

SOUTH AFRICA / JUDGMENT

CMT Transport (Pty) Ltd and Another v Findaload (Pty) Ltd and Others (584/2019) [2020] ZAFSHC 82 (22 April 2020)

[2020] ZAFSHC 82

COURT

Free State High Court, Bloemfontein

BEFORE

C J Musi

CASE / FILE NUMBER

584/2019

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 584/2019

In the matter between:-

CMT TRANSPORT (PTY) LTD

1st Applicant

JOHANNES PHILIPPUS KRUGER

2nd Applicant

and

FINDALOAD (PTY) LTD

1st Respondent

LOHAN LOGISTICS (PTY) LTD

2nd Respondent

SCARLICENTO (PTY) LTD

3rd Respondent

CORAM:

C. J. MUSI, JP

HEARD ON:

24 FEBRUARY 2020

DELIVERED ON: 22 APRIL 2020

[1] This is an application for leave to appeal against my judgment, wherein I made the following order:

‘1. Interdicting and restraining the second respondent from disclosing the first applicant’s information to the first respondent.

2. Interdicting the first and second respondents from representing to members of the public that the first respondent is associated with, alternatively related to the first applicant.

3. In the event of the second respondent resigning his appointment as director of the first applicant, interdicting and restraining the first respondent from delivering logistics and transport services to any existing clients of the first applicant.

4. Interdicting and restraining the first and second respondents from unlawfully competing with the first applicant by using any

information pertaining to the first applicant’s business forthcoming from either the second or third respondents.

5. Ordering and directing the first respondent to render a full account, supported by documents and vouchers, of all logistics and transport services or services falling within the scope of services recorded in item 4 of the Memorandum of Understanding appended to the founding affidavit as Annexure “H”, that it has rendered since the first day it commenced business until 28 February 2019.

6. Ordering and directing the first respondent to keep a full and proper account of all the logistics and transport services and any other services falling in the scope of services that the first applicant recorded in Item 4 of the Memorandum of Understanding, appended to the founding affidavit as Annexure “H”, which account must be furnished to the applicant within 7 days of a demand that the account be rendered to the applicant and which obligation will subsist, notwithstanding demand that the account be delivered to the Applicant for as long as the second respondent remains a director of the first respondent and, in the event of the second respondent’s resignation as director, for a period of one year thereafter.

7. That first and second respondents pay the costs of this application, jointly and severally, the one paying the others to be absolved.’

[2] The applicants raised numerous grounds of appeal. All the bases on which the judgment is attacked will be discussed later.

[3] Section 17(1)(a) of the Superior Courts Act[1], which governs applications for leave to appeal, reads:

‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard,
including conflicting judgments on the matter under consideration;’

[4] In Mkhitha[2] it was said that:

‘Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable

prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.’[3]

[5] I now turn to deal with all the bases for the application for leave to appeal. The applicants alleged that I failed to have proper regard to the fact that the second applicant resigned as a director of both the first and second respondents at the time that the application was heard. Furthermore, so it was alleged, the respondents did not contend for a case of loss of a corporate opportunity or actual losses sustained with reference to specific incidents of breach of fiduciary duty. It is alleged that the case was based solely on the second applicant obtaining information while he acted in a fiduciary capacity and the future protection of such information.

[6] I have dealt extensively with the duty of a director in the main judgment. I have also elaborated with the assistance of numerous

precedents on the fact that the fiduciary duty of a director does not end at the resignation of such director. In the context of this case, as I have pointed out in the main judgment, the second applicant did not present an iota of evidence to substantiate his claim that he had indeed resigned. In the absence of any evidence to the fact that he had resigned I have assumed in his favor that he had resigned. I still found that he was under a fiduciary duty not to engage in the conduct which he did i.e.

colluding with Mr. Bloem to divert business from the first respondent, using the first respondent's information and deliberately forming a company to compete with the first respondent whilst he was a director and CEO of the first respondent.

[7] I specifically found that the determination of the relationship between the second applicant and the first respondent was not of such a nature that the second applicant's fiduciary duty should not survive the determination of the relationship. The purported resignation from the first respondent is a fact that is, up to this stage, exclusively in the knowledge of the second applicant.

[8] The only possible limitation, in this case, that could be placed on the principle that a director's fiduciary duty survives

resignation is the bad blood between the second applicant and the Ceronio brothers. That, however, is of no moment because the issue here is about the second applicant's duty as director of the first respondent.

[9] I agree with Mr. Snellenberg, that on the second respondent's own version he secured business opportunities for the first applicant who directly competed with the first respondent during the second applicant's tenure as the CEO of the first respondent.

[10] It is also clear that the second applicant continued to utilize the first respondent's information to compete with it to the benefit of the first applicant. As the CEO of the first respondent the second applicant had access to information about the first respondent's business opportunities. He used and continued to use information about those business opportunities in order to advantage the first applicant. He did so contrary to his fiduciary duty as a director and in breach of the first respondent's

clear right.

