



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case nos: 802/2020 and 813/2020

In the matter between:

SURESH CHANDERBHAN MIRCHANDANI **APPELLANT**

and

UNICA IRON & STEEL (PTY) LTD **RESPONDENT**

AND

UNICA IRON & STEEL (PTY) LTD **APPELLANT**

and

SURESH CHANDERBHAN MIRCHANDANI **RESPONDENT**

Neutral citation: *Mirchandani v Unica Iron & Steel (Pty) Ltd and Unica Iron & Steel (Pty) Ltd v Mirchandani* (Case no 802/2020 & 813/2020) [2022] ZASCA 58 (22 April 2022)

Coram: SALDULKER, MOCUMIE and MBATHA JJA and
TSOKA and WEINER AJJA

Heard: 4 March 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 22 April 2022.

Summary: Damages – breach of profit share agreement and lease agreements – claim for payment of utilities and bond charges erroneously debited in appellant's loan account and damages – tacit term of fiduciary duties – liability in terms of s 218(2) read with s 76(2)(a) of the Companies Act 71 of 2008 – and breach of common law fiduciary duty – s 218(2) of the Companies Act 71 of 2008 and the common law fiduciary duty not pleaded.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mngqibisa – Thusi J, sitting as Court of first instance):

Case no: 802/2020

- 1 The appeal is upheld with costs including costs of senior counsel.
- 2 The judgment of the court a quo is set aside and replaced with the following order:
 - 2.1 ‘Plaintiff’s claim 1 is dismissed with costs.
 - 2.2 Defendant to pay the wasted costs of adjournment of 31 July 2017.
 - 2.3 Defendant to pay the costs of the application to set aside the subpoena *duces tecum* of the Plaintiff’s auditor.’

Case no: 813/2020

- 1 The appeal is dismissed with costs including costs of senior counsel.
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JUDGMENT

Tsoka AJA (Saldulker, Mocumie and Mbatha JJA and Weiner AJA concurring)

[1] There are two appeals before this court, SCA case no.813/2020 and SCA case no. 802/2020. In the former case, Mr Suresh Chanderbhan Mirchandani (Mr Mirchandani) is the appellant while in the latter case, Unica Iron & Steel (Pty) (Ltd) (Unica) is the appellant. Both are the respondents in the respective

cases. In their respective appeals, they appeal against the judgment and orders granted by the Gauteng Division of the High Court, Pretoria (the high court) on 3 March 2020, which orders were corrected by the high court on 4 September 2020. Both appeals are with leave of the high court.

[2] The background facts in these matters are the following: in terms of a written Profit Share Agreement (the profit agreement) concluded between Mr Mirchandani and the respondent, Unica, on 21 May 2007, which profit agreement was backdated to 4 December 2006, the former agreed to work for the latter as a technical director on a profit sharing basis. In the agreement, it is recorded that Mr Mirchandani will be a key person under whose leadership and guidance, Unica will source, commission and run its plant in Babelegi, Hammanskraal, successfully. The plant is hereafter referred to as Unica 1.

[3] It is common cause that pursuant to the profit agreement, Mr Mirchandani sourced, commissioned and ran Unica's plant successfully until his association with Unica 1 was mutually terminated on 30 September 2010.

[4] Subsequent to the termination of his employment with Unica in 2010, Unica was in the process of establishing a second plant to be known as Unica 2. As Mr Mirchandani was unhappy in leaving Unica, he reported the company to the Gauteng Department of Rural Development (GDRD). In the report, he alleged that in establishing Unica 1, the directors deliberately breached the applicable environmental laws, in particular, the provisions of the National Environmental Management Act 107 of 1998 (NEMA), in that Unica 1 operated without ensuring that the provisions of NEMA were duly complied with and that the operation of the company would not endanger the environment.

[5] As a result of the complaint Mr Mirchandani laid against Unica with GDRD, Unica was charged in terms of the Criminal Procedure Act 51 of 1977 (the CPA) for the contravention of the provisions of NEMA. In terms of s 105A of the CPA, a Plea and Sentence Agreement (the plea agreement) was concluded between Unica and GDRD in terms of which the former was fined a R5 million penalty, half of which was suspended, plus R3 million in respect of the rehabilitation of the environment.

