costs of two counsel.

6 The first and fourth to eighth respondents shall pay 50% of the costs of the appeal, jointly and severally, the one paying the others to be absolved, which costs shall include the costs of two counsel.

7 The cross-appeal by the first and the fourth to eighth respondents, is dismissed with costs, jointly and severally, the one paying the others to be absolved, which costs shall include the costs of two counsel.

8 The cross-appeal by the second respondent is dismissed with costs, which costs shall include the costs of two counsel.

JUDGMENT

Schippers JA (Hughes and Goosen JJA and Coppin and Bloem AJJA concurring)

Introduction

[1] The first appellant, Grancy Property Limited (Grancy), is a company incorporated in the British Virgin Islands with its principal place of business in Lichtenstein. Grancy is an entity used for investment purposes by Mr Karim Mawji, a Kenyan national who resides in the United Kingdom. The second appellant, Montague Goldsmith AG (Montague), is a Swiss company (in liquidation) which acted on behalf of Grancy in respect of two black economic empowerment (BEE) investments.

[2] The first was an investment in linked units in Spearhead Property Holdings Ltd (Spearhead), which was subsequently merged with Redefine Income Fund Limited (the Spearhead investment). The second investment was the purchase of shares in Scharrig Mining Limited (Scharrig), previously Sentula Mining Limited and now called Union Capital Partners Limited (the Scharrig investment).

[3] The first respondent, Mr Dines Chandra Manilal Gihwala, through the Dines Gihwala Family Trust (DGFT), participated with others in the Scharrig and Spearhead investments. The second respondent, Mr Lancelot Manala, a businessman and an associate of Mr Gihwala, was a participant in the Spearhead investment. The third respondent, Seena Marena Investments (Pty) Ltd (SMI), is a company in which the DGFT and Mr Manala held equal shares prior to Grancy's involvement in the Spearhead investment. The fourth to eighth respondents are the trustees of the DGFT. Where appropriate, I refer to Mr Gihwala and the DGFT as 'the Gihwala defendants'.

[4] This appeal is the culmination of some 16 years of continuous litigation by Grancy against Mr Gihwala, the DGFT and Mr Manala (the respondents), to obtain an accounting from them showing how its investments were utilised and to quantify its claims against them. Mr Gihwala is a former acting judge, attorney, and chairman of a law firm, Hofmeyr Herbstein and Gihwala (HHG). He has since been struck from the roll of attorneys. The court in his striking-off application held that Mr Gihwala was 'guilty of numerous acts of serious misconduct, committed over a period of many years'. These included theft, the abuse of funds entrusted to him to enrich himself, various acts of dishonesty, and breaches of integrity and his fiduciary duties.[1]

[1] *Cape Law Society (formerly the Law Society of the Cape of Good Hope) v Gihwala* [2019] ZAWCHC 1; [2019] 2 All SA 84 (WCC) para 91.

[5] This Court has found in relation to the Spearhead investment, that Mr Gihwala and Mr Manala committed the 'most egregious' and 'fundamental' breaches of the 'principles of trust and good faith on which the investment agreement rested'.[2] They paid themselves millions of Rands to which they were not entitled to the prejudice of Grancy;[3] breached their duties as directors for years;[4] and diverted funds, including funds to repay Grancy's loan account, to speculate in secret investments.[5] The inescapable conclusion, this Court found, was that Grancy's funds and the entities housing the investments were treated as the 'personal piggy banks' of Mr Gihwala and Mr Manala.[6]

[6] This appeal and cross-appeals, with the leave of the Western Cape Division of the High Court, Cape Town (the High Court), concerns the second stage of a two-stage accounting and debatement procedure envisaged in this Court's order in *Grancy Property Limited and Another v Seena Marena Investments (Pty) Ltd and Others* (the 2014 debatement order).[7] The first stage of the accounting involved an examination of the respondents before the court regarding the adequacy of the accounts that they furnished. In the second stage, the accounts were to be debated, to determine their accuracy and whether any amounts were due to the appellants.[8]

[7] The first stage of the accounting and debatement procedure took place in the High Court before Traverso DJP in August 2015. On 26 February 2016 that court delivered judgment and made an order declaring that the accounts furnished by the respondents were inadequate (the February 2016 order). Mr Gihwala (in

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[2] *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; [2016] 2 All SA 649 (SCA); 2017 (2) SA 337 (SCA) (the 2016 SCA judgment) para 64.
[3] Id para 70.
[4] Id para 134.
[5] Id paras 65, 66 and 71.
[6] Id para 69.
[7] *Grancy Property Ltd and Another v Seena Marena Investment (Pty) Ltd and Others* [2014] ZASCA 50; [2014] 3 All SA 123 (SCA).
[8] The 2014 debatement order fn 3 paras 27 and 28.

his personal capacity and in his representative capacity as a trustee of the DGFT) was directed to furnish detailed accounts in relation to the Spearhead and Scharrig investments. Mr Manala was directed to furnish an account in relation to the Spearhead investment. The costs of the adequacy stage of the proceedings were reserved for later determination.

[8] On 31 May 2016 Mr Gihwala delivered two separate further accounts pursuant to the February 2016 order, in respect of the Scharrig and Spearhead investments. Mr Manala did not deliver any accounting.

[9] Pursuant to Mr Gihwala's further accounting, the appellants initiated the second stage of the procedure envisaged in the 2014 debatement order. This was a debate of the accuracy of the accounts with which the High Court was seized. The appellants claimed various amounts relating to the Scharrig and Spearhead investments. They also sought an order declaring that Mr Gihwala, Mr Manala, and the DGFT were in contempt of the February 2016 order. Mr Gihwala and the DGFT raised special pleas of prescription to the appellants' claims, as well as substantive defences on the merits.

[10] The High Court (Wragge AJ) handed down its judgment and order in the accuracy stage of the debatement on 18 August 2021. The order was subsequently amplified and corrected on 12 January 2023. The court upheld some of the appellants' monetary claims with costs on a party and party scale, and dismissed others. It declined to grant an order that the respondents were in contempt of the February 2016 order. It awarded the appellants the reserved costs in relation to the February 2016 order, on an attorney and client scale.

[11] As set out in their notice of appeal, the appellants appeal against:

(a) the High Court's refusal to grant the relief sought in prayers 1.13, 1.14, 1.15, 1.16, 1.20, 1.21, 1.22, 1.23 and 1.27 of the particulars of claim, which are monetary claims pertaining to the Spearhead investment;

(b) the High Court's monetary award, in the sum of R5 401 908.51, in respect of the Scharrig investment (the appellants seek an award in the amount of R82 423 109.81, plus interest);

(c) the High Court's refusal to hold Mr Gihwala and Mr Manala in contempt of the February 2016 order; and

(d) the High Court's refusal to award costs on a punitive scale in the accuracy stage of the debatement.

[12] The Gihwala defendants cross-appeal against the principal monetary award (in the sum of R5 401 908.51) in respect of the Scharrig investment and most of the monetary orders in respect of the Spearhead investment. They also appeal against the High Court's costs order in respect of the proceedings before Wragge AJ; and the costs order relating to the proceedings before Traverso DJP insofar as Wragge AJ granted those costs on the attorney and client scale.

[13] Mr Manala cross-appeals against the order of Wragge AJ on the basis that the doctrine of *res judicata* in the form of issue estoppel should be relaxed, and that he should not be bound by the 2016 SCA judgment. He also appeals against certain monetary orders relating to the Spearhead investment, and the order by Wragge AJ directing him to pay the costs of 6 December 2019.

THE SCHARRIG INVESTMENT

The participants and their shareholding

[14] In 2004 Mr Allan Joffe, a senior manager at Coronation Capital (Pty) Ltd (Coronation), identified a BEE investment opportunity in Scharrig, a listed mining company. Scharrig wanted to partner with empowerment individuals or

companies, because one of the objects of the Mining Charter published in August 2004 was black equity empowerment of 15% within a period of five years.

[15] Mr Gihwala testified that Mr Joffe had found the Scharrig deal; that he was the architect of the transaction and 'was integrally involved in the actual mechanics of the purchase and the sale of the shares and the allocation to the various participants'. In short, Mr Joffe drove the process.

[16] Mr Joffe approached Mr Wayne Brett and Mr Avram Levy whom he knew had empowerment connections. They introduced Mr David Brouze, a businessman, who in turn was connected to Sir Sam Jonah, a Ghanaian mining magnate of international repute. Messrs Brett and Levy introduced Mr Gihwala, a member of a previously disadvantaged group, as the empowerment investor.

[17] Mr Gihwala introduced Grancy to the transaction. An initial investment structure was proposed which Grancy's Mr Mawji rejected. Mr Gihwala then approached Grancy with his own offer, after which the terms of the proposed investment and relationship were agreed between him and Mr Mawji (the Scharrig agreement). In terms of that agreement Mr Gihwala and the DGFT were in a multifaceted fiduciary relationship with Grancy, referred to as 'the Partnership' in the particulars of claim. The terms of the Scharrig agreement are summarised below.

[18] Various investors participated in the Scharrig transaction. These were:

(a) the Interactive Consortium, comprising Mr Gihwala (through the DGFT), Mr Avram Levy through the Jacob Levy Trust, and Mr Wayne Brett through the Wayne Brett Trust;

(b) the Coronation Consortium, represented in the transaction by Mr Allan Joffe; and

(c) the Jonah Consortium, comprising Sir Sam Jonah and his son, Mr Richard Jonah, through the GYE Nyane Trust (the Nyane Trust), and Mr David Brouze through the David Brouze Trust.

[19] It is common ground that the shares forming part of the Scharrig investment were acquired in two tranches. The first tranche consisted of 22 million shares at R2.25 per share, allocated on the basis of the participants' financial contributions. Grancy and the DGFT contributed R1 million each, acquired 888 000 shares (4% of the first tranche) and each held an interest in 444 000 shares (or 2%).

[20] The second tranche comprised 34.38 million shares. The participants in the Scharrig transaction had to exercise an option to acquire these shares by 8 July 2005. Between April and June 2005, Mr Joffe, acting for all the participants, prepared a schedule showing the share allocations and who was entitled to what shares (the Joffe Schedule). It records that the DGFT and the Nyane Trust were each entitled to 9 621 900 shares (as at July 2005), on the evidence to bring the DGFT's shareholding to parity with that of the Nyane Trust, so that each trust would have an equal share of the 15% empowerment holding in Scharrig. A central issue in the Scharrig investment is the appellants' claim that the Gihwala defendants failed to acquire 50% of the 9 621 900 shares for Grancy, in breach of the Scharrig agreement.

An empowerment transaction

[21] The Scharrig Investment unquestionably was a BEE transaction. This is reflected in a contemporaneous note of an investment meeting held on 12 March 2005, which records that Scharrig was 'keen to bring in a BEE shareholder to comply with the Mining Charter'. An investment memorandum dated April 2005,

on the evidence probably compiled by Coronation, highlighted the Mining Charter requirements as objectives sought to be met through the transaction.

[22] Mr Gihwala knew that the 15% target was the starting point for the Scharrig transaction. In the proceedings before Wragge AJ he testified as follows:

'Transformation at the time was generally very topical . . . and I think one of the sectors that was lagging behind was the mining sector and there was a lot of agitation in order to get into it and the big issue was, what would be the threshold starting point which was then at 15% growing progressively over a period of time, so that black people could get a meaningful stake in the mining industry. But the entry level was 15% and going upwards.'

[23] Thus BEE was essential to the Scharrig investment from the outset, the basis on which it was pitched to the sellers, and why a discounted share price was offered. Grancy was aware that this was an empowerment transaction attracting an empowerment discount, and that Mr Gihwala would be contributing his empowerment credentials.

[24] The transaction was presented to the market by way of a Stock Exchange News Service (SENS) announcement by Scharrig on 22 April 2005. It was stressed that it was a BEE consortium that would take up the Scharrig shares, led by Mr Gihwala and Mr Richard Jonah; and that the introduction of the BEE consortium as a strategic shareholder in Schamin would 'provide Schamin with the requisite BEE shareholding to comply with relevant empowerment charters'. This rationale for the transaction was affirmed in a SENS announcement by Scharrig dated 18 July 2005:

'The BEE consortium has become a strategic shareholder in Schamin in cognisance of the relevant empowerment charters governing the Company and industry in which it operates.'

[25] Scharrig's own documentation also records the centrality of the BEE nature of the transaction and Mr Gihwala's role as one of two empowerment investors.

Scharrig's 2006 annual financial report, authored by Mr Gihwala, its Chairman, states:

> 'BEE Initiative and Group History:
>
> As a first landmark, a year of negotiations culminated in April 2005 in a partnership with a BEE consortium led by Richard Jonah and myself . . . The conclusion of the broad-based BEE transaction on 22 April 2005 . . .'

[26] The fact that a 15% empowerment shareholding was the target of the share allocation is also confirmed by the Joffe Schedule. It identifies what number of shares constitutes 15% of Sharrig's issued shares and links this figure to 'BEE shareholding'. The 15% shareholding is then split equally between the Nyane Trust and the DGFT.

[27] In addition, Mr Levy also understood the 15% to relate to BEE shareholding and the Mining Charter target. Both he and Mr Joffe confirmed the empowerment nature of the transaction, and that the purpose of the reallocation, which occurred after the option was exercised, was to ensure that the DGFT was allocated the same number of shares as the Nyane Trust, so that between them, they would hold 15% of the Scharrig shares.

[28] Despite this overwhelming evidence, the Gihwala defendants argue that the parties knew that Mr Richard Jonah did not qualify for a BEE transaction; that there was no disproportionate allocation to grant Mr Gihwala an equal share of the 15% empowerment; and that the Scharrig structure and shareholding was designed to 'give the impression that it was BEE transaction', when in truth it was not.

[29] This argument is opportunistic and baseless. It can be dealt with briefly. First, the Gihwala defendants ignore the evidence. Mr Levy conceded that he and Mr Brett asked Mr Joffe for an additional allocation of shares to Mr Gihwala,

solely on the basis of his empowerment credentials. He also conceded that the participants in the Scharrig investment understood that Mr Richard Jonah was a BEE participant and that he and Mr Gihwala were Scharrig's empowerment partners who would hold 15% of its shares. That was the message communicated to the commercial world through the SENS announcements. And Mr Joffe testified that there were two BEE shareholders in the Scharrig investment: Mr Gihwala and Mr Richard Jonah.