[11] The applicants alleged that I erred in granting paragraph 3 of my order. They alleged that the order operates infinitely; that there was no exposition given of who exactly the first respondent's clients are and that the order is inimical to the first and second applicants' rights to actively participate in commercial trade.

[12] There was factually and legally no indication that the second applicant had resigned as a director of the first respondent. The second applicant did not produce any evidence to substantiate his claim that he had resigned as a director of the first respondent. He was involved in a commercial enterprise that was directly in competition with the first respondent. He was reposed of information

of the first respondent's operations. He intended continuing to utilize the first respondent's information in order to compete with it for the benefit of the first applicant. His actions, as I have indicated in the main judgment, are a contravention of section 218(2) of the Companies Act.

- [13] The first and second applicants are not restricted from participating in commercial trade. I interdicted them from doing business with the existing clients of the first respondent, on the day of the order. There is nothing prohibiting existing clients of the first respondent from ending their business relationship with it and moving over to the first applicant. The order does not bind those businesses, it only binds the first and second applicants. After moving their business from the first respondent to the first applicant, they cease to be clients of first respondent.
- [14] Section 76(2) proscribes the use of any information obtained by a director while acting in that capacity, to gain an advantage for the director, or for any other person other than the company, or to knowingly cause harm to the company. As I have said in the main judgment, this obligation lives even after the determination of the relationship.
- [15] Paragraph 5 of the order is also challenged on the basis that it should have been granted from the time that the first applicant

commenced with business until the date of the second applicant's resignation as a director. First, it is still not clear when the second applicant resigned. Second it is important that the first respondent quantify its loss from the date of commencement of business by the first applicant through to the date of the order so that it could properly determine its loss.

- [16] Section 77(2)(a) and (b) of the Act reads as follows:

‘(2) A director of a company may be held liable–

- (a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76(3)(a) or (b); or
- (b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of –
 - (i) a duty contemplated in section 76(3)(c);
 - (ii) any provision of this Act not otherwise mentioned in this section; or
 - (iii) any provision of the company's Memorandum of Incorporation.’

- [17] In order to know what damage the applicants wrought on its business, it needs to know to what extent the first applicant benefitted from the second applicant's inappropriate conduct.
- [18] The contention that I erred in granting paragraph 6 of my order is comprehensively met by what is stated in paragraphs 14 to 17 above.
- [19] Mr. Grobler contended that my finding that Cyberscene[4] was authority for the proposition that the information pertaining to the applicants' doings need not be confidential information to warrant protection is incorrect. Moreover, so he argued, my finding in that regard is at odds with what was said in Da Silva[5].

[20] This contention makes it necessary for me to quote extensively from Da Silva.

In Da Silva it was said:

‘It is of no consequence that in the particular circumstances of the case the opportunity would not or even could not have been taken up by the company (Regal (Hastings) Ltd v Gulliver

[1942] 1 All ER 378 (HL) at 389D, 392H-393A; Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA) para 31). But the opportunity in question must be one which can properly be categorized as a ‘corporate opportunity’.

While any attempt at an all-embracing definition is likely to prove a fruitless task, a corporate opportunity has been variously described as one which the company was ‘actively pursuing’ (Canadian Aero Service v O’Malley

(1973) 40 DLR (3d) 371 SCC at 382) or one which can be said to fall within ‘the company’s existing or prospective business activities’ (Davies, Gower and Davies’ Principles of Modern Company Law 7ed at 422) or which ‘related to the operations of the Company within the scope of its business’ (Bellairs v Hodnett 1978 (1) SA 1109 (A) at 1132H) or which falls within its ‘line of business’ (Movie Camera Company (Pty) Ltd v Van Wyk [2003] 2 All SA 291 (C) at 308b; 313d-e). Ultimately, the inquiry will involve in each case a close and careful examination of all the relevant circumstances, including in particular the opportunity in question, to determine whether the exploitation of the opportunity by the director, whether for the director’s own benefit or for that of another, gave rise to a conflict between the director’s personal interests and those of the company which the director was then duty-bound to protect and advance.

A director will not escape liability by first resigning before seeking to exploit an opportunity which the company was actively pursuing (Canadian Aero Service v O’Malley supra) or one within the scope of the company’s business activities of which the director became aware in the performance of the latter’s duties as a director and which he or she deliberately concealed from the company (Industrial Developments Consultants v Cooley [1972] 1 WLR 443 (Birmingham Assizes)). The opportunity remains that of the company and the director will remain accountable. But if the opportunity is not of such a kind or if it is an opportunity which, although within the scope of the company’s business activities, only arose after his resignation or was one of which he was unaware prior to his resignation, he is at liberty in the absence of explicit contractual restraints to exploit it to the full. It must be emphasized that the expertise and experience acquired by a director during his period of employment with the company and in general even the personal relationships established by him during that period belong to him and not to the company. It is a well-established principle of the common law, now enshrined in s 22 of the Bill of Rights, that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or their professions. (See e.g. Reddy v Siemens Telecommunications (Pty) Ltd 2007

- (2) SA 486 (SCA) para 15.) The general policy of the courts is accordingly not to impose undue restraints on post-resignation activities.