[6] It is Unica's contention that the profit agreement concluded between it and Mr Mirchandani in 2006 was that the parties, in concluding the agreement explicitly, alternatively tacitly, further alternatively, impliedly agreed that Mr Mirchandani, as technical director and the responsible person for ensuring the commissioning of Unica 1, would ensure that Unica complied with the provisions of NEMA. He, however, failed to do so. His failure, so the contentions went, were in breach of the profit agreement.

[7] The contentions that Mr Mirchandani, as the technical director of Unica breached the terms of the profit agreement are unfounded. Firstly, the profit agreement does not expressly state that compliance with the provisions of NEMA was indeed a term of the agreement. Secondly, on the evidence of the other co-directors, Mr Irshad Ul Haq (Mr Ul Haq) and Mr Mohammed Asif Qasim (Mr Qasim), compliance with the provisions of NEMA could not have been a tacit term of the profit agreement, as according to them, they were unaware of the applicability of the provisions of NEMA when the profit agreement was concluded between the parties. The inevitable conclusion is that the profit agreement could therefore not have been entered into in contemplation of the provisions of that Act. On the contrary, it is Mr Mirchandani's evidence that the provisions of NEMA were not complied with

as a result of a deliberate and conscious decision of the board of directors of Unica not to comply with the provisions of the Act, as to do so, would delay the coming into operation of the plant for a period of 18-24 months, which delay the company could ill-afford as the company was eager to commence its operations and start generating income.

[8] Mr Mirchandani's evidence that the provisions of NEMA were deliberately not complied with is more probable than the denial of both Mr Ul Haq and Mr Qasim. Mr Mirchandani's testimony is corroborated by the following: (a) while Mr Mirchandani was outside the country and unavailable, the other two co-directors, namely, Mr Ul Haq and Mr Qasim completed an Industrial Development Corporation (IDC) application to raise funds for the operation of the plant. Amongst the requirements that the IDC required to be fulfilled before funding could be provided, was compliance with the provisions of any environmental legislation, such as NEMA. Both Mr Ul Haq and Mr Qasim's signatures were appended to the said application. Their statement that they were not aware and not involved, while they had to comply with the requirements of the IDC to obtain financial assistance, is improbable; (b) it is common cause that for the successful operation of the plant, the plant required electricity. When Eskom was approached to supply the company with electricity, it expressly demanded that the company be compliant with any applicable environmental legislation. The directors, without demur, stated that the company was indeed compliant, hence Eskom agreed to supply the company with electricity; and (c) when Eskom's senior personnel met with the directors subsequent to the application for the supply of electricity, he was again assured that Unica 1 was indeed compliant with any applicable environmental legislation.

[9] To show that Mr Ul Haq and Mr Qasim's version, with regard to NEMA, is improbable, is further corroborated by the terms of the plea agreement reached with the GDRD when the company was criminally charged for contravening the provisions of NEMA. The entire plea agreement, including the mitigating circumstances spelled out therein, does not suggest that the company operated as it did because it was misled by Mr Mirchandani. That the allocation of blame to Mr Mirchandani, is an afterthought, because the relationship between the directors of Unica became toxic, appears more probable than that the non-compliance was solely due to Mr Mirchandani alleged breach of his fiduciary duties to Unica.

[10] The inevitable conclusion reached is that the three directors, with their eyes open, took a conscious decision not to comply with the provisions of NEMA. In these circumstances, it is inexplicable why the one director should take the blame while the other two are absolved. In the circumstances of this matter, non-compliance with the provisions of NEMA must surely be shouldered by Unica and its three directors.

[11] Mr Mirchandani's testimony that the company knowingly contravened the provisions of NEMA on the basis that, should the authorities become aware of the contravention of the provisions of the Act, refuge could be sought by reliance on s 24G of NEMA ie rectification, cannot therefore be faulted. In terms of the provisions of this section, a non-compliant company may apply for condonation, on pain of paying a penalty and remedial damages to the GDRD, for the late compliance with the provisions of the NEMA. This, in the result, is what Unica did. It is therefore incorrect for Unica to accuse Mr Mirchandani of being untruthful in the high court when he testified that there was non-compliance with the provisions of NEMA because in 2006, s 24G of NEMA had not yet been promulgated and was therefore not applicable. Mr

Mirchandani's evidence regarding rectification in terms of s 24G is correct, as it is supported by the following: it is common cause that NEMA was amended on 14 July 2004 by s 3 of the National Environmental Management Act 8 of 2004. At the time of the trial of this matter, and his testimony, in the high court, the provisions of s 24G of NEMA were indeed applicable. In this Court, counsel for Unica readily conceded that indeed when Mr Mirchandani testified, s 24G of NEMA was applicable with the result that the process of rectification as testified to by Mr Mirchandani was indeed available for Unica to utilize.

