



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN

THE SUPREME COURT OF APPEAL

Modise and Another v Tladi Holdings (Pty) Ltd (Case no 307/2019) [2020] ZASCA 112

From: The Registrar, Supreme Court of Appeal
Date: 29 September 2020
Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of the Supreme Court of Appeal

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against an order of the Gauteng Division of the High Court, Johannesburg (Weiner J, sitting as court of first instance). The matter concerned the appropriation of a corporate opportunity to buy shares in a company, ARB Electrical Wholesalers (Pty) Ltd (ARB), by the first and second appellants, respectively Mr Jacob Modise and Batsomi Power (Pty) Ltd, of which Modise was a director.

In 2004 ARB had been negotiating a transaction with a potential BEE partner (Umbani), intending to allocate a 30 percent stake to this entity. In this regard ARB's chief executives sought advice from Mr Jonathan Sandler, the majority shareholder of a company to which ARB supplied electrical equipment, mindful of his experience in the structuring of BEE deals. Sandler predicted that the envisaged deal would unravel, and moved to set up a company with another businessman in order to exploit the ARB opportunity once negotiations with Umbani had proved unsuccessful. Modise, a black executive whose business acumen was held in high regard, was identified as the most appropriately situated person to chair the envisaged electrical

conglomerate. This structure would eventually become Tladi Holdings (Pty) Ltd, the respondent.

Sandler thereafter met with Modise in order to introduce to him the proposed venture. Part of the presentation involved a synopsis of the various electrical opportunities, including ARB, that Sandler had identified as viable and which he intended to pursue. Sandler and Modise would also meet on a number of occasions in the days that followed, to discuss each of the opportunities and to devise strategies for pursuing the same.

In May 2005, when it became apparent that ARB's relationship with Umbani was not without issue, ARB realised that it would need to terminate its relationship with the latter and find a substitute BEE partner. Modise was again headhunted for this purpose. After meeting with the ARB chairman, he and his company (Batsomi Power) were offered the deal – the same opportunity that he had been consistently instructed to exploit on behalf of Tladi, not least when Sandler was informed of the ARB-Umbani scheme beginning to unravel, and of which Modise was aware. He did not disclose this meeting to Tladi and ultimately accepted the deal. A few days later, ARB and Batsomi Power concluded a confidentiality agreement pertaining to the scrutiny of their records for the purpose of assessing the efficacy of the deal.

No disclosures were made to Tladi concerning the ARB chairman's offer, or Modise's acceptance, of the ARB opportunity either. Sandler's inquiries in relation to the ripeness of Tladi's approach were met with the refrain that ARB's existing deal had not yet unwound. Nonetheless, on 1 December 2005 Batsomi Power concluded an agreement with ARB in terms of which it acquired a 26 percent shareholding. Sandler became aware of the transaction on 23 December 2005. He made various abortive attempts to contact Modise and an invitation to a Tladi board meeting was left unanswered. At a meeting of the board on 3 January 2006, Tladi resolved to institute legal proceedings in response to Modise's usurping of the ARB opportunity in favour of his own company.

Modise attempted to deny the allegations of Sandler not being informed at all times of his movements and agenda. He insisted that he had kept Sandler abreast of the process throughout. ARB's chief executive officer at first denied any recollection of Sandler or Tladi being mentioned or discussed at the meeting between the ARB chairman and Modise. When he participated in a radio interview two years later, however, he noted that both him and the ARB chairman were only interested in doing a deal with Batsomi Power – not anybody else. This suggested that Sandler's name had indeed been referred to during discussions. Modise thereafter testified that there had been no discussion of Sandler or Tladi at the meeting. The high court rejected this evidence. Due to ARB's chief executive officer not being able to recall whether the issue had been discussed, it was incumbent upon the appellants to call Burke, the ARB chairman, to provide clarity. The appellants chose not to do so and the SCA found that the high court's decision to draw an adverse inference from this decision was certainly justified.

The high court found that Modise and Batsomi Power had misappropriated a corporate opportunity, to buy shares in ARB, that properly belonged to Tladi. Modise and Batsomi Power took issue with this finding. They also challenged the dismissal of their special plea of prescription in respect of the claim against Batsomi Power.

The SCA began with an analysis of the fiduciary duty resting on all directors to exercise their powers and perform their functions in good faith and in the best interests of the company. This duty was held to encompass at least three rules – the no-conflict rule; the no-profit rule; and the corporate opportunity rule. On the last-mentioned rule, it was held that a consequence of the rule is a director being obliged to obtain such opportunities for the company if anyone is to obtain it. A ‘corporate opportunity’ was one which the company was actively pursuing, or which could be said to fall within the company’s existing or prospective business activities; or that is related to the operations of the company within its scope of business; or which fell within its line of business.

Modise argued that the opportunity had not arisen by virtue of his association with Tladi, and that the opportunity was in any event not available to Tladi. He argued further that the information pertaining to it was not confidential because Tladi had no proprietary interest in it. The SCA held that it mattered not whether, in the circumstances of a particular case, the opportunity would not – or even could not – have been taken up by the company. Also irrelevant was whether the corporate opportunity would indeed have materialised. A director remained under a duty to disclose its existence, and the information pertaining to it, to the company. The SCA confirmed the high court’s finding that Modise’s evidence was not only improbable, but evasive, contradictory, and untruthful. He was held not to have fulfilled his fiduciary duty to act in good faith and in Tladi’s best interests. Instead, it was found that Modise surreptitiously and mala fide purloined the opportunity for himself. He had not been entitled to secure the ARB opportunity in his own interest without disclosure and approval of Tladi’s board. The SCA found that Tladi had established its claim against Modise.

As to the contention that the claim against Batsomi Power had prescribed, the SCA found that Tladi had not demonstrated that the amended disgorgement claim against Batsomi Power was ‘part and parcel’ of the original cause of action, or substantially the same claim as the claim for damages. It was based on a different cause of action and the prescriptive period had run. The SCA accordingly upheld Batsomi Power’s appeal against the high court’s finding on prescription.

In the result, the appeal by Modise was dismissed with costs; and the appeal by Batsomi Power was upheld with costs.