[30] Second, at no stage in the litigation before 25 March 2019 when they gave notice of their intention to amend their plea, did the Gihwala defendants suggest that Grancy was not entitled to be allocated Scharrig shares, on the grounds that such allocation constitutes 'fronting' (that the BEE component of the Scharrig investment did not in fact consist of historically disadvantaged South Africans); or that it is contrary to public policy and violates the *par delictum* rule (the rule that the law should discourage illegality and not aid those who defy the law). On the contrary, Mr Gihwala gave effect to the Scharrig agreement in the allocation of the first tranche of shares, without demur, and benefited from that allocation. It does not now lie in his mouth to assert that the structure of the Scharrig investment is illegal and unenforceable.

[31] The High Court, rightly in my view, dismissed the application for the amendment, inter alia, on the grounds that the proposed amendment to invoke the *par delictum* rule does not give rise to a triable issue, and that the appellants would be prejudiced. Their main witnesses had already given evidence, and the case had to be brought to finality.

[32] Third, the argument is inconsistent with the SENS announcements as well as Scharrig's 2006 annual report. That report, authored by Mr Gihwala in his capacity as Chairman of the Board, states:

‘As a first landmark, a year of negotiations culminated in April 2005 in a partnership with a BEE consortium led by Richard Jonah and myself.’

The terms of the Scharrig agreement

[33] In the proceedings before Traverso DJP, Mr Gihwala accepted that the terms regulating the relationship between the DGFT and Grancy in the Spearhead transaction were essentially replicated in the Scharrig transaction. In terms of the Spearhead agreement, Mr Gihwala, Mr Manala and the DGFT were in a multi-faceted fiduciary relationship with Grancy, akin to a partnership.

[34] The salient terms of the Scharrig agreement between the Gihwala defendants and Grancy, were these:

(a) Grancy would participate equally with the DGFT in acquiring any shares in Scharrig, and in taking up any additional Scharrig shares which became available to the DGFT or Mr Gihwala. Grancy would acquire these shares on the same terms as the acquisition by the DGFT or Mr Gihwala.

(b) Practically, Mr Gihwala, on the joint behalf of the DGFT and Grancy, would take up as many Scharrig shares that became available. Grancy would be entitled to the economic benefit of half the shares acquired by the DGFT, provided that Grancy paid its share of the purchase price of such shares. The DGFT or Mr Gihwala was entitled to the other half. In sum, it was a single investment with Grancy’s shareholding being a ‘mirror image’ of the DGFT’s shareholding.

(c) Mr Gihwala and the DGFT owed Grancy duties of confidence, trust and the utmost good faith, and were obliged to act in the best interests of Grancy.

(d) Grancy’s participation would not be disclosed to the other participants in the Scharrig investment. This was at the request of Mr Gihwala or the DGFT.

[35] Grancy had no direct connection to its shareholding. Its shares were held by Mr Gihwala and if Grancy wanted to do anything with those shares, it had to instruct him to do it. Grancy thus relied on Mr Gihwala to secure shares as and when they became available; to manage the shares for their joint benefit; to account to Grancy; and to pay to Grancy any amounts owing under the Scharrig investment.

The issues

[36] The particulars of claim state that on 8 July 2005, a further 7 359 508 Scharrig shares (the additional option shares) were available to be acquired as part of the Scharrig investment, by Mr Gihwala or the DGFT. Grancy was entitled to the full economic benefit of one half of the additional option shares, ie 3 679 754 shares, in terms of the Scharrig agreement. In breach of that agreement, Mr Gihwala or the DGFT failed to secure for Grancy and pay over to it, the full benefit of one half of the additional option shares. As a result of this breach, Grancy suffered a loss in an amount of R18 018 263,17.

[37] The Gihwala defendants deny that the 7 359 508 additional option shares were available to be acquired as part of the Scharrig investment. They say that apart from 880 000 initial shares and 1 375 200 option shares, no shares were available to be acquired on 8 July 2005, under the Scharrig agreement. They plead that the DGFT held 1 131 600 shares for Grancy's benefit and that it paid Grancy R 2 764 188.24, being the full economic benefit of those shares, which it accepted.

[38] The appellants' claim to the 7 359 508 additional option shares is based on the DGFT's entitlement to the allocation of 9 621 900 shares, in accordance with the Joffe Schedule. Consequently, there are two core issues raised by the Scharrig investment:

(a) Was Grancy entitled to 50% of the 9 621 900 shares, or only 50% of the 'bonus pool' shares with which Mr Gihwala ultimately exited from the Scharrig transaction?

(b) When would Grancy probably have sold it shares and at what price?

Was Grancy entitled to 50% of the additional option shares?

[39] The High Court held that Grancy was entitled to 50% of the value of any shares allocated to the DGFT, and that in July 2005 the DGFT had been allocated 9 621 900 shares to bring it to parity with the Nyane Trust. The court concluded that Rosedane Investments (Pty) Ltd (Rosedane), which held the shares to effect this parity, did so 'for the general benefit of all of the Interactive Consortium participants' (and thus not for the DGFT specifically); and that those shares were allocated only after an internal agreement at the end of 2006 among Messrs Brett, Levy and Gihwala.

[40] It was only after conclusion of the internal agreement, the court found, that Grancy's rights to the option shares vested. On that basis the court ruled that Grancy's entitlement was limited to what Mr Gihwala/the DGFT received in late 2006, and not the shares to which they were entitled in terms of the share equalisation exercise in July 2005.

[41] The appellants submit that the option shares were allocated on a different basis from the initial allocation of shares, so that the DGFT and the Nyane Trust would each acquire an equal share of the 15% empowerment holding in Scharrig. Consequently, the DGFT was entitled to the additional option shares and Grancy to half of those shares, in terms of the Scharrig agreement. The Gihwala defendants breached that agreement by failing to secure those shares and paying the appellants the economic benefit of half those shares.

[42] The case of the Gihwala defendants is that the option shares were allocated to the participants in proportion to the number of shares they held in the first tranche, or the amount of their monetary contribution. The DGFT, they say, was never entitled to 9 621 900 shares in the Joffe Schedule, because Messrs Levy and Brett had deceived Mr Joffe into believing that those shares would be taken up in that way. But they were not.

[43] Instead, so the Gihwala defendants contend, the 9 621 900 shares were taken up by Rosedane, as reflected in the option exercise notice and Scharrig's share register. It did not hold the shares on behalf of particular members of the Interactive Consortium. Subsequently 3.5 million of the shares that Rosedane held were allocated to the DGFT when Messrs Levy and Brett parted ways with Mr Gihwala in 2006. These shares, together with the 1.5 million shares which the DGFT sold to Coronation in January 2006, are the only shares to which the DGFT was entitled and which it acquired.

[44] There are two irreconcilable versions on this issue. The High Court was therefore required to make findings on the credibility of the witnesses, in particular, Messrs Mawji, Joffe, Levy and Gihwala, their reliability, and the probabilities.[9]

[45] There was no challenge to Mr Joffe's credibility, role or calculations. Mr Gihwala described him as a person of integrity, an 'extremely bright fellow'; 'infinitely more experienced' than he in these matters; 'a thorough gentleman, a very competent man'; and 'a quality human being'. Mr Levy agreed with this description.

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[9] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) para 5.

[46] Mr Gihwala accepted the accuracy of Mr Joffe's calculations and conceded that as a matter of logic, the shares had to be taken up in accordance with the Joffe Schedule. It establishes that the DGFT was entitled to 9 621 900 shares. Moreover, Mr Gihwala indicated in his accounting that he was not in a position to gainsay the first-hand knowledge of Mr Joffe. Indeed, Mr Gihwala relied on this knowledge when in 2016 he wrote to Mr Levy and Mr Joffe and requested them to provide certain information to assist with his accounting.

[47] The evidence makes it clear that Mr Joffe was a reliable witness. It is common ground that before the participants in the Scharrig transaction exercised their option to purchase the remaining 34.38 million Scharrig shares, Mr Gihwala requested Mr Joffe to approach all the participants to sacrifice some of the shares to which they were entitled, to bring the DGFT shareholding to parity with that of the Nyane Trust, so that together they would hold 15% of Scharrig shares and thus meet the Mining Charter target. Mr Joffe denied this request.

[48] Subsequently, Messrs Levy and Brett successfully approached Mr Joffe with the same request. Mr Levy testified that the shares were requested for the DGFT on account of Mr Gihwala's empowerment credentials. He was playing an important role in the company as Mr Richard Jonah; they wanted Mr Gihwala to chair the company; and it was unsatisfactory that he had a much smaller shareholding than Mr Jonah. Messrs Levy and Brett told Mr Joffe that the 9.6 million shares would be given to the DGFT in accordance with the Joffe Schedule, which Mr Joffe accepted.

[49] Mr Joffe then approached the other participants in the Scharrig investment to give up some of their shares. They were initially reluctant and agreed to do so only after he assured them that the shares were 'definitely going to Mr Gihwala'. Mr Joffe testified that they wanted Mr Gihwala and Mr Jonah to have 15% of the

total shares in Scharrig, or 15% empowerment. As Mr Joffe put it, '[t]hat is 9 621 900. So we wanted to equalise the two. We wanted to make them both have 7½ or roughly 7½% of the equity'. Mr Joffe went on to say that he and the other participants would never have allocated the additional option shares to the Interactive Consortium.

[50] There is no question that the Joffe Schedule is reliable. Mr Levy confirmed that the Schedule accurately reflects the share allocation and funding for the DGFT, Wayne Brett Primary Trust and Jacob Levy Trust, in relation to the first tranche of 22.2 million shares. The Joffe Schedule also accurately records the exercise of the option resulting in the total allocation to the DGFT of 7½% of Scharrig shares – 9 621 900, in a manner not pro rata to the initial investment made by each consortium member. Mr Levy also confirmed that Mr Gihwala was aware of the disproportionate allocation of the option shares; that he was informed that they had been allocated for BEE purposes; and that Mr Gihwala had the same knowledge as Messrs Levy and Brett in this regard.

[51] The unchallenged evidence that Mr Joffe had convinced the other participants in the Scharrig investment to part with option shares, and that these shares were allocated so that the DGFT and Mr Jonah could have 15% of the total shares in Scharrig, is destructive of Mr Gihwala's version. That version – advanced in every accounting – that the option shares were allocated in proportion to the number of shares held in the first tranche or the amount of the participants' monetary contribution, can therefore safely be rejected.

[52] What is more, on his own showing, Mr Gihwala knew that 7.5 million shares had been allocated to him for BEE credentials – a fact he withheld from Grancy. In the proceedings before Traverso DJP, he said:

'. . . everybody got the shares that they were supposed to get in terms of their capital contribution. I was then asked to go and ask for more shares, which I did. There was then according to Avi [Mr Levy], 7.5 million shares given for BEE credentials and I got that about a year and a half later at a time when we were exiting and I purely per chance raised it.'

[53] Further, in a letter to the attorney acting for Messrs Levy and Brett dated 25 June 2010, Mr Gihwala admits that Mr Levy informed him that they got 7.5 million shares, which corresponds to a rounding-up of the additional shares in fact allocated. Mr Gihwala thus knew, before the exercise of the option, that the DGFT had been allocated 7.5 million shares over and above the 2.2 million shares proportionally allocated, totalling 9.7 million shares (rounded up). That is why Mr Gihwala declared a shareholding of 9 622 708 shares in Scharrig's March 2006 annual report. Importantly, both Messrs Levy and Joffe confirmed that they did not provide this figure to Mr Gihwala, who must have sourced it independently.

[54] In fact, Coronation was on the look-out for the declaration of the 9.6 million shares in Scharrig's 2006 annual report. Mr Joffe said that they wanted to see that Mr Gihwala indeed got the shares. The report confirmed that he did.

[55] So, the contemporaneous documents, which are of the utmost importance on this part of the case, namely the Joffe Schedule; Scharrig's 2006 annual financial statements; the 2006 annual report on shareholder information; and the Scharrig share register, independently prove the allocation of 7½% of Scharrig shares to the DGFT.

[56] The share register shows that after the option was exercised and as at 29 July 2005, the Interactive Consortium held 22 386 572 shares. This shareholding comprised 6 808 074 shares held by BVI 977 (Pty) Ltd (BVI 977) and 15 578 498, by Rosedane – 421 shares more than the figure in the Joffe Schedule.

Thus, the accounts given by the witnesses concerning the allocation of 9 621 900 additional option shares to the DGFT, were tested by reference to contemporaneous documents.

[57] These documents contradict Mr Levy's evidence that the 9 621 900 shares were not in fact allocated to the DGFT by the participants in the Scharrig investment, but is a fiction, based on his deception of Mr Joffe that those shares would go to the DGFT. Consequently, Mr Levy's evidence on this aspect may also be rejected as implausible. His admission that he lied to Mr Joffe about the shares going to Mr Gihwala, casts serious doubt on Mr Levy's credibility on this score. And Mr Levy's evidence is unsustainable on the evidence, and inconsistent with the overall probabilities.

[58] Further, it is highly probable that Grancy's transfer of R10 million to Mr Gihwala in the latter part of June 2005, shortly before the exercise of the option, was for the purchase of the 7.5% of the additional option shares ie 9 621 900 shares. Mr Gihwala's version is that the transfer of R10 million was speculative: he did not tell Grancy how much more it could invest in Scharrig; it arbitrarily sent the amount of R10 million to him.

[59] This version too, is false, for three reasons. First, in evidence Mr Gihwala acknowledged that in the latter part of June 2005, Grancy sent him R10 million 'to take advantage of the option'. And it is not coincidental that R20 million was almost exactly the cost of the further shares allocated to the DGFT in terms of the Joffe Schedule (the actual amount was R20 016 660 of which Grancy's share would be fractionally over R10 million). Second, Mr Gihwala admitted that he informed the DGFT's bank manager that he had asked Grancy to send over R10 million to assist with the funding of the option shares. Third, Grancy was entirely removed from the investment and could not have speculated that R10

million (a tenfold increase on its initial R1 million investment) would be required. And this, when it was unaware of the allocation of the additional option shares.