[12] Unica's claim for damages, allegedly, on the basis of breach of fiduciary duty in terms of the common law is also unfounded and untenable. The evidence on record reveals no such breach. It is undisputed that Mr Mirchandani, as the technical director of the company, complied diligently with the terms of the profit agreement. And because of him being a diligent technical director, at the time of termination of his relationship with Unica, the plant was, as a matter of fact, operational and profitable. During his tenure as the technical director of the company, he pursued the interests of the company rather than his own. This being the case, there cannot be any suggestions that while being the technical director, he breached his fiduciary duties as alleged or at all.

[13] It is worth restating what breach of fiduciary entails. In *Master of the High Court Western Cape Division, Cape Town v Van Zyl*¹ the court stated:

'Breach of fiduciary duty entails something materially different from the negligent discharge of his or her functions by a person in a fiduciary position. Millett LJ (as he then was) stressed this action in *Briston and West Building Society v Mothew (t/a Stapley & Co)* [1998]1 Ch 1[1996]4 All ER 698(CA) at p.712 [All ER], noting that "The Various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. *Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not*

¹ *Master of the High Court, Western Cape Division, Cape Town v Van Zyl* [2019] JOL 41274 (WCC) para 108.

enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty”.’ (Emphasis added.)

[14] In casu, at best for Unica, Mr Mirchandani was, at most, incompetent, if at all. Like in *Van Zyl*, he may have done his ‘incompetent best’ to see to it that Unica 1 was operational and profitable. It cannot therefore be said that he was unfaithful and disloyal to Unica and thus breached his fiduciary duties to the company.

[15] That Unica’s claim based on common law breach of fiduciary duty is unfounded and is further supported by the testimony of Mr Ul Haq. In the court a quo, he conceded that as the CEO, he knew that the company should have complied with the by-laws. Surprisingly, he pleaded ignorance to the provisions of NEMA, the national legislation and a constitutional imperative that guarantees the safe environment for all. Furthermore, his denial that none of the directors, but Mr Mirchandani, were aware of the applicability of the provisions of NEMA is therefore improbable. This leads me to the alleged breach of s 218 read with s 76(2)(a) of the Companies Act 71 of 2008 (the Companies Act).

[16] Unica’s reliance on the provisions of s 218 of the Companies Act, is misplaced. It was neither pleaded, nor were the facts alluding to the applicability of the provisions of the said section stated, to enable Mr Mirchandani to plead thereto and to raise any defence that may have been available to him in terms of s 77 of the same Act, such as prescription. The reliance on the provisions of s 218 of the Companies Act, is a non-starter. For the court a quo to base its reasoning on the provisions of the section, which was not pleaded is, in my view, a misdirection. The misdirection must be corrected.

[17] In *Maake v Chemfit Finechemical (Pty) Ltd*² the Full Court, dealing with a litigant who relied on the provisions of s 218, reasoned as follows: -

‘Section 218 of the [Companies Act] provides a general remedy to any person who suffers loss or damages as a result of contravention of the Act. However, it does not specify which contravention the person may sue for. A creditor may sue a director of a company in his/her personal, capacity for the loss or damage it has suffered as a result of that director(s) actions. Since the section does not specify which actions may be regarded as contravention of the [Companies Act], it follows that the creditor who sues must specify which contravention were attributed to the director(s) and the exact losses or damages with sufficient particulars. Sufficient facts should be pleaded to enable the director(s) to know which case they would meet.’ (Emphasis added.)

[18] As pointed out above, Unica did not, in the court a quo plead sufficient facts to enable Mr Mirchandani to know which case he had to meet. This failure was not only prejudicial to Mr Mirchandani but breached the timeless rule of our procedural law that a litigant, such as Unica, must plead sufficient facts to enable its counterparty to know which case he/she has to meet. Not to do so, is extremely prejudicial. So, was the case in the present matter.