Thus far, I have been dealing with corporate opportunities in the sense in which they are generally understood. But what has been said applies equally to the case of a director who in competition with the company and in breach of his fiduciary duty procures for his own benefit or for that of another, not a corporate opportunity as such, but some part of the existing business of the company. In that event the remedies available to the company will be the same and the director will be liable even if he first resigns before exploiting the business so procured. But in the absence of such conduct and provided there are no contractual restraints a director is free to resign and set up business in competition with his former company or obtain employment with a competing company. In that event, he is at liberty to compete with his former company even to the extent of enticing away existing customers.’[6]

- [21] Da Silva explains what a corporate opportunity is. It enjoins the Court to carefully look at the evidence to see whether there was an exploitation of a corporate opportunity giving rise to a conflict of interest. It emphasizes that a director will not escape liability by first resigning before seeking to exploit an opportunity in the scope of the company’s business or which it was pursuing which the

director became aware of in the performance of his duties and which he or she deliberately concealed from the company. In other words, the duty will survive resignation. In the absence of conduct pointing to the director having exploited a corporate opportunity, such director would be free to compete with his or her former company.

- [22] There must, in essence be evidence that the director acted against the company’s interest in conflict with his or her fiduciary duty for such director to be held liable.

- [23] In this matter there is an abundance of undisputed evidence that the second applicant, whilst being a director of the first respondent, acted contrary to his fiduciary duty in order to advantage the first applicant to the detriment of the first respondent. At the very least the applicants exploited the first respondent’s corporate opportunities by actively pursuing the company’s active business and directly competed with it in its line of business.

- [24] Da Silva is indeed authority for the proposition that a director who exploits a corporate opportunity which is within the scope of the company’s

business activities of which he or she became aware in the performance of his or her duties and which he or she deliberately concealed from the company shall not escape liability. There is overwhelming evidence that the second applicant did exactly what he was not supposed to do as a director. The only inference from the facts is that he colluded with Mr Bloem in order to exploit the first

respondent’s corporate opportunities for the benefit of the first applicant.

[25] Da Silva was decided before the promulgation of the Act. It therefore predates the unambiguous provisions of section 76. The section specifically

refers to any information and not confidential information.

[26] I agree with the respondent's contention that the second applicant's version that he distanced himself from the

respondents on 14 November 2018 is not only improbable but palpably untrue. Likewise, his assertion that he was suspended as CEO of the first respondent is clearly untrue. The second applicant had a meeting with one of the first respondent's subcontractors and 15 November 2018. He also attended a financial meeting of the first respondent which was held on 28 November 2018. He stated that he informed the respondents of his resignation. That is also inaccurate because his attorneys, in a letter dated 14 March 2019, stated that he "shall resign" as a director of the first respondent. In the face of all this damning evidence the second applicant contends that I erred in making credibility findings against him.

[27] The second applicant avers that I erred in finding that he had embarked upon a deceptive course with the aim of taking the first respondent's clients. I don't want to say much about this ground because the uncontroverted evidence shows that he did not inform the other directors of the first respondent that he started a rival company while he was a director and CEO of the first respondent. He and Mr Bloem deceptively diverted the first respondent's clients to the first applicant. It is this conduct that I inter alia found, in paragraph 43 of the main judgment, breached the first respondent's clear right.

[28] In my view the applicants did not show that the appeal would have reasonable prospects of success. There is also no compelling reason why the application should succeed.

[29] I accordingly make the following order:

1. The application for leave to appeal is dismissed with costs.

C.J. MUSI, JP

Appearances:

For the 1st & 2nd Applicants: Adv S Grobler SC

Instructed by Rossouws Attorneys

Bloemfontein

For the Respondents: Adv N Snellenburg SC

Instructed by Honey Attorneys

[1] Act 10 of 2013.

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- [2] MEC Health, Eastern Cape v Mkhitha (1221/2015) [2016] ZASCA 176 (25 November 2016).
- [3] Ibid at para 16 and 17.
- [4] Cyberscene Ltd v I-Kiosk Internet and Information (Pty) Ltd 2000 (3) SA 806 (CPD).
- [5] Da Silva and Others v CH Chemicals (Pty) Ltd [2008] ZASCA 110; 2008 (6) SA 620 (SCA) at para 21.
- [6] Ibid paras 19 to 21.
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Prepared on 12 October 2026 · Esheria