[60] So, on the facts – which are common ground – by July 2005 there was a disproportionate allocation of 9 621 900 million shares to the DGFT, consistent with the Joffe Schedule and the purpose of that allocation. The allocation to the DGFT, together with the 9 621 900 shares of the Nyane Trust, totalled 19 243 800 shares, comprising 15% of the issued share capital of Scharrig. These calculations appear in the Joffe Schedule.

[61] Once that allocation was made, Grancy was entitled to half the value of those shares in accordance with the Scharrig agreement. The fact that the DGFT shareholding comprising 9 621 900 shares was housed in BVI 977 and Rosedane, could not, and did not, affect Grancy's entitlement to those shares.

[62] What is more, Rosedane did not hold Scharrig shares in its own right, but as a special purpose vehicle (SPV) and an agent for the DGFT, Mr Levy and Mr Brett. Indeed, Mr Levy confirmed this. He said:

'. . . in the documentation earlier we referred to Rosedane as, operating as a SPV for the purpose of the Scharrig transaction, and the shares that were held in Rosedane were attributable to members of the interactive consortium and accordingly weren't recorded in the financials of Rosedane.'

[63] It is thus not surprising that no investment in Scharrig appears as one of the investments listed in as Rosedane's annual financial statements for the years 2005 to 2008. Likewise, Rosedane did not record any sales, proceeds or profits in relation to Scharrig shares: it was never the beneficial owner of those shares.

[64] For the above reasons, Mr Gihwala breached the Scharrig agreement: he knew that 7.5% of the Scharrig shares had been allocated to him for the purpose

of BEE, but he denied Grancy the opportunity of participating in that allocation. Instead, he participated in a 'reallocation' of shares from a 'bonus pool' when the Interactive Consortium came to an end. But shares were never allocated to any bonus pool – they were always allocated directly to the DGFT. And the evidence is clear: the participants in the Scharrig investment would never have allocated any additional option shares to the Interactive Consortium.

[65] It follows that the High Court was correct to hold that in July 2005, the DGFT had been allocated 9 621 900 shares to bring it to parity with the Nyane Trust. However, it erred in holding that those shares were for the benefit of all of the Interactive Consortium participants. Grancy is entitled to the economic benefit of one half of the value of the 7 359 508 additional option shares.

When would Grancy probably have sold its shares and at what price?

[66] In the particulars of claim, the appellants allege that the Gihwala defendants breached the Scharrig agreement by disposing of the initial investment comprising 1 131 600 Scharrig shares acquired on Grancy's behalf (which I shall refer to as claim 1) and the DGFT's failure to secure for the appellants the benefit of one half of the additional 7 359 508 option shares (claim 2).

Claim 1: The sale of the initial investment

[67] The following facts are common ground on the pleadings:

(a) On 15 April 2005 the DGFT purchased 444 000 shares for Grancy (the Grancy initial shares) and 444 000 for itself at R2.25 per share. This was part of the initial 22.2 million Scharrig shares.

(b) On or about 8 July 2005 the DGFT acquired an additional 687 600 shares (the Grancy option shares) for Grancy and the same amount for the DGFT. These shares were part of the option to acquire 34.38 million Scharrig option shares.

(c) On 25 January 2006 the DGFT sold the Grancy initial and option shares for R5.75 per share in an off-market transaction. The market price of Scharrig shares on 25 January 2006 was R6.60 per share.

[68] The appellants allege that the sale of Grancy's initial and option shares on 25 January 2006 was a breach of the Scharrig agreement. They claim that (a) the sale took place without their knowledge or authorisation; (b) the sale price of R5.75 per share was below the prevailing market price of Scharrig shares; and (c) they would only have authorised Mr Gihwala to sell the combined Grancy shares at R25.00 per share; alternatively, at the market price of R6.60 per share on 25 January 2006. The Scharrig shares reached a market price of R25.00 per share on 24 October 2007.

[69] The appellants claim the difference between the market value of R25.00 or 6.60 and the sale price of R5.75, minus Mr Gihwala's 25% profit share entitlement under the Scharrig agreement and the amount of R2 764 118.24 already paid by the DGFT to the appellants. The claims were accordingly for R18 018 263.17 (calculated on the basis of a market price of R25.00 per share) or R2 006 123.17 (calculated at a market price of R6.60 per share), plus interest.

[70] The appellants thus pleaded, as one of the two alternative grounds for their claim, that they would have sold their shares for R6.60 on 25 January 2006. This reflects the normal measure of damages, calculated with reference to the value of the shares as at the date of the alleged breach. However, in their heads of argument, the appellants submit that the highest intermediate value principle used in the United States of America supports Grancy's damages claim. I revert to this aspect below.

A sale without Grancy's knowledge or authorisation?

[71] The High Court found that Grancy had agreed or would have agreed to an arrangement which enabled it to exit from the Scharrig transaction, but that it would not have done so at a discounted price of R5.75 per share, when the shares were trading at R6.60 in January 2006. Grancy had therefore established a breach of the Scharrig agreement and was entitled to damages, calculated as the difference between the market value of the shares on the date of their disposal (R6.60) and the price at which they were sold (R5.75 per share).

[72] The reasons for this finding are the following. Grancy would not have agreed to the sale of its entire shareholding at a discounted price two months after indicating that it wished to retain its interest in the Scharrig shares. Grancy's agreement to sell its shares was probably based on a belief that the shares could not be traded directly on the open market because of a lock-in agreement or a similar bar to selling, but no such lock-in or bar existed. If Mr Mawji accepted the proceeds of the sale of the shares, he did so without knowing that there was no need for the sale at a discounted price, and that Grancy's interest in the Scharrig option shares was greater than what it had been told.

[73] The appellants submit that there is no explanation nor any evidential basis for the High Court's conclusion that Grancy would have wished to exit from the transaction in January 2006, and that it would have done so at a price of R6.60 per share. They contend that Grancy had rejected an initial offer by Mr Gihwala to exit at R4.00 per share in August and November 2005, which was the last word on any exit from the transaction. The date of disposal, the appellants say, was not determined by agreement, but because Mr Gihwala needed to sell shares to help Messrs Brett and Levy reach their necessary disinvestment level to appease Sir Sam Jonah. Mr Gihwala then sold all the shares which he said he was holding for Grancy, without its consent.

[74] The appellants further submit that had Grancy acquired the additional option shares for their full economic benefit, it would have disposed of its entire shareholding (of 4 810 950 shares) around 24 October 2007 at the prevailing market price of R25.00, R22.50 or R21.50 per share. This submission is essentially based on Mr Mawji's evidence that Grancy would have exited from the Scharrig transaction when the share price reached a figure ten times its initial value; and that this exit strategy would have been informed by factors such as the performance of the shares and where Grancy believed the market would move. Grancy, so it is submitted, is a long-term investor; and would have waited until the time was right to dispose of its shares, and adopted a similar strategy to that of sophisticated commercial investors, such as Coronation and the Jonah Consortium, which exited from the Scharrig transaction at R21.75 per share.

[75] The Gihwala defendants submit that Grancy agreed to the disposal of its initial shares in January 2006. Consequently, it failed to establish a breach of the Scharrig agreement and Claim 1 should have been dismissed.

[76] The evidence shows that Mr Mawji knew on 29 March 2006 that the sum of R 2 764 118.24 was going to be paid to Grancy for the sale of its initial shares. Six days before, Mr Anil Narotam, Montague Goldsmith's Chief Operations Officer, in an email sent on 23 March 2006, had informed the appellants' representatives that funds of R2.7 million would be paid by Mr Gihwala 'for the return of investment in Scharrig plus profits'. When asked in cross-examination what the R2.7 million was for, Mr Mawji replied: 'It was the calculation from the Gihwala schedule of what he told us we were entitled to for the sale of shares that we were aware of at that point in time'. However, in response to questions from the court, Mr Mawji confirmed that he was aware that the shares had been sold and that Grancy had received the funds relating to that sale. He also confirmed that he was aware as to how the amount of R2.7 million had been calculated.

[77] One would expect that if Grancy's initial and option shares were sold without its knowledge and authorisation, and at a price which did not meet with its approval, Mr Mawji would have expressed surprise at or objected to the sale. He did neither. This is astounding, particularly given the allegation that Grancy is a long-term investor and would have adopted a similar strategy to Coronation or the Jonah Consortium. It is unlikely that Mr Mawji would have kept silent about the sale of Grancy's shares, if this happened without its authority.

[78] Mr Mawji was evasive as to why he never challenged Mr Gihwala concerning the sale without Grancy's consent. He said that he had asked for further information – from whom, he did not disclose – on which to base his decision on how to proceed. This explanation is inherently improbable, and contrived. The appellants were on the horns of a dilemma: if they would have sold the Scharrig shares only in October 2007 at R25.00 per share, then they had to explain why Mr Mawji agreed to the sale of Grancy's shares in January 2006 at R5.75. Conversely, if they agreed to the sale in January 2006, then the appellants could not claim that they would only have disposed of their entire shareholding in October 2007.

[79] When the shares were sold in January 2006, Mr Mawji knew how the sum of R2.7 million had been calculated. And Grancy accepted the proceeds of the sale of its shares, without any qualification or reservation of its rights. What is more, at the time of the sale Mr Mawji never asked for further information from the Gihwala defendants, and nothing happened in terms of a request for an accounting until the letter of demand by the appellants' attorneys – almost a year later. Mr Mawji's evidence that he 'immediately asked for an accounting' must therefore be rejected.

[80] The evidence accordingly shows that Mr Mawji was aware that Grancy's shares had been sold at R5.75 per share, how the amount which it received had

been calculated, and that he did not at any stage object to the sale. This is confirmed by his subsequent conduct and his evidence in other proceedings, and is consistent with the known and probable facts.

[81] Mr Narotam prepared the schedule calculating the amount due to Grancy pursuant to the sale of the initial investment, which was annexed to the affidavits in the application proceedings relating to the Scharrig investment (the Scharrig application). Tellingly, Mr Mawji made no mention of this schedule in his founding affidavit in the Scharrig application. When asked why he had not disclosed it, Mr Mawji said that this was a mistake on his part. He acknowledged that had he done so, it would have shown the correlation between the calculation and the R2.7 million paid to Grancy for the sale of its shares.

[82] After receipt of the funds, Mr Mawji, Mr Narotam and Mr Ian D'Costa (an associate of Mr Mawji) were allocated their share of the profits. At Mr Mawji's request, his company, Rattan, was repaid the R1 million it had made available for the Scharrig investment. Mr Gihwala had a meeting in May 2005 with Mr Mawji in Johannesburg (Mr Narotam and Mr D'Costa were also present), concerning an unrelated investment. Mr Mawji raised no concerns about the sale of Grancy's shares without its consent. Neither did he do so in subsequent telephonic discussions with Mr Gihwala.

[83] The letter of demand to Mr Gihwala by the appellants' attorneys dated 5 February 2007 – almost a year after the sale of the shares – which sets out in some detail Grancy's claims in relation to the Scharrig investment, also says nothing about Grancy's shares having been sold without its knowledge and authority. Mr Mawji attempted to avoid answering this simple proposition in cross-examination, but was driven to concede it after he asked to read the letter of demand.

[84] Likewise, in the Scharrig application, Mr Mawji did not in his affidavits say that the sale of Grancy's shares was without his knowledge and consent. Neither did he deny the allegation that Grancy's shares were realised at his request. Given the nature and extent of Grancy's claim based on the alleged unauthorised sale of its shares – some R82 million – for this not to have been included in the letter of demand nor the Scharrig application, could not have been due to a mere omission or inadvertent oversight. In my judgment, it can only be the result of a decision by the appellants to opportunistically extract the maximum benefit from the failure of the Gihwala defendants to give them the additional option shares. This, as is shown below, is buttressed by the fact that their exorbitant claim finds no support in the evidence.

[85] In his evidence in these proceedings, Mr Mawji acknowledged that he had been informed that Grancy's shares were sold at R5.75 and that this was reflected in the calculations done. This, of course, is inconsistent with Grancy's pleaded case that its initial and option shares were sold without its knowledge.

[86] Moreover, in the disciplinary proceedings before the Cape Law Society against Mr Gihwala (the CLS proceedings), in response to a question from the *pro forma* prosecutor, Mr Mawji testified that he would have been satisfied with exiting the Scharrig transaction at R5.75 per share:

'MR ROGERS: And had the question been raised with you at that time, are you satisfied with an exit at 5.75? Is that something for which you had actually given authority, or not?

MR MAWJI: Well, the 5.75 would be something that I would have agreed to, no doubt, but we didn't have the full details of how, and proof of how everything had been arrived at, especially some of the deductions that were taking place.

MR ROGERS: Well, what I'm asking is, do you actually recall having agreed to a disposal at 5. 75 or not?

MR MAWJI: Yes, I would have.'

[87] This evidence, Mr Mawji said in these proceedings, is correct and that he stands by it. Nothing could be clearer. In the CLS proceedings, Mr Mawji obviously did not say that Grancy would only have sold its initial and option shares at R25.00 or R6.60 per share. This too, he confirmed in these proceedings. However, he sought to explain it away by saying that he had not been asked about a sale at R25.00 or R6.60. But that begs the question. If a sale at R25.00 in October 2007 were indeed true, that would have been the natural and obvious answer to the prosecutor's question. But that was not Mr Mawji's evidence.

[88] In an attempt to avoid the obvious significance of Mr Mawji's evidence in the CLS proceedings, the appellants have variously tried to 'contextualise' his evidence; to attribute his unequivocal statement that he would have agreed to the disposal of the shares at R5.75, to the poor quality of the video link; and to rely on Mr Mawji's subsequent efforts in the High Court proceedings to qualify his evidence. However, the record shows that those parts of the evidence dealing with the sale of the initial investment were not impacted by the quality of the video link at all, and that the Gihwala defendants properly contextualised his evidence. Further, the appellants cannot rely on Mr Mawji's subsequent efforts to qualify the unequivocal evidence that he had given previously.