[19] Unica’s reliance on *Breetzke and Others NO v Alexander*³, a decision of this Court, in support of its argument that Mr Mirchandani breached his fiduciary duties in terms of s 218 of the Companies Act, is thus misplaced. The facts in that matter are distinguishable from the facts in the present matter. In that matter, a trustee abused his position to further his own interests over the interests of the trust, which he ought to have served. In the present matter, it is undisputed that Mr Mirchandani served the interests of Unica rather than his own. In *Breetzke* this Court, unequivocally, stated that ‘. . . The fiduciary must place the interests of the other party to whom the duty is owed before their own. . .’

² *Maake v Chemfit Finechemical (Pty) Ltd* [2018] ZALMPPHC 71 para 28.

³ *Breetzke and Others NO v Alexander* [2020] JOL 48345 (SCA) para36.

[20] Thus, Unica has failed to prove that the term it relied on was express, tacit or implied. In the present matter, there is neither suggestion nor evidence that Mr Mirchandani breached his fiduciary duties to Unica in furtherance of his own interests. To the contrary, as technical director, he breached the provisions of NEMA, in furtherance of Unica's interests and not for his own. For this breach by Mr Mirchandani, Unica 1 became operational and profitable. That the alleged breach of the fiduciary duties owed to Unica, in not complying with the provisions of NEMA, was solely for the benefit of Unica and the plant and not for his own, admits no doubt.

[21] In the result, the conclusion reached is that Unica's claim for damages against Mr Mirchandani arising out a breach of fiduciary duties must fail. Accordingly, the appeal must succeed.

[22] With regard to the accounting action relating to the rental charges and bond repayments raised against his loan account in Unica, Mr Mirchandani testified that the parties agreed to buy a house for him to live in it with his family. At the beginning, the parties agreed that Mr Mirchandani would service the bond used to acquire the house. But this did not meet the approval of Mr Qasim's father who suggested that Mr Mirchandani should rather rent the house until the purchased house was transferred into his name.

[23] It was on this basis that the two lease agreements were concluded. On expiry of the first lease agreement, which was for a period of three years, a second lease agreement, also for a three-year period, was concluded. The parties to the lease agreements agreed that Mr Mirchandani would pay rental while the charges for utilities such as water, electricity and taxes, probably rates and

taxes, would be for the lessor's account. That is to say, the utilities were to be paid by Unica and not by Mr Mirchandani.

[24] Contrary to the agreements concluded, Mr Mirchandani's loan account in Unica, was, however, debited with the bond repayments instead of the rental charges due and payable by him as well as the charges relating to water, electricity and taxes, which in terms of the lease agreements, as pointed above, were to be for the lessor's account. This resulted in Mr Mirchandani's loan account being debited with bond charges which were higher instead of the rental amounts which were lower. The net effect was that Mr Mirchandani's share profit was adversely affected. This was the amount which Mr Mirchandani instituted an action for and succeeded in the high court.

[25] In addition, Mr Mirchandani claimed for his director's salary as well as wastages, which according to him, were agreed to be capped at 5% to maximise the profitability of Unica 1. This, in turn would inevitably have no material effect on his 17% share profit in terms of the profit agreement concluded with Unica.

[26] Unica's contention that the issue of salaries and wastages were not resolved at the meeting of the directors on 15 April 2010 is not supported by the evidence on record. It is both Mr Mirchandani and Mr Qasim's evidence that the issue of wastages was resolved in that meeting of 15 April 2010. At page 932 of the record, Mr Qasim confirmed the said agreement in the following terms 'M-lady this wastage allowance was discussed in this meeting on 15 April 2010...it was myself, I took the initiative and I requested my other co-director that can we now allow this thing for 5%, *and was agreed*'. (Emphasis added.)

[27] For Unica to turn around and contend that the issue of wastages was not agreed to, on the basis of the facts recited by this Court in an earlier dispute that was resolved in 2016⁴, is untenable. In that matter, this Court was required to determine whether a document signed by the parties constituted a valid agreement. The fact that this Court then referred to the meeting of 15 April 2010 and stated that the issue of 5% was not resolved does not amount to res judicata. The reference to that meeting and the issue of 5% is irrelevant and of no consequence. This Court's reference to that meeting and the 5% wastage was in any event in passing, as the real issue to be determined was whether the document signed by the parties constituted an agreement or not. It was an obiter statement, which does not affect the issues in the present case. Mr Ul Haq's statement that the issue of wastages was not agreed to, on the basis of the previous court decision, cannot therefore be upheld. In any event, should he not have agreed to this, the other two co-directors, who were in the majority, agreed on the 5% wastages. The agreement is therefore binding on him. The agreement of Mr Mirchandani and Mr Qasim is thus the decision of Unica. His dissatisfaction in this regard is irrelevant and of no consequence.