[89] The evidence outlined above contradicts Mr Mawji's claim that Grancy would have retained the Scharrig shares until they got to ten times their value, and that it would have exited from the Scharrig transaction around October 2007 at some R25.00 per share. This claim is based on hindsight: it is insupportable on the evidence.

[90] In addition, and on his own version, Mr Mawji never took an investment decision to hold the Scharrig shares until they reached ten times their value. He stubbornly refused to concede this, but eventually did so on questioning by the court. When it was put to him in cross-examination that his approach was

arbitrary, Mr Mawji replied that it is neither justifiable, nor 'explainable to somebody'. He said, '[i]t's our internal opinion of where we think the market is going'. Then he said that in all investments '[w]e don't take premeditated decisions . . . we assess why we bought the asset and where it is going to go'. On this version, Grancy's investment strategy cannot be objectively ascertained; neither does Mr Mawji's account provide any details of any assessment of the performance of the Scharrig shares, nor what it believed the fair value of the shares to be.

[91] There is no documentary evidence, nor evidence upon which probable reliance can be placed for Grancy's investment strategy. There is also no evidence to show that Grancy is a long-term investor; nor for its claim that it would have adopted a similar strategy to that of commercial investors, such as Coronation and the Jonah Consortium. And Mr Narotam's note of the meeting at which the prospect of the Scharrig investment was discussed in March 2005, which states that the time frame for the realisation of the investment would be two to three years, also has no foundation in the evidence. In short, the claim that Grancy would have exited from the Scharrig transaction in October 2007 at some R25.00 per share, is based on Mr Mawji's say-so, by which no store can be placed.

[92] Rather, the evidence points the other way. Mr Mawji knew that the shares had been sold, and received the calculations at R5.75 which showed the net profit and the amount of R2.7 million that was going to be remitted, and that was in fact remitted to Grancy. Mr Mawji at no stage raised any objection to the sale of Grancy's shares, nor the price at which they had been sold. The reliability of Mr Mawji's evidence is undermined yet further by the fact that the allegation that Grancy would only have been prepared to sell at R25.00 was raised for the very first time in the particulars of claim: it was never suggested in the Scharrig

application, and it is directly at odds with Mr Mawji's evidence in the CLS proceedings.

[93] Apart from this, the appellants ignore the presumption that a trial court's factual findings – including that Grancy would have disposed of all its shares in January 2006 – are correct in the absence of demonstrable error. To overcome this presumption, the appellants must convince this Court on adequate grounds that the trial court's factual findings, and its evaluation of those facts and the inferences to be drawn from them, are plainly wrong.[10]

[94] What all of this shows, is that the appellants failed to prove that the disposal of the initial investment took place without their knowledge or authorisation. The High Court correctly concluded that Grancy would have agreed to the disposal of its initial and option shares. This is consistent with the appellants' alternative claim that they would have sold their shares on 25 January 2006, albeit at R6.60 per share. No other conclusion is sustainable on the evidence.

The share price

[95] The High Court found that Grancy did not agree to dispose of its shares at a discounted price. Consequently, it held that Grancy had established a breach of the Scharrig agreement, and was entitled to damages calculated at the difference between the market price of the Scharrig shares and the price at which they were sold.

[96] These findings are erroneous for two main reasons:

(a) First, the evidence outlined above shows that Mr Mawji would not only have agreed to a disposal of the shares, but also that he would have done so at a price of R5.75 per share.

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[10] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706; *Sanlam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5; *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 46.

(b) Second, these findings are inconsistent with other findings in the High Court's judgment. In paragraphs 303 and 313.3 of the judgment, the court found that there was no reason why Grancy would have agreed to the disposal of the initial investment at a discount. But paragraph 313.4 states: 'Grancy's agreement to sell its shares at a discounted price was probably based on a belief that the shares could not be traded directly.' The court therefore found both that Grancy would not have agreed to the sale at a discounted price, and that it had in fact agreed to do so, based on a belief that the shares could not be traded directly.

[97] The evidence unquestionably shows that Mr Mawji would have agreed to the sale of the shares at a price of R5.75, below the market value. Grancy's agreement to do so was not based on a wrong belief that the shares could not be traded directly. But even if there was a prohibition on the trading of the shares, this was not the appellants' pleaded case. They did not plead that the agreement by Mr Mawji or Grancy to dispose of the shares, was vitiated by Mr Mawji's lack of knowledge or that his consent to the sale was not informed consent. The appellants simply alleged that the sale took place without their knowledge or authorisation. These allegations, as shown above, are not supported by the evidence.

[98] The High Court's finding that Grancy's agreement to sell its shares at a discounted price was probably based on an incorrect appreciation of the ability to trade Scharrig shares, since there 'was no evidence of any lock-in or restriction', is also insupportable on the evidence. Mr Joffe was taken to an offer made by the Interactive Consortium to Mr Tony Scharrighuisen in a letter dated 7 February 2005, in which that Consortium agreed that if it disposed of any shares within a three-year lock-up period (until 31 March 2008), Mr Sharrighuisen would be permitted to sell the shares he had undertaken to retain during the lock-up period.

The undertaking by the Interactive Consortium served as a restriction on the disposal of Scharrig shares by the purchasers.

[99] In addition, the Scharrig shares were housed in BVI 977 of which Mr Gihwala was not a director. The sale of the shares was consequently not within his exclusive control. The Gihwala defendants' disposal of shares in Scharrig would also have had an impact upon the BEE status of the transaction and how it was perceived in the market.

[100] However, the High Court was correct in holding that Grancy would not have sold it shares at R25.00, R22.50 or R21.75 when the share price was near its peak in 2007. The evidence that Grancy would have sold its shares at R25.00 is speculative and contrived. The Scharrig share price reached a high of 25.80 on 29 October 2007. Mr Mawji opportunistically contended that Grancy would have sold at the top of the market a few days before then.

[101] In this regard, the following remarks of Schutz JA in *De Klerk* are apposite:[11]

'[A]lthough this case is concerned with the past, in reality what is being looked at is the unpredictable future as it appeared in 1988 and thereafter. And what would particularly have bedevilled any evidence given by De Klerk was the fact that he had the benefit of hindsight. It would be nice if one could place one's bet after the race has been run. How much content or weight his evidence would have had is questionable. In the case of most persons I do not think that an honest plaintiff could have said, other than in general terms, what he would have done.'

[102] Mr Mawji specifically states that Grancy would have sold its Scharrig shares at R25.00, because its investment horizon was two to three years, and it would only have sold the shares when the value had reached ten times the purchase price. These statements are inconsistent with his evidence in the CLS

[11] *De Klerk v Absa Bank Ltd and Others* 2003 (4) SA 315 (SCA) para 40.

proceedings, and inherently implausible. They conveniently coincide with the height of the market.

[103] Grancy expressed its desire to exit the Scharrig investment much earlier than the two to three-year horizon, when the shares were trading at R4.20 – less than a fifth of the value now claimed. This was just over four months after Grancy had made the investment and about two to three weeks after the exercise of the option. Mr Mawji could not satisfactorily explain why Grancy wished to exit at that stage. What it does show, is that Grancy was prepared to exit the investment at a much earlier stage and at a time when the shares were trading at about twice the purchase price. As explained above, Grancy agreed to the sale of the initial and option shares at R5.75 per share.

[104] Further, the Spearhead transaction is an indicator of Grancy's exit strategy. Mr Mawji wished to exit that investment at R30.00 per unit, when the acquisition cost was R15.50 – a healthy return, and considerably less than the 1000% Mr Mawji said would be satisfactory. The appellants' contention that the Spearhead investment was 'subject to its own unique facts and circumstances', does not explain how that investment was unique and why Grancy's exit consideration would have been different in the Scharrig transaction.

[105] As stated, Mr Mawji was forced to concede that he had never taken a decision to dispose of the Scharrig shares when they reached ten times their acquisition costs. This allegation was made for the first time in the particulars of claim. And Mr Mawji conceded on more than one occasion that Grancy may very well have been satisfied with a sale of the shares at a different time and for a lesser amount.

[106] The appellants' contention that because Mr Mawji is an 'astute businessman', he would have sold the shares at a similar high price to the price at which the Coronation Consortium and the Jonah Consortium sold their shares, is obvious hindsight, and is insupportable on the evidence. The appellants say that Coronation embarked on an 'accelerated book-build' to sell its shares in March 2008 (before the market dropped) at R21.75 per share, and suggest that Grancy would have joined in the book-building process. This, of course, ignores Mr Mawji's evidence that he would have agreed to the sale of Grancy's shares at R5.75 in January 2006. It is also inconsistent with Grancy's own case: it cannot simultaneously claim that it would have sold its shares in October 2007 and that it would also have sold its shares in March 2008. The appellants also ignore the fact that Mr Gihwala was excluded from the book-building-process, as a result of which Grancy would necessarily have been excluded, since it held its investment through the DGFT.

[107] The appellants thus failed to prove that Grancy would have disposed of its shares in October 2007 at the prices alleged, whether on account of an investment horizon or because the shares would have reached ten times their initial value. Their claim that Grancy would have sold its shares at the optimal time and price is nothing more than an attempt to place their bet after the race had been run. It is opportunistic speculation with the benefit of hindsight.

Claim 2: The additional option shares

[108] I have concluded that the additional option shares became available to the DGFT over and above its initial and pro rata entitlement (and consequently, that it was entitled to one half of the additional option shares, ie 3 679 754 shares); and that the High Court erred in holding that the DGFT's entitlement was limited to 5 million shares. The remaining issue is when they would have sold the additional option shares and at what price.

[109] As shown above, the appellants failed to prove that they would have sold Grancy's entire shareholding in October 2007 at the prices they claim. Mr Mawji made no decision to retain the shares until they reached ten times their initial cost. Grancy was entitled to an allocation of 3 679 754 additional option shares on 8 July 2005. In an email sent on 3 August 2005 – some four months after making the investment – Grancy indicated that it wished to exit the Scharrig transaction 'at the earliest available opportunity'. At that time the shares were valued at R4.20 – some 80% more than what they cost.

[110] The appellants, however, say that this was the last word on an exit from the Scharrig investment. Equally, and as already stated, the facts show that there was an exit from the investment in January 2006, to which there was no objection at the time, nor thereafter. And the appellants ignore Mr Mawji's evidence that if a suitable opportunity presented itself, Grancy would have exited early from the Scharrig investment, rather than waiting two to three years, and that he took no decision to exit at any predetermined price.

[111] Mr Mawji was happy to dispose of all Grancy's initial and option shares at R5.75 per share in January 2006, when they were trading at about twice their initial cost. The appellants' alternative claim that they would have disposed of the shares in January 2006, is thus not surprising. There is no evidence that the number of shares was a consideration when they were sold. On the contrary, the probabilities indicate that the 3 679 754 additional option shares would have been an even greater incentive to sell in January 2006. Apart from Mr Mawji's say-so, there is no evidence that is inconsistent with this conclusion.

[112] In my view, the issue as to the price at which Grancy would have disposed of the additional option shares is simpler than the submissions on behalf of the

appellants would suggest. It is this. What inference as to when Grancy would have sold its shares, can be drawn from the proven facts?

[113] In *Ocean Accident and Guarantee Corporation*[12] Holmes JA approved the following dictum in *Govan v Skidmore*:[13]

'. . . in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence*, 3rd ed., para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[114] The natural and plausible inference to be drawn from the proven facts, is that Grancy would have disposed of its entire shareholding, ie its initial and option shares as well as the additional option shares, at R5.75 per share in January 2006.[14] In addition, this inference accords with the evidence, considered globally and holistically, and the inherent probabilities. In my opinion, there are no factors that point away from this conclusion.

[115] By reason of the conclusion to which I have come, it is unnecessary to consider in any detail, the appellants' argument that the High Court erred in applying the ordinary measure of damages for breach of contract – that the innocent party should be placed in the position it would have been had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party.[15]

[116] The appellants, however, contend that the High Court should have applied a flexible approach to the calculation of damages, more specifically, the 'highest

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[12] *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159C, affirmed in *Kruger v National Director of Public Prosecutions* [2019] ZACC 13; 2019 (6) BCLR 703 (CC) para 79.
[13] 1952(1) SA 732 (N) at 734C-D.
[14] *Govan v Skidmore* fn 13, approved in *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614G.
[15] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687C.

intermediate value' adopted by the courts in the United States, to assess the measure of damages in conversion cases where the property in question fluctuates in value.[16] In this regard they rely on *Galigher*[17] in which the United States Supreme Court said:

'It has been assumed in the consideration of the case that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, *to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated.* This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would in most cases afford a very inadequate remedy, and in the case of a broker holding the stocks of his principal it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time and for an unfavorable price.' (Emphasis added.)

[117] This is another instance of an opportunistic attempt by the appellants to unjustifiably extract the maximum benefit out of the breach of contract by the Gihwala defendants. The argument based on the highest intermediate value rule was not pressed with any conviction before us, and it can be disposed of in three short points.

[118] First, the rule is completely inapposite. The foreign cases upon which the appellants rely concern the 'wrongful conversion' of shares and include lost profits as a result of the wrongful conduct.[18] Conversion is an intentional tort which occurs when a party takes the chattel (personal or movable) property of another with intent to deprive them of it.[19] This is a case of breach of contract in which it has been found that the appellants would have disposed of Grancy's

[16] The appellants cite *Galigher v Jones* 129 US 193 (1889).
[17] *Galigher* fn 16 at 129 para 200.
[18] *Galigher* fn 16; *Schultz v Commodity Futures Trading Commission* 716 F.2d 136 (1983), 140.
[19] https://www.law.cornell.edu>Wex; Jones (ed) *Clark and Lindsell on Torts* 21 ed (2014) at 17-06 ff and 18 Am Jur 2d, Conversion § 1-8.

entire shareholding in January 2006. Moreover, the appellants have neither pleaded nor proved any claim for lost profits.

[119] Second, the highest intermediate value rule is foreign to South African law and conflicts with settled principles relating to causation, remoteness and quantification of damages for breach of contract in our law. The Constitutional Court has cautioned against the use of 'ostensible analogies' in foreign jurisdictions 'without a thorough understanding of the foreign systems'; and the 'blithe adoption of alien concepts or inapposite precedents'.[20] A claim for damages for a lost chance or opportunity is in principle recognised in our law. Where a party can prove that it has lost an opportunity of making a profit as a result of a breach of contract, the court will apply the principles for quantifying the loss of opportunity caused by the breach.[21] The court then determines damages by estimating the chances of earning a particular profit.

[120] Finally, the appellants' reliance on the highest intermediate value rule was all but abandoned, when in the replying argument Grancy's counsel submitted that the court must do the best it can to determine when Grancy would have sold its shares, and then apply a contingency. No such case was pleaded nor proved. The appellants' attempt to develop their case in this way on appeal, is impermissible. The prejudice to the respondents is self-evident. And as stated, this is not a delictual but contractual claim.

Conclusions on the Scharrig Investment

[121] In July 2005, the participants in the Scharrig transaction allocated 9 621 900 additional option shares to the DGFT to bring it to parity with the Nyane Trust, so that these entities had a combined 15% shareholding in Scharrig. In

[20] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) paras 132 and 133.
[21] *De Klerk* fn 11 paras 27-33; G B Bradfield *Christie's Law of Contract in South Africa* 8 ed (2022) at 682.

terms of the Scharrig agreement, Grancy is entitled to the economic value of one half of the additional option shares as alleged in the particulars of claim, ie 3 679 754 shares.

[122] Grancy failed to prove that the DGFT defendants breached the Scharrig agreement, by selling its initial and option shares without its knowledge or authorisation. Grancy would have sold its entire shareholding at R5.75 per share in January 2006, including the 3 679 754 additional option shares.

THE SPEARHEAD INVESTMENT

The terms of the Spearhead agreement

[123] The material terms of the Spearhead agreement are summarised in the 2016 SCA judgment, as follows:

'*(a)* Mr Gihwala (through the vehicle of the Trust), Mr Manala and Grancy would participate in the Spearhead BEE transaction and thereby invest indirectly in Spearhead linked units.

(b) The investment would be undertaken using SMI as a corporate vehicle with each participant (Grancy, the Trust and Mr Manala) holding one-third of the shares in SMI.

(c) The parties would make their investment contributions by way of subscription for shares in and the making of loans to SMI on the basis set out in Mr Gihwala's email of 21 February 2005, which included the making of loans to Mr Manala to enable him to lend his share of the amount required by SMI.

(d) SMI would use the funds so acquired to subscribe for 58% of the shares in Ngatana, which was the corporate vehicle that would hold the 3,5 million Spearhead linked units acquired in terms of the BEE transaction, and lend money to Ngatana to enable it to take up these Spearhead units.

(e) The investment would be directly managed by Messrs Gihwala and Manala, who would be the directors of SMI and SMI's nominees as directors of Ngatana.

(f) Unless otherwise agreed by the investing parties, the investment by Ngatana would be restricted to an investment in the 3,5 million Spearhead units and SMI's investment would be restricted to its investment in 58% of the shares of Ngatana.

(g) In the management of the investment Messrs Gihwala and Manala, the Trust and SMI owed Grancy a duty to exercise good faith and to account fully for their stewardship of Grancy's investment. Their relationship with Grancy was a fiduciary one.

(h) Grancy would be entitled on request to be given access to all books and records of SMI relating to its affairs and Grancy's investment in it.

(i) The two directors would procure that the net income accruing to Ngatana from the investment, after servicing the Standard Bank loan and paying its administrative expenses, would be distributed to shareholders, first by repaying shareholder loans and then as dividends.

(j) The net income accruing to SMI after paying its administrative expenses would be distributed to shareholders, first by repaying shareholder loans and then by way of dividends.

(k) The investors would be treated equally so that in the allocation of benefits arising from the investment no investor would be treated less favourably than another and no investor would secure for himself or itself a benefit that was not afforded to the other investors. I refer to this as the principle of parity of treatment.' [22]

[124] The appellants appeal against the High Court's refusal to grant them the relief sought in prayers 1.13 to 1.16; 1.20 to 1.23; and 1.27 of the particulars of claim. In what follows I refer to this relief as claims 13 to 16, 20 to 23, and 27. The respondents cross-appeal against most of the High Court's monetary orders in respect of the Spearhead transaction, save for those relating to the Prescient management fees (claims 19 to 25).

[125] Initially the Gihwala defendants denied certain terms of the Spearhead agreement in their plea. However, in evidence Mr Gihwala admitted that those terms are covered in the above summary of the terms of the Spearhead agreement, and thus form part of that agreement.

[22] 2016 SCA judgment para 58.

The second respondent's liability

[126] Mr Manala denies each of the pleaded terms of the Spearhead agreement. In amplification he pleads that he did not enter into any agreement with Grancy, save for a loan advanced by the appellants to enable Mr Manala to purchase his interest in SMI. He persisted with that version in evidence. He contends that the High Court erred in refusing to relax the doctrine of issue estoppel in his favour, and to depart from the findings in the 2016 SCA judgment, in terms of which this Court held that Mr Gihwala, the DGFT and Mr Manala were each liable *in solidum* (for performance of the whole obligation) to Grancy. Mr Manala asserts that the High Court failed to consider material evidence in the proceedings before Traverso DJP in 2015, and in these proceedings.

[127] In the event that this Court does not depart from the High Court's findings regarding issue estoppel, Mr Manala says, then he joins the Gihwala defendants in their cross-appeal concerning the Spearhead investment, and asks that the orders granted against him be set aside. Mr Manala also cross-appeals the orders of the High Court in respect of Spearhead claims 23 to 25 and claims 16 to 18, granted in favour of Grancy.

[128] The answer to Mr Manala's claim that he is not a party to the Spearhead agreement, is short and conclusive. This Court found that Mr Manala, together with Grancy and the DGFT, participated in the Spearhead transaction through SMI, in which he held one-third of the shares;[23] that he was in a fiduciary relationship with Grancy;[24] and that he is liable, jointly and severally with Mr Gihwala and the DGFT, for the breaches of the Spearhead agreement.[25]

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[23] 2016 SCA judgment fn 2 para 58 *(a)*.
[24] 2016 SCA judgment fn 2 para 58 *(g)*.
[25] 2016 SCA judgment paras 102 to 106.

[129] As to Mr Manala's reliance on issue estoppel, this defence remains one of *res judicata* (a matter which has been determined by judicial decision). The defence is available where a dispute which has been brought to an end, is again litigated between the same persons, regarding the same thing and on the same cause.[26]

[130] The appellants raised the defence of *res judicata*, specifically that the proceedings before Fourie J in the Western Cape High Court, involving the consolidated hearing of two actions brought mainly against Messrs Gihwala and Manala, (the consolidated action),[27] which resulted in the 2016 SCA judgment and this case, involve the same persons.[28] The consolidated action was based on the same thing or relief – Mr Manala's liability to Grancy under the Spearhead agreement.[29] And it is founded on the same cause of action – in the present proceedings the complaint is based on the Spearhead agreement and involves the adjudication of the appellants' contractual claims in terms of that agreement, as was the case in the consolidated action.[30]

[131] The High Court rightly held that the grounds for the claims against Mr Manala in the case before it, were the same issues decided in the consolidated action, more particularly, who the parties to the Spearhead agreement are, and whether that agreement was breached and in what respects. Further, in the proceedings before Fourie J, Mr Manala (and Mr Gihwala) chose not to testify, and the evidence of Mr Mawji in the consolidated action stands uncontradicted. Mr Manala should have disputed his participation in the Spearhead agreement, and advanced the basis of that claim, in those proceedings. He chose not to do so.

[26] 18 *Lawsa* 3 ed paras 32 and 75.
[27] The consolidated action is also referred to as 'the 2010 and 2011 actions'.
[28] *Lawsa* fn 26 paras 65 to 67.
[29] *Lawsa* fn 26 paras 70 and 71.
[30] *Lawsa* fn 26 paras 72 to 75.

[132] Mr Manala cannot, as the High Court indeed found, simply ignore the consolidated action, let alone on any ground of equity and justice. Moreover, as the court correctly observed, Mr Manala's stance is contrary to that which he adopted in earlier proceedings. In those proceedings he accepted that Mr Gihwala was authorised to represent him at the February 2005 meeting, which formed part of the conclusion of the Spearhead agreement.

[133] Although Mr Gihwala may have made the decisions in relation to the Spearhead agreement in the progress of the investment, Mr Manala accepts – as he must – that the SCA judgment finds that he was party to the relevant transactions. Consequently, he cannot be excused from any misconduct in relation to decisions by Mr Gihwala, and is thus party to the breaches of that agreement. The same applies to breaches of the agreement by Mr Gihwala that give rise to the claims in these proceedings.

[134] Finally, on this issue, Mr Gihwala's accounting in these proceedings confirms that Mr Manala is a party to the Spearhead agreement, is subject to its terms, and is jointly and severally liable with Mr Gihwala and the DGFT for the obligations under the agreement. For these reasons, his cross-appeal must fail.

Overview of Grancy's claims

[135] Spearhead claims 1 to 11 relate to amounts arising from Grancy's entitlement to a one third shareholding in SMI, confirmed by this Court. In the consolidated action, Grancy claimed an amount based on a 31% shareholding in Spearhead. In the proceedings before Wragge AJ, Grancy claimed amounts due based on its additional 2.33% shareholding in SMI, which it did not claim in the consolidated action and were thus not addressed in the SCA 2016 judgment.

[136] Grancy contends that the following further claims are due to it pursuant to the debatement:

(a) Interest on the initial payment of R1.8 million made by Grancy for purposes of the investment (Spearhead claim 12). It appears that this is an error. Grancy claimed interest in the amount of R42 041.10 in paragraph 35.5 of the particulars of claim. Messrs Gihwala and Manala and the DGFT were ordered to pay this amount to Grancy (paragraph A1(l) of the High Court's order dated 18 August 2021).

(b) Interest on amounts held in the HHG trust account that were not required to be utilised immediately for the investment (Spearhead claims 13 to 15).

(c) Claims arising from an unauthorised loan from SMI to Ngatana (Spearhead claims 16 to 18). This is also an error. The defendants in the Spearhead case were ordered to pay the relevant amounts to Grancy (paragraphs A1(m) to (o) of the High Court's order of 18 August 2021).

(d) Claims in relation to unlawful Prescient management and administration fees (Spearhead claims 19 to 25).

(e) A claim concerning the secret profit made in respect of an authorised investment in Strand Property Investments (Spearhead claim 26).

(f) A claim for declaratory relief in relation to the secret profit made in the Cape Gannet investment (Spearhead claim 27).

Prescription

[137] Before dealing with the claims under the Spearhead agreement, it is necessary to briefly address the contention by the Gihwala defendants that most of those claims have prescribed. They say that the appellants have been aware of the identity of the debtors and the facts from which the debts arise, as contemplated in s 12(3) of the Prescription Act 68 of 1969 (the Prescription Act).[31] For example, as regards Spearhead claims 1, 2 and 3, the Gihwala

[31] Section 12(3) of the Prescription Act provides:

defendants contend that the dates upon which Grancy alleges that it should have received dividend payments are 17 October 2008, 26 March 2009 and 12 February 2010. The process to interrupt prescription – a notice in the form of particulars of claim – was served on 15 July 2016, more than three years after the claim arose. Consequently, so it is contended, claims 1, 2 and 3 have been extinguished by prescription.

[138] But that is not so. The notice entitled 'Particulars of Claim' did not initiate a cause of action. Instead, the initial Spearhead application launched on 5 November 2007 and served on the respondents, in which the debts owed to Grancy were claimed, interrupted prescription in terms of s 15(1) of the Prescription Act.[32] That application gave rise to the order dated 9 March 2009 (the March 2009 order) by Traverso DJP. In terms of that order, the respondents were directed to render a full account in relation to the Spearhead investment, after which they were required to debate the account and to pay the appellants the amounts due to them upon the debatement.

[139] The proceedings that followed dealt with the procedure utilised in the debatement of the account. Thus, in terms of the 2014 debatement order, the appellants were required to deliver a written notice in the form of particulars of claim.[33] The High Court rightly concluded that questions of prescription do not arise and that the defence of prescription in relation to claims 1, 2 and 3 could not succeed.

'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[32] Section 15(1) of the Prescription Act provides:

'The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'

[33] *Grancy v Seena Marena Investment* fn 7 Annex A para 14.1.

[140] Given that the Gihwala defendants' cross-appeal against most of the High Court's monetary orders, it is convenient to deal with the Spearhead claims in numerical order.

Spearhead claims 1 to 11: claims based on a one-third shareholding

[141] The 2016 SCA judgment confirmed that in terms of the Spearhead agreement, Grancy was entitled to a one third shareholding in SMI. This Court construed the March 2009 order granted by Traverso DJP, as follows:

'In November 2007 Grancy launched an application in the Western Cape Division of the High Court claiming against Messrs Gihwala and Manala, SMI and the Trust delivery of a 31% shareholding in SMI. Although this was less than the one-third share originally agreed upon, Mr Mawji explained in his founding affidavit that this was being accepted on the basis of a concession by Messrs Gihwala and Manala, whilst reserving Grancy's position to make further claims after receiving a proper account of its investment. In addition to the registration of that shareholding in its name, it sought an accounting in respect of its original investment in SMI.'

[142] A number of Grancy's claims in the current proceedings is based on its entitlement to the benefits associated with an additional 2.33% shareholding in SMI, being the difference between the 31% granted in the consolidated action and its overall entitlement to a one third shareholding in SMI.

[143] The March 2009 order that gave rise to the consolidated action was based on Grancy's acceptance of a concession by the Gihwala defendants that SMI had acquired 630 000 Spearhead units on behalf of Grancy, which was equivalent to a 31% shareholding in SMI. However, the court order encompassed a claim for a full statement of account in relation to the use of Grancy's funds of R4 040 250, of which R3 040 250 was used for the Spearhead investment and R1 000 000, for the Scharrig investment, including an accounting for any shortfall in SMI shares acquired on Grancy's behalf, the debatement of that account, and payment of any amounts due to Grancy from the debatement.