[28] In the pre-trial minutes, the parties agreed on the quantum of damages due to Mr Mirchandani with regard to his accounting claims. It was on this basis that the high court, after finding in favour of Mr Mirchandani, ordered that the agreed amount be paid to him.

[29] In the high court and in this Court, Unica submitted that the lease agreements were a sham and that no legal consequences should flow therefrom. Furthermore, it contended that the lease agreements were concluded solely to enable Mr Mirchandani to comply with the FICA requirements. The onus to prove these allegations rested on Unica.

⁴ *Unica Iron and Steel v Mirchandani* [2015] ZASCA 150; 2016 (2) SA 307 (SCA).

[30] In the main, Unica, in attempting to discharge its burden of proof, and in substantiation that the lease agreements were a sham, contended that the lease agreements referred to two addresses, which were different to the property in which Mr Mirchandani resided.

[31] Unica's contention in this regard is far from the truth. It is undisputed that the property purchased by Mr Qasim is 30 Blesbuck Avenue, Eldo Manor, Centurion. The two lease agreements concluded between the parties, described the house to be rented as 'No 30 Blesbuck Avenue, Eldo Manor Centurion'. That this was the house acquired by Mr Qasim for Mr Mirchandani to live in, and to which the two lease agreements relate, is more than clear. For Unica to contend that the house being rented, as described on page 2 of the lease agreements, being 8 Jackal Street, Eldo Manor, Centurion, is nothing but disingenuous. It is common cause that the house purchased by Mr Qasim and rented to Mr Mirchandani was 30 Blesbuck Avenue, Eldo Manor, Centurion and not 8 Jackal Street.

[32] The sensible interpretation of the lease agreements, on the authority of this Court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵, is that the house rented to Mr Mirchandani, to which he would ultimately acquire, was 30 Blesbuck Avenue, Eldo Manor, Centurion and not 8 Jackal Street. It appears to me that the description of the house let as 8 Jackal Street, Eldo Manor, Centurion, is nothing but a common error, which could easily have been rectified.

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

[33] The contention that the lease agreements were concluded for the purposes of FICA also appears to be untrue, or at least, improbable. If the agreements were indeed concluded for the purposes of FICA, on Unica's evidence, which of the two houses was to be regarded as by the authorities as Mr Mirchandani's proof of residence? Why then, if the agreements were solely for FICA purposes, backdate them? If the agreements were a sham and were concluded for the purposes of FICA, there is no logical basis for them to have been backdated. It is undisputed that the house purchased for Mr Mirchandani, which was rented to him pending transfer into his name, and which house was for the purposes of FICA to be regarded by the authorities as his residence, was 30 Blesbuck Street and not number 8 Jackal Street. Unica's contention that the lease agreements were a sham and were not to be relied on is nothing else but a diversion. The lease agreements were therefore correctly found by the court a quo to be legal and binding.

[34] In this Court, Unica argued that the rental amount for the second year being less than the first and third year is further proof that the agreements were a sham. Again, this contention is also untenable. There is a myriad of reasons why the parties agreed to the renewal amount as they did. It is therefore not for this Court to second-guess the reason why the parties concluded the lease agreements as they did. It is impermissible for this Court to interpret the lease agreements on the basis as to what is reasonable, as to do so, the Court would be making the agreements for the parties. See *Endumeni* referred to above.

[35] The conclusion reached is that Unica failed to discharge its onus of proof regarding the accounting claims. In the result, the appeal on the accounting issue must fail.

[36] The following order is made:

Case no: 802/2020

- 1 The appeal is upheld with costs including costs of senior counsel.
- 2 The judgment of the court a quo is set aside and replaced with the following order:
 - 2.1 ‘Plaintiff’s claim 1 is dismissed with costs.
 - 2.2 Defendant to pay the wasted costs of adjournment of 31 July 2017.
 - 2.3 Defendant to pay the costs of the application to set aside the subpoena *duces tecum* of the Plaintiff’s auditor.’

Case no: 813/2020

- 1 The appeal is dismissed with costs including costs of senior counsel.

M TSOKA
ACTING JUDGE OF APPEAL

Appearances:

Case no: 802/2020

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Case no: 813/2020

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