[144] The High Court found that the 2016 SCA judgment placed the terms of the Spearhead agreement beyond doubt, and made clear what the effect of the March 2009 Spearhead order was. Implicit in that order, the court said, was the reservation of Grancy's rights to claim further amounts once further information was revealed in the debatement process, and that Grancy's claims were based on its entitlement to a 33.33% interest in SMI. Consequently, the High Court upheld Grancy's claims based on its contention that it was entitled to 33.33% shareholding in SMI, and awarded Grancy the difference between the amounts it had received as a 31% shareholder and what it would have received had it held 33.33%.

[145] The Gihwala defendants, however, contend that Grancy has waived its right to any claim arising from a shareholding of 33.33%. They say that Grancy knew that it would receive dividends equating to only a 31% shareholding when it agreed to the March 2009 order; that the order required the respondents to account for the use of the appellants' funds and a debatement of that account; and that the High Court overlooked the nature of the settlement resulting in the March 2009 order.

[146] The Gihwala defendants are mistaken. The March 2009 order which gave rise to the consolidated action, was based on Grancy's acceptance of the Gihwala defendants' concession that SMI had acquired 630,000 Spearhead units on behalf of Grancy, which was equivalent to a 31% shareholding in SMI. Grancy never accepted that it was entitled to only a 31% shareholding. The order encompassed a claim for a full statement of account in relation to the use of the entire R3,040,250, which Grancy had invested in Spearhead (and R1,000,000, utilised in the Scharrig investment), and to pay to Grancy any amounts due after the debatement of that account. Information arising from the debatement can form the basis for additional monetary claims, which includes the additional

shareholding to which Grancy was entitled. In fact, the March 2009 order provides that pursuant to the debatement, Grancy may claim 'such amount, if any, as may be due' to it.

[147] There is nothing in the consolidated action that supports the conclusion that Grancy waived its right to claim any benefits arising from the additional 2.33% shareholding. Mr Gihwala chose not to testify in those proceedings, and this Court has held that in terms of the Spearhead agreement, Grancy is entitled to a one third shareholding in SMI.

[148] For his part, Mr Manala persisted in his denial that Grancy was entitled to any shareholding in SMI. He pleaded that the settlement agreement reflected in the March 2009 order was made as a compromise on the strength of a false representation by Mr Gihwala to the effect that the order would bring an end to and settle the dispute between the parties. Mr Manala asserts that he relied on this misrepresentation, in good faith and to his prejudice.

[149] However, the alleged misrepresentation is a matter between Mr Manala and Mr Gihwala. It does not affect any claim by Grancy against Mr Manala based on the Spearhead agreement. Mr Manala cannot now contend that Grancy must look to Mr Gihwala for the satisfaction of its claims under that agreement, since Traverso DJP in the first stage of the accounting process, and this Court, have in effect concluded that Mr Gihwala and Mr Manala acted in concert in relation to everything that was done under the Spearhead investment. Moreover, in the consolidated action, Mr Manala chose not to adduce any evidence in relation to his version of events, nor the circumstances surrounding the issuance of the March 2009 order.

Claims 1 to 3: non-payment of dividends due

[150] Grancy's entitlement to dividends not yet received is a matter of straightforward calculation, based on the additional 2.33% shareholding. The dates and amounts have been admitted by Mr Gihwala. Mr Manala pleaded no knowledge of these amounts and accordingly denies them. To the extent that Mr Gihwala's decisions constituted a breach of the Spearhead agreement and are the foundation of Grancy's claims, Mr Manala is equally responsible, and likewise liable.

[151] Grancy received only 31% of the dividends, but should have received 33.33% by virtue of the Spearhead agreement. Mr Gihwala admits that Grancy received 31%, but denies that it is entitled to receive the additional 2.33% of the dividends declared by SMI.

[152] The benefit of 2.33% of the dividends declared by SMI went to Mr Gihwala and Mr Manala in breach of the Spearhead agreement. It caused Grancy loss in an equal amount.

Claims 4 and 5: late payment of dividends

[153] SMI paid dividends of R10 000 000 on 27 May 2010, and R10 000 000 on 8 April 2011. However, Ngatana had declared and paid dividends sufficient to cover these amounts on 26 March 2009 and 12 February 2010, and was in possession of the required funds. At that time, both Mr Gihwala and Mr Manala were directors of SMI, responsible for declaring and paying dividends to shareholders, without delay.

[154] Despite this, Mr Gihwala and Mr Manala paid out dividends to SMI shareholders only on 27 May 2010 and 8 April 2011. They furnished no reasons for the late payments.

[155] The quantification of the losses to Grancy is a matter of simple calculation. Grancy is entitled to interest at 15.5% on 31% of the dividends it received, from the date that the funds were available for distribution until the date that the dividends were paid. That amount, in turn, attracts interest until the date of payment.

[156] The Gihwala defendants submit that the High Court erred in holding that SMI was obliged to pay dividends immediately upon receipt of funds from Ngatana, because this is inconsistent with the statutory duty to verify the profits available for distribution, taking into account SMI's administrative expenses.

[157] But as the High Court found, no evidence of any administrative expenses, statutory annual returns, or tax liabilities had been placed before it; and no reasons were given why the payment of these expenses should have delayed the payment of dividends to SMI shareholders. It follows that the appeal against paragraphs 426 A1(d) and (e) of the High Court's judgment, cannot succeed.

Shortfall in other distributions

[158] There are other distributions for which Grancy received benefits based on only a 31% shareholding in SMI. These distributions were recognised as due to Grancy in the 2016 SCA judgment. On the basis of being entitled to 33.33% of the shares, Grancy is entitled to the additional 2.33% of each of these distributions. The calculation of these amounts is set out in the particulars of claim, and the report and evidence by the appellants' expert, Mr Hilton Greenbaum.

[159] The High Court thus correctly granted the relief sought under claims 1 to 11 (prayers 1.1 to 1.11 of the particulars of claim). Consequently, the cross-appeal against these claims is dismissed.

Claim 12: interest on the initial Ngatana payment

[160] On or about 16 February 2005, without its knowledge, R1.8 million of Grancy's funds was transferred from the HHG trust account to Ngatana for the purchase of SMI's portion of the first tranche of shares purchased by Ngatana.

[161] To the extent that R1.8 million was required by Ngatana from SMI, each shareholder of SMI had to contribute one third of that amount, ie R600,000, subject to Grancy and the DGFT each contributing one half of Mr Manala's share. Thus, Grancy and the DGFT should each have contributed R900,000. Grancy suffered loss in that its funds were used, without its knowledge, to finance the other shareholders' financial obligations to Ngatana for the period 16 February 2005 to 6 June 2005.

[162] The loss suffered is the interest on the Gihwala and Manala portion of the amount funded by Grancy, being R900,000, from 16 February 2005 to 6 June 2005. The loss of interest suffered is thus R42,041.10. Grancy is also entitled to interest on that amount, at the applicable statutory rate of 15.5% per annum, from 6 June 2005 to date of payment.

[163] Mr Gihwala denies Grancy's entitlement to this claim on the basis either that Mr Narotam, acting on behalf of Grancy, had authorised the transfer of the R1,800,000 to Ngatana on 16 February 2005, or that Grancy is estopped from denying such authority. In the alternative to the estoppel defence, Mr Gihwala and the DGFT contend that Mr Narotam had ostensible authority to represent and bind Grancy.

[164] The High Court found that there was no acceptable evidence that Mr Narotam was aware that Grancy's funds were being used to fund Mr Gihwala's and Mr Manala's contributions for the relevant period. The court

referred to Mr Gihwala's evidence that Mr Mawji made financial decisions on behalf of Grancy and that one would have expected Mr Gihwala to obtain written authority for the transfer.

[165] However, the Gihwala defendants submit that the High Court overlooked Mr Narotam's affidavit evidence in the Spearhead proceedings, in which he stated that he gave permission to Mr Gihwala to pay the R1.8 million to fund SMI's portion of the shares purchased by Ngatana. The High Court was correct in finding that this evidence was not credible. It is at odds with the inherent probabilities. As the court found, there was no reason why Grancy would have agreed to finance the financial obligations of the other shareholders, and it was not suggested that Mr Gihwala (or Mr Manala) did not have the funds to effect the transfer at the time that it was requested.

[166] Consequently, the High Court was correct in finding that there was no evidence to show that Mr Narotam was aware that the amount of R1.8 million had been used. It follows that the cross-appeal on this aspect must fail.

Claims 13 to 15 – interest on amounts held in HHG's trust account

[167] Grancy transferred R3.5 million to the HHG trust account on 11 February 2005 and R540,200 on 16 May 2005. Mr Mawji testified that at the time of the investment, there was a sense of urgency in Grancy deciding whether to pursue the investment.

[168] Mr Mawji conceded that Grancy did not give any specific instruction to Mr Gihwala that the funds should be placed in any interest-bearing trust investment account. Mr Mawji explained, however, that in accordance with a practice in the United Kingdom, to which he is accustomed, funds are placed on deposit whenever they are transmitted to a lawyer; and he presumed that a similar practice was followed in South Africa. He also confirmed that he was not familiar

with the nature of a s 78(2)*(a)* account in terms of the Attorneys Act 53 of 1979 (the Attorneys Act).[34]

[169] Grancy contends that the following amounts were not required for the Spearhead investment for the relevant periods and should have been placed in an interest-bearing account for its benefit: R1 million of the R3.5 million contribution for the period 11 February 2005 to 14 April 2005; R700,000 of the R3.5 million contribution, for the period 11 February 2005 to 6 June 2005 (6 June 2005 being the date that the funds were paid over to Ngatana); and a contribution of R540,250, for the period 16 May 2005 to 6 June 2005 (6 June 2005 being the date that the funds were paid over to Ngatana).

[170] The relevant interest rates which were applicable to a s 78(2)*(a)* account at the relevant times were 5.4% per annum from 1 January to 19 April 2005 and 5.1% per annum from 20 April to 31 July 2005, compounded daily.

[171] The High Court refused Grancy's claims. Its reasons may be summarised as follows. Mr Gihwala required a written authorisation under the Attorneys Act and in terms of HHG's internal procedures, for funds to be deposited in a s 78(2A) account. Nobody gave Mr Gihwala such an instruction. It is not a requirement under the Spearhead agreement. According to the evidence, the Spearhead transaction was urgent and the funds for that investment would have been required almost immediately. Neither Mr Mawji nor Mr Gihwala contemplated that Grancy's funds would be held in trust for any length of time. No claim for interest for the failure to deposit Grancy's funds in an interest-bearing trust account had been advanced in the 2010 and 2011 actions. The evidence of the

[34] Section 78(2)*(a)* of the Attorneys Act provides:
'Any practitioner may invest in a separate savings or other interest-bearing account opened by him with any banking institution or building society any money deposited in his trust account which is not immediately required for any particular purpose.'

appellants' expert regarding the rate of interest that would have applied to HHG, was unsatisfactory.

[172] The appellants contend that the duty to invest the unused funds, arises from the duties of confidence, trust and the utmost good faith under the Spearhead agreement. The appellants miss the point. Mr Gihwala received no instruction to deposit the funds in an interest-bearing account, and the funds were required almost immediately. And Mr Mawji's assumption that funds handed to a lawyer in South Africa should be placed on deposit, as in the United Kingdom, cannot found a claim that the funds should have been deposited in an interest-bearing account.

[173] The High Court was accordingly correct to dismiss these claims. Grancy's appeal against this part of the judgment fails.

Claims 16 to 18: SMI loan to Ngatana

[174] Ngatana purchased a total of 3.5 million Spearhead units. The contribution that Ngatana was required to make (taking into account the Standard Bank funding) was R2.75 per unit. When financing and transaction costs are taken into account, the cost was R2.852 per unit. Ngatana was required to pay R9 981 900, in respect of the 3.5 million units. These facts are admitted by Mr Gihwala.

[175] Grancy contends that SMI was liable for 58% of such payment, being R5,788,980.00 for 2,030,000 units. SMI in fact contributed an amount of R6,657,673.00 to Ngatana. This constituted an overpayment of R868,693.00, which would have purchased an additional 304,387 units, or an additional 8.67% shareholding in Ngatana.

[176] Mr Gihwala denies that SMI was liable for only 58% of the amount that Ngatana was required to pay Spearhead, as SMI was also required to contribute towards Ngatana's transactional costs and other expenses. This denial is inconsistent with his admission that the financing, transactional and unit costs were included in the R9 981 900.00 figure.

[177] Mr Gihwala accepted that more was paid by SMI than was required for the purchase of its 2,030,000 units. However, he testified that there was an agreement that minority shareholders would be funded and that the overpaid amount would be utilised to fund them. But the Spearhead agreement does not permit the use of SMI funds in this way. And Mr Gihwala did not plead, neither could he produce any evidence for the existence of any agreement, nor a variation of the Spearhead agreement in this regard.

[178] Mr Gihwala does not take issue with the calculations of the dividends that Grancy contends it should have received. The High Court held that the use of SMI funds to fund minorities is a breach of the Spearhead agreement, and Grancy is entitled to one third of the benefits of the overpayment. Grancy is thus entitled to one third of 8.67% of the dividends paid by Ngatana, being:

(a) R262,727.27, plus interest at the rate of 15.5% per annum from 15 October 2008 to date of payment;

(b) R1,734,000.00 plus interest at the rate of 15.5% per annum from 26 March 2009 to date of payment;

(c) R558,665.75 plus interest at the rate of 15.5% per annum from 12 February 2010 to date of payment.

[179] The Gihwala defendants, however, submit that these claims assume that SMI should have had a larger shareholding in Ngatana and would have received additional dividends as a result; and that the High Court took as an incorrect

starting point, the fact that the respondents had admitted the appellants' calculations. That admission, the respondents say, does not take into account the transaction costs at the Ngatana level which are unrelated to the purchase price for the Spearhead units.

[180] But that is not so. The Gihwala defendants ignore the evidence. Mr Gihwala accepted that SMI had overpaid the amount for its shareholding of 58%. His explanation was not that this was on account of transaction costs, but rather to fund minority shareholders – which was impermissible under the Spearhead agreement. And Mr Gihwala agreed that the amount of R9 981 900 covered transaction costs, which included, inter alia, legal and accounting fees and tax and bank charges.

[181] The High Court thus correctly upheld claims 16 to 18. The cross-appeal against these claims falls to be dismissed.

Claims 19 to 25: Prescient management and administration fees

[182] The High Court found that some of the management fees that Ngatana paid to the various Prescient entities were properly incurred and fell within the ordinary scope of its business, but that other management fees were not properly explained. The High Court accordingly upheld some of Grancy's claims, but dismissed others.

[183] The respondents do not cross-appeal against the claims the High Court upheld, which included the largest claim for R387,463.20. The issues on appeal therefore concern the claims totalling R164,138.62 which the High Court dismissed.

[184] The appellants contend that the High Court ought to have upheld all its claims for three main reasons. First, Ngatana was to be a SPV that was not authorised to make any investments other than the investment in Spearhead linked units; and Grancy's consent was required before Ngatana could incur any additional obligations, including management fees. Second, they contend that this Court in the 2016 SCA judgment found that Ngatana's affairs would require little by way of active management, and consequently that the High Court's order is inconsistent with that finding. Third, the management fees required the consent of SMI under the Ngatana shareholders' agreement because they were not fees incurred in the ordinary course of business.

[185] These contentions, however, are unsustainable for the following reasons:

(a) The appellants did not plead that Ngatana could only incur additional expenses with Grancy's consent. They pleaded that Messrs Gihwala and Manala were obliged to ensure that 'all proceeds of the Spearhead investment received by Ngatana were promptly and fully distributed to SMI, *less any necessary costs and expenses*'.[35] Their pleaded case consequently acknowledged that Ngatana would incur necessary expenses, and did not require Messrs Gihwala or Manala to seek Grancy's consent before they were incurred.

(b) The appellants' reliance on this Court's findings in the 2016 SCA judgment is misplaced. The High Court had before it significantly more evidence regarding Ngatana's activities than was available in the trial before Fourie J. The High Court properly concluded that Prescient managed Ngatana's loan from Standard Bank, prepared its financial ledgers and submitted its tax returns and, consequently, that it rendered 'services generally associated with a business'.

[35] Emphasis added.

(c) The appellants have not established any sustainable basis for their contention that the management fees – to the extent that the High Court found them to have been properly incurred – were not incurred by Ngatana in the ordinary course of its business.

[186] Consequently, the appeal against the High Court's (limited) dismissal of the appellants' claims pertaining to Ngatana's management fees, falls to be dismissed.

Claim 26: The secret profit made in Strand Property Investments

[187] Grancy pleaded that under the Spearhead agreement, SMI would make no investments other than the Spearhead investment, unless otherwise agreed between the shareholders, including Grancy. The particulars of claim state that Mr Gihwala, the DGFT and Mr Manala were in a multi-faceted fiduciary relationship with Grancy and thus owed Grancy duties of confidence, trust and good faith. These duties are part of the material terms of the Spearhead agreement determined by this Court in the 2016 SCA judgment.

[188] In April 2007, Messrs Manala and Gihwala made an unauthorised investment, through SMI, of R2 million in Strand Property Investments. This investment was not authorised by Grancy and none of the proceeds was paid over to Grancy.

[189] The DGFT and Mr Gihwala profited through the Strand investment by receiving an amount of R3 million on 5 April 2007. Mr Gihwala admits that the investment was made, that neither he nor Mr Manala sought approval from Grancy, and that the DGFT received R3 million from the investment on 5 April 2007.

[190] In *Robinson v Randfontein Estates Gold Mining Co Ltd*,[36] Innes CJ stated the 'no profit' rule and the 'no conflict' rule as follows:

'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship . . .'

[191] The no profit rule and the no conflict rule were reaffirmed by this Court in *Phillips*.[37] These are strict rules that allow little room for exception. They extend to both actual conflicts of interest and to cases in which there is a real, sensible possibility of conflict. The defences open to a fiduciary who breaches trust are extremely limited: only the free consent of the principal after full disclosure will suffice. Once the breach of a fiduciary duty is established, the fact that the company has suffered no loss or damage, or that the profit was not made at the expense of the company, is irrelevant.[38]

[192] The term 'profits' in relation to a claim for disgorgement of secret profits does not refer simply to a financial profit on an investment. Instead, the term is a 'wide one' and 'is not confined to money, but covers every gain or advantage made by a wrongdoer'.[39] Once the scope of the fiduciary duty and a breach thereof is established, the wrongdoer will be responsible for disgorgement of all such profits made within the scope of that duty.[40]

[193] Mr Gihwala denies that the R3 million which the DGFT received is a secret profit liable to disgorgement, or that it was secured using SMI's funds. He testified that the Strand investment required him to raise R6.4 million. He says

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[36] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177.
[37] *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA); Farouk H I Cassim, M F Cassim, R Cassim et al *Contemporary Company Law* 3 ed (2021) at 725.
[38] *Phillips* fn 37 paras 31 and 32.
[39] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1923 AD 155 at 159.
[40] *Phillips* fn 37 para 33.

that he raised this amount through SMI (R2 million) and other sources (R4.4 million). He alleges that, due to the structure of the Strand investment, the amount of R3 million represented repayment of the capital plus his profit. However, he cannot deny that R2 million of the funding came from SMI and that the return (whether it includes the capital or not) went directly to the DGFT.

[194] The amount received by the DGFT from the unauthorised investment by SMI was therefore R3 million. This is an amount which it would not have received had the Gihwala defendants or Mr Manala not misused Grancy's funds. A secret profit of R3 million was thus made by the DGFT.

[195] Despite pleading no knowledge of the investment, Mr Manala testified that Mr Gihwala had informed him about the Strand investment, which involved R2 million being invested by Mr Gihwala through the vehicle of SMI, which amount was going to be repaid in no more that 18 to 24 months with a 50% return.

[196] Contemporaneous correspondence from Mr Manala reveals that the R2 million which they used to invest in the Strand investment through SMI was, in fact, Grancy's R2 million. In an email which Mr Manala sent to Mr Gihwala on 15 March 2009, he states:

> 'You will recall that when we all received our shareholders' loans from Ngatana, I suggested that [Grancy's] loans be repaid. After the DGFT loans including interest for funding my deal were paid, you then suggested that we should instead take the R2m and place same in the Strand Development and guaranteed that we would get back 50% return in 24 months. We placed the money in the development based on this undertaking.'

[197] It is common ground, and it was confirmed by this Court, that Grancy never agreed to its funds being used for this investment. The R2 million was Grancy's; it should have been repaid to Grancy, but instead was used by Messrs Manala and

Gihwala to engage in an unauthorised investment, pursuant to which the DGFT was paid out R3 million.

[198] Mr Manala testified that he did not receive any amount from the proceeds of R3 million paid to the DGFT, and that at the time of the investment, he was of the view that only he and DGFT were shareholders in SMI. This does not assist Mr Manala. As this Court held, and as Mr Manala conceded, any decisions by Mr Gihwala were made on his behalf and any breach of the Spearhead agreement by Mr Gihwala would also constitute a breach by Mr Manala.

[199] The High Court accepted Mr Gihwala's contention that the R3 million repayment was part of a different transaction (between the DGFT and Strand Junction Development), for the repayment of a series of loans made to Strand Junction Development. Central to the court's reasoning was its finding that the Scarlet Ibis loan of R2 million was dealt with in the 2010 and 2011 actions, and that Grancy had claimed and obtained repayment of its contribution in the amount of R2,051,833.34.

[200] Consequently, the High Court found that the amount of R3 million was not paid to the DGFT as a profit on the Scarlet Ibis transaction, but was rather payment of an agreed return in accordance with a separate transaction, and that Grancy had already been paid the amount improperly used by Messrs Gihwala and Manala for the Scarlet Ibis investment.

[201] The High Court erred. Grancy's claim was for the disgorgement of the R3 million profit. The fact that it was repaid the amount of R2 million used in the Scarlet Ibis investment is irrelevant. The High Court's conclusion is tantamount to a finding that Grancy is not entitled to disgorgement of the profit of R3 million because it suffered no loss. But this disregards the rationale for the no profit and

no conflict rules: to underpin the fiduciary's duty of undivided loyalty to the principal. In the leading case of *Regal (Hastings) Ltd*,[41] approved in *Phillips*,[42] Lord Wright said:

'[I]f a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which would otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship.'[43]

[202] An undisclosed profit which directors obtain as a result of the execution of their fiduciary duties belongs to the company. It follows that Grancy's appeal in respect of claim 26 must succeed.

Claim 27: The Cape Gannet Investment

[203] This investment stands on a different footing from the Strand Property Investment, and can be dealt with briefly. As was stated in *Phillips*, a claim for a secret profit arises where the fiduciary's duty in acquiring the profit amounts to a conflict of interest between their own interests and those to whom they owe duties of trust.[44]

[204] The High Court dismissed the Cape Gannet secret profit claim principally on the basis that Messrs Gihwala and Manala's interests were aligned with those of Grancy. Consequently, there was no conflict of interest (which Grancy was required to prove to succeed with its claim). Grancy, Mr Manala and the DGFT were all shareholders in SMI who stood to benefit (or indeed to make a loss) from Ngatana's investment. Further, there is nothing secret about the investment. It was a public transaction about which the appellants had known for many years, and from which they had benefited (and continue to benefit).

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[41] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.
[42] *Phillips* fn 37 para 31.
[43] *Regal (Hastings) Ltd* fn 41 at 154F.
[44] *Phillips* fn 37 para 32.

[205] The appellants pleaded that the Cape Gannet investment was contrary to the Spearhead agreement. More specifically, they alleged that in breach of the agreement, Mr Gihwala consented to the investment on behalf of SMI. But Grancy, through its shareholding in SMI, has earned and will continue to earn substantial profits from the Cape Gannet investment. Yet the appellants seek a disgorgement of an alleged secret profit. As the appellants would have it, Grancy is entitled to *all* the profits earned by SMI from the Cape Gannet transaction – the benefit of profits that it earned (and continues to earn) by virtue of its shareholding, as well as the profits that would accrue to the DGFT and Mr Manala by virtue of their shareholding. And this, when Grancy, since it became aware of the Cape Gannet transaction, has neither objected to it, nor demanded that Ngatana dispose of the units acquired through that transaction.

[206] This is untenable, and runs counter to the no conflict rule – the consent to the investment by SMI did not place the respondents in a conflict between their personal interests and those of Grancy – the core duty of a fiduciary. Neither was there a breach of the corporate opportunity rule: the appellants do not, and cannot, claim that the Cape Gannet investment was an economic opportunity that properly belonged to Grancy, which the respondents had usurped or diverted for themselves.[45] Instead, they contend that the 'conflict of interest is inherent in the fact that Grancy was not informed of the investment and the investment was not authorised'. These facts self-evidently do not give rise to a conflict of interest. And the fact that Grancy may not have been informed of the investment and did not consent to it, does not mean that its interests diverged from those of Mr Manala and the DGFT.

[45] *Da Silva and Others v CH Chemicals (Pty) Ltd* [2008] ZASCA 110; 2008 (6) SA 620 (SCA); [2009] 1 All SA 216 (SCA) para 18.

[207] For these reasons, the High Court rightly dismissed the appellants' claim in relation to the Cape Gannet investment. Consequently, their appeal against this order fails.

Conclusions on the Spearhead investment

[208] Mr Manala was a party to the Spearhead agreement. The terms of the Spearhead agreement have been finally determined by this Court. In the consolidated action before Fourie J, Messrs Gihwala and Manala chose not to give evidence and thus conceded the terms of the Spearhead agreement. These terms cannot be revisited by resort to issue estoppel. Mr Manala associated himself with the accounting of the Gihwala defendants. He stands or falls by that accounting.

[209] The High Court rightly granted Grancy's claims based on its full 33.33% shareholding in SMI (claims 1 to 11). Consequently, the cross-appeal against paragraphs 426 A1(a)-(k) of the High Court's order fails.

[210] The High Court was correct in holding that there was no acceptable evidence that Mr Narotam was aware that Grancy's funds were being used to fund the other shareholders' contributions in the purchase of the first tranche of Spearhead units by Ngatana. Therefore, the cross-appeal against paragraph 426 A1(l) must fail.

[211] The High Court correctly dismissed the appellants' claim for interest on amounts held in the HHG account (Spearhead claims 13 to 15). Consequently, Grancy's appeal against this part of the judgment fails.

[212] The High Court rightly held that the use of SMI's funds to fund minorities without Grancy's consent, was a breach of the Spearhead agreement and that

Grancy was entitled to the amounts sought under claims 16 to 18. Therefore, the cross-appeal against paragraphs 426 A1(m) to (o) of the High Court's order fails.

[213] The High Court correctly found that some of the management fees that Ngatana paid to the various Prescient entities were properly incurred and fell within the ordinary scope of its business, but that other management fees were not properly explained. Consequently, the cross-appeal against this part of the judgment fails.

[214] The High Court erred in refusing Grancy's claim for the disgorgement of the secret profit of R3 million in respect of the unauthorised investment in Strand Property investments. Grancy's appeal against this part of the judgment therefore succeeds.

[215] Concerning the Cape Gannet investment, the High Court rightly held that the appellants failed to prove that Mr Gihwala and Mr Manala obtained a secret profit, or that they had placed themselves in a position where their interests came into conflict with Grancy's interests. Consequently, the declaratory order sought under claim 27 is refused, and Grancy's appeal against this part of the judgment fails.

The issues relevant to both investments

Interest

[216] The High Court found that the interest payable by the Gihwala defendants and Mr Manala on the debts in respect of which it granted judgment was subject to the *in duplum* rule (interest on a debt stops running when the total amount of the unpaid interest is equal to the unpaid principal debt).[46] It rejected the

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[46] *Nedbank Ltd and Others v National Credit Regulator and Another* [2011] ZASCA 35; 2011 (3) SA 581 (SCA); [2011] 4 All SA 131 (SCA) para 49.

appellants' argument that the common law should be developed to allow for the suspension of the rule between the period when an account is due and the date on which an adequate account is rendered.

[217] The appellants argue that the *in duplum* rule should not apply in this case. This is yet another example of their attempt to extract the maximum benefit out of the respondents' failure to comply with their contractual obligations. The argument is opportunistic and artificial. It was, understandably, not pressed before us.

[218] The argument fails at the first hurdle, for the following reasons. First, the appellants failed to plead that the common law should be developed. Their attempt at this development at the end of the trial is impermissible. Basic procedural fairness dictates that a party is entitled to know what case it has to meet before it presents its own case. Further, litigants are obliged to raise constitutional arguments in litigation at the earliest opportunity, to ensure that the jurisprudence under the Constitution develops reliably and harmoniously.[47] Second, it is undesirable for an appellate court to develop the common law as a court of first and last instance; it must consider whether it would be unfair or prejudicial to do so, based on the pleaded and established facts.[48] This is such a case: a development of the *in duplum* rule would prejudice the respondents. And third, it is the Legislature and not the courts which has the major responsibility for law reform.[49]

[219] The *in duplum* rule is a settled principle of South African law that has stretched back centuries into Roman Dutch and Roman law.[50] It has been

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[47] *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) para 41.
[48] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC), 2012 (3) BCLR 219 paras 27 and 31; *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) paras 43-44.
[49] *Carmichele* fn 47 para 36.
[50] *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 All SA 325 (SCA) para 23.

carefully and deliberately developed by the Legislature and the courts. The developments for which the appellants contend would involve a complex reform of the law, which the Constitutional Court has held, is best left to Parliament.[51]

[220] In any event, the appellants' submissions regarding the development of the *in duplum* rule, do not withstand scrutiny. They contend that the rule should not apply to a debatement of account until the party receiving the account has received an adequate, accurate account which allows it to formulate its claim; that their claims are for unliquidated debts and a court has a discretion under s 2A(5) of the Prescribed Rate of Interest Act 55 of 1975 (the Interest Act), to fix any interest rate and starting date which is just;[52] and that there should be two different interest regimes in a claim for an accounting. According to this argument, interest should be regarded as running from the date that payment was due until the order requiring an accounting; thereafter, that amount (capital and interest) 'takes on the form of a due debt' on which interest starts to run anew.

[221] This case demonstrates that the contention that a creditor cannot advance its claim without an adequate accounting, is unsustainable. The appellants launched the 2010 and 2011 actions while the debatement procedures were ongoing. They were also in a position to advance most of their claims in this case before proceedings were instituted. They did not need an accounting. The developments for which the appellants contend would enable a creditor to fend off the application of the *in duplum* rule, by contending that it requires an adequate accounting in circumstances where it has the necessary information to pursue a claim, but elects not to do so.

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[51] *Carmichele* fn 47 para 41; *MEC for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC).

[52] Section 2A(5) of the Prescribed Rate of Interest Act 55 of 1975, provides:
'Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.'

[222] All the appellants' claims (save for the declaratory order sought in relation to the Cape Gannet transaction) are for liquidated amounts, as the High Court rightly held. These claims were either quantified in the particulars of claim, or capable of prompt and speedy ascertainment.[53] Interest which accrues on an unliquidated debt, ordinarily will be arrear interest.[54] Section 2A(2)*(a)* of the Interest Act states that interest runs 'from date on which payment of the debt is claimed by the service on the debtor of a demand or summons'. This simply means that interest which accumulates on an unpaid unliquidated debt will be arrear interest. It would in any event not be just to award interest from the date of the loss until final payment in this case. Much of the delay has not been as a result of any party's conduct, but rather the ordinary course of litigation.

[223] The appellants, unsurprisingly, have cited no authority for the application of a bifurcated interest regime. The contention conflicts with the settled rule that interest only starts running again on a date (where the interest has already reached the capital) after the date that the judgment debt becomes due and payable. When Traverso J and Dlodlo J issued their orders, there was no judgment debt against the respondents that was due and payable.

[224] It follows that any interest payable in terms of s 2 and s 2A of the Interest Act will be capped by the *in duplum* rule, as it is arrear interest. The appellants have not made out a case for the development of the common law.

Contempt of Court

[225] The appellants sought an order declaring that Mr Gihwala, Mr Manala and the DGFT were in contempt of the February 2016 order; and that they should be imprisoned for 30 days, alternatively, sentenced to a fine. The High Court found

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[53] *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* [2010] ZASCA 19; 2010 (4) SA 232 (SCA); [2010] 3 All SA 383 (SCA) para 15.

[54] *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2014] ZASCA 16; [2014] 2 All SA 527 (SCA); 2014 (4) SA 253 (SCA) para 17.

that the accounting contained a wealth of detail dealing with each paragraph set out in the order and that the respondents had bona fide attempted to comply with it. Further, the accounting was sufficient to allow the appellants to pursue their claims as is evidenced by the particulars of claim which they delivered.

[226] The law on contempt is well-settled. All court orders must be obeyed on pain of contempt. The appellants bear the onus to prove the existence, service and breach of the order. Once those requisites are established, wilfulness is presumed and the burden shifts to the respondents to disprove the element of intention.[55]

[227] The appellants did not identify the respects in which they contend that the accounting is deficient and fails to comply with the order. Indeed, the appellants did not during the course of the examination and cross-examination of the parties' witnesses address the particular respects in which the Gihwala defendants are alleged to have breached the February 2016 order. Mr Mawji was asked during cross-examination to provide particulars of the alleged non-compliance with the order, but could not do so.

[228] It is hard to see how the Gihwala defendants breached the February 2016 order, let alone that they wilfully defied it. They delivered two sets of comprehensive accounts pursuant to that order, spanning 395 pages in the case of the Scharrig investment (including 29 pages of narrations addressing each individual paragraph of the order), and 301 pages in the case of the Spearhead investment (containing 31 pages of detailed narration which also addressed each paragraph of the February 2016 order).

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[55] *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) 327 (CC) paras 40-43, affirming *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 41.

[229] In addition, Mr Gihwala testified that he did not put together or negotiate the Scharrig or the Spearhead investments. The Scharrig investment was driven by Messrs Joffe, Levy and Brett, and the Spearhead investment was put together by Mr Manala and Mr Brodie.

[230] The appellants' sole contention concerning the alleged failure by the Gihwala defendants to comply with the February 2016 order, is that Mr Gihwala tried to conceal relevant information concerning the Scharrig investment and that he 'carried on to the last day to deny in his account the receipt of any additional Scharrig shares'. But this complaint goes to the accuracy of Mr Gihwala's account, not the wilful breach of an order. The very purpose of this stage of the accounting was to assess its accuracy, to test the correctness of the propositions contained in the accounting and to determine whether any amounts were outstanding.

[231] Recognising that they failed to establish a breach of the February 2016 order, the appellants submit that the High Court ought to have had regard to the respondents' conduct prior to the February 2016 order, and suggest that they should be found to be in contempt of the earlier orders of Binns-Ward J and Dlodlo J. Then it is submitted that there is nothing in the February 2016 order that precludes Grancy from bringing a contempt application in respect of the non-compliance with the orders of Binns-Ward J and Dlodlo J.

[232] The short answer to these submissions is that the appellants rely solely on the February 2016 order for their claim that the respondents should be held in contempt. That was the case the respondents had to meet. No claim for contempt of the orders of Binns-Ward J and Dlodlo J is foreshadowed in the particulars of claim; it was for this reason not traversed in the evidence; and the appellants' claim for contempt of those orders is therefore impermissible.

[233] The High Court found that Mr Manala failed to comply with the February 2016 order in that he did not furnish an account regarding the Spearhead investment, as required in terms of paragraph 27.3 of that order. However, the court held that Mr Manala did not act mala fide or wilfully. He testified that he genuinely believed that there was no need for him to submit an account; and that he considered Mr Gihwala's account to be adequate and had nothing further to add. The High Court was correct in coming to this conclusion.

[234] For these reasons, the appeal against the High Court's order declining to hold the respondents in contempt of the February 2016 order, fails.

Costs

[235] The High Court ordered costs on an attorney and client scale in relation to the proceedings before Traverso DJP. The respondents submit that this is erroneous since their conduct in those proceedings did not warrant a punitive costs order, and the appellants have not furnished adequate reasons for that order.

[236] In *Public Protector v SARB*[56] the Constitutional Court affirmed the principle that an appellate court does not lightly interfere with the exercise of a true discretion, which applies to an award of costs *de bonis propriis* and costs on a punitive scale. Interference is warranted only where the discretion is not exercised judicially; or where it is based on the wrong principle, or upon a wrong view of the facts; or where it is exercised in the absence of sufficient legal grounds; or the decision could not reasonably have been reached by a court properly directing itself to the relevant facts and principles.[57]

[56] [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC).
[57] *Public Protector v SARB* paras 107 and 226.

[237] The appellants, in reliance upon *US Legal Aid Clinic*[58] submit that the costs order relating to the proceedings before Traverso DJP should be set aside because the High Court was influenced by a wrong principle – that there is no distinction between costs on an attorney and client scale, and costs on an attorney and *own* client scale;[59] and that the costs order should be replaced by an order on the latter scale. The submission is unsound. It is clear from the judgment that Wragge AJ intended to grant an order for costs on an attorney and client scale, and the reasons for the costs award in paragraphs 1 and 2 of the order dated 12 January 2023, cannot be faulted.

[238] As regards the costs of the proceedings before Wragge AJ, the appellants submit that the High Court was wrong not to award punitive costs. They accept that the court exercised a true discretion and that this Court has limited scope for interference, but say that it is at large to interfere where the court a quo was influenced by wrong principles or a misdirection on the facts.

[239] The appellants contend that Wragge AJ failed to take into account the egregious misconduct by Messrs Gihwala over many years; that Mr Manala persistently denied the terms of the Spearhead agreement; that there was 'nothing benign about the defences' put up by Mr Manala and Mr Gihwala; and that Grancy was put to unnecessary cost and expense in litigating this matter over some two decades. They ask that the costs order of Wragge AJ be replaced with an order for costs on an attorney and own client scale.

[240] The appellants' submissions, in effect, come down to this. The respondents should pay punitive costs simply because of their egregious conduct over many

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[58] *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) para 8 and fn 5.

[59] Wragge AJ referred to *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* 2004 (1) SA 123 (W) in which it was doubted whether an order is competent in circumstances other than those where attorneys seek to recover costs from their own client.

years, despite the following facts. The respondents were entitled to defend the claims against them, and the order sought for their imprisonment for contempt of court. They achieved some success in the High Court.

[241] In these circumstances, it cannot be said that Wragge AJ, in the exercise of his discretion, could not reasonably have made the costs order that he did. And Mr Manala's claim that the court erred in holding him solely liable for the appellants' costs of 6 December 2019, has no merit. Consequently, there is no basis to interfere with the costs orders in paragraphs 3, 4 and 5 of the High Court's order of 12 January 2023.

[242] As to the costs of this appeal, the appellants have achieved substantial success. There is no reason why costs should not follow the result. By contrast, the success which the first and fourth to eighth respondents have achieved in their cross-appeal, is insignificant. The second respondent's cross-appeal was unsuccessful, apart from limited success on the issues in which he made common cause with the Gihwala respondents. Fairness dictates that he should not be held liable for all the costs of appeal, since his participation in the appeal is limited to the Spearhead investment.

The order

[243] The order which I make is as follows:

1 The appeal succeeds in part.

2 The order of the High Court dated 18 August 2021, in relation to the Spearhead proceedings (WCC case no: 15757/2007), in terms of which it dismissed the appellants' claim for the disgorgement of the secret profit made in respect of the unauthorised investment in Strand Property Investments or Scarlet Ibis Investments 52 (Pty) Ltd, is set aside and replaced with the following:

‘The first defendant and the Dines Gihwala Family Trust, and the second defendant are declared liable, jointly and severally, to pay to the first plaintiff the sum of R3 million (R3 000 000.00), plus interest thereon at the rate of 15.5% per annum from 5 April 2007 to date of payment.’

3 Paragraph B1(a) of the High Court’s order dated 18 August 2021, in relation to the Scharrig proceedings (WCC case no: 10547/2008), is set aside and replaced with the following:

‘1. The first defendant and the Dines Gihwala Family Trust are declared liable, jointly and severally, to pay the following to the first plaintiff:

(a) The full economic benefit of one half of the Scharrig additional option shares, namely 3 679 754 shares at a price of R5.75 per share, minus the cost of these shares (R2.2918 per share) and any amount to which the first defendant and the Dines Gihwala Family Trust are entitled in terms of the Scharrig agreement;

(b) Interest on the amount referred to in paragraph (a) at the rate of 15.5% per annum from 25 January 2006 to date of payment.’

4 Save as aforesaid, the appeal is dismissed.

5 The first, second, and the fourth to eighth respondents shall pay 50% of the costs of the appeal, jointly and severally, the one paying the others to be absolved, which costs shall include the costs of two counsel.

6 The first and fourth to eighth respondents shall pay 50% of the costs of the appeal, jointly and severally, the one paying the others to be absolved, which costs shall include the costs of two counsel.

7 The cross-appeal by the first and the fourth to eighth respondents, is dismissed with costs, jointly and severally, the one paying the others to be absolved, which costs shall include the costs of two counsel.

8 The cross-appeal by the second respondent is dismissed with costs, which costs shall include the costs of two counsel.

A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For appellants:	P B Hodes SC and J P V McNally SC
Instructed by:	Webber Wentzel, Johannesburg
	Symington & De Kok Attorneys, Bloemfontein
For first, fourth to eighth respondents:	L A Rose-Innes SC and G G M Quixley
Instructed by:	Adriaans Attorneys, Cape Town
	Honey Attorneys Inc, Bloemfontein
For second respondent:	C Bollo
Instructed by:	Biccari Bollo Mariano Inc, Cape Town
	Van Der Merwe & Sorour Attorneys, Bloemfontein