



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 118/2021

In the matter between:

WENTZEL LINDSAY OAKER

FIRST APPELLANT

GLOBAL PACT TRADING 151 (PTY) LTD

SECOND APPELLANT

WENTZEL LINDSAY OAKER NO

THIRD APPELLANT

ROCHELLE DEIDRE OAKER NO

FOURTH APPELLANT

CLINT BRENT OAKER

FIFTH APPELLANT

DARREN PILLAY

SIXTH APPELLANT

and

PIERRE DU PLESSIS KRIEL NO

RESPONDENT

AND

Case no: 185/2022

In the matter between:

ROCKLAND GROUP HOLDINGS (PTY) LTD

APPLICANT

and

PIERRE DU PLESSIS KRIEL NO

FIRST RESPONDENT

PIERRE DU PLESSIS KRIEL NO

SECOND RESPONDENT

**THE COMMISSIONER OF THE FINANCIAL
SECTOR CONDUCT AUTHORITY**

THIRD RESPONDENT

Neutral citation: *Oaker and Others v Kriel NO* (118/2021); *Rockland Group Holdings (Pty) Ltd v Kriel NO and Others* (185/2022) [2023] ZASCA 68 (17 May 2023)

Coram: PONNAN ADP and GORVEN and MABINDLA-BOQWANA
JJA and NHLANGULELA and OLSEN AJJA

Heard: 1 March 2023

Delivered: 17 May 2023

Summary: Curatorship – s 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 (Protection of Funds Act) – bewind trusts and their fund manager placed under curatorship – s 2 of the Protection of Funds Act – breach of fiduciary duties by persons dealing with funds and trust property – purchase of properties, share transactions and self-enrichment – application to stay appeal and cross-appeal dismissed – appeal dismissed and cross-appeal upheld.

ORDER

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

1 Each of the two applications to stay the appeal and the cross-appeal is dismissed with costs, including the costs of two counsel.

2 The appeal is dismissed with costs, including the costs of two counsel, such costs to be paid jointly and severally by the appellants.

3 The cross-appeal is upheld with costs, including the costs of two counsel, such costs to be paid jointly and severally by the appellants.

4 The high court's order is set aside and replaced with the following:

‘1 In respect of the claim for diversion of a corporate opportunity, the first, second, third and twelfth defendants in case number 10984/2014 are jointly and severally liable to the plaintiff for payment in the amount of R232 622 338.96, together with interest thereon at the rate of 15.5% per annum from the date of the issue of summons on 25 June 2014 to date of payment.

2 It is declared that the fourth and fifth defendants in case number 10984/2014 are jointly and severally liable with the first, second, third and twelfth defendants for the aforesaid amount of R232 622 338.96, to the extent of R94 550 025.96, together with interest thereon at the rate of 15.5% per annum from the date of the issue of summons on 25 June 2014 to date of payment.

3 In respect of the claim for excessive management and performance fees, the first, second, third, twelfth and thirteenth defendants, and the fourth and fifth defendants, in case number 10984/2014 are held to be jointly and severally liable to the plaintiff for the payment of such amount as may be agreed between the parties or failing agreement, determined thereafter by the high court to be due, owing and payable together with interest thereon at the rate of 15.5% per annum from the date of the issue of summons on 25 June 2014 to date of payment.

4 In respect of the claim for other fees irregularly charged, the first, second, third, twelfth and thirteenth defendants, and the fourth and fifth defendants, in case number 10984/2014 are jointly and severally liable to the plaintiff for payment of the amount of R10 734 524.45 together with interest thereon at the rate of 15.5% per annum from the date of the issue of summons on 25 June 2014 to date of payment. The thirteenth defendant is excluded from any liability for fees paid prior to September 2007.

5 The second option cancellation agreement, the transfer of shares in Rapicorp 122 (Pty) Ltd and Rapicorp 123 (Pty) Ltd pursuant to that agreement, and the creation of a loan of R6 700 000 in favour of the fourth and fifth defendants are declared to be void *ab origine*, and the plaintiff is authorised to reverse the said loan account and alter the share register accordingly.

6 The fourth and fifth defendants are liable for payment to the plaintiff in the amount of R500 000, together with interest thereon at the rate of 15.5% per annum from the date of the issue of summons on 25 June 2014 to date of payment.

7(a) Regarding the costs incurred prior to the date upon which it was agreed that the actions under case number 10984/2014 and case number 1534/2013 be consolidated for the purposes of trial (the consolidation date), the first, second, third, twelfth and thirteenth defendants, and the fourth and fifth defendants, in case number 10984/2014 shall be jointly and severally liable for the plaintiff's costs in that action; and the first and third defendants, and the first defendant in his representative capacity with the second defendant, in case number 1534/2013 shall be jointly and severally liable for the plaintiff's costs in that action.

(b) The costs incurred after the consolidation date shall be regarded as indivisible as between the two actions.

(c) The first, second, third, twelfth and thirteenth defendants, and the fourth and fifth defendants, in case number 10984/2014 are jointly and severally liable for the plaintiff's costs incurred after the consolidation date, including the costs of three counsel where so employed.

(d) Each party shall bear the costs of its own expert witnesses.'

5 The orders for payment set out in paragraphs 1, 2, 4 and 6 of the judgment of the high court, as altered by this order, shall be executable immediately upon delivery of this judgment.

6 In respect of the claim for excessive payment of performance and management fees, the parties are directed to make further calculations, debate them, and apply to the high court for determination of them if agreement on the amount is not reached within 30 days of this order. The input into the calculations for land value shall be R160 million, or any lesser amount that might have been actually used at the material time, up to 31 December 2007; and R211 million as at 31 December 2007, to be escalated at 5% per annum thereafter. No sand value shall be included

in the calculations. No set off shall be allowed of instances of overcharging against any instance of undercharging.

7 The monetary claim for payment of excessive performance and management fees shall be executable upon the making of an order for such payment by the high court, whether it be for an agreed amount or one determined by the high court.

8 The matter is remitted to the high court.

9 The Registrar of this Court is directed to forward a copy of this judgment, accompanied by copies of the judgments of the high court, to the National Commissioner of the South African Police Service and the National Director of Public Prosecutions for investigation and, if so advised, prosecution.

JUDGMENT

Mabindla-Boqwana JA (Ponnan ADP and Gorven JA and Nhlangulela and Olsen AJJA concurring):

Introduction

[1] Before us are two matters, an appeal and a cross-appeal, as well as an application to stay these proceedings pending the determination of an application for leave to appeal to the Constitutional Court. Foundational to these matters is the placing under curatorship of two bewind trusts, Rockland Targeted Development Investment Fund (TDI) and Rockland Property Investment Fund (PIF), and their fund manager, Rockland Asset Management and Consulting (Pty) Ltd (RAM). The respondent in the appeal, Pierre du Plessis Kriel NO (the Curator), was appointed as the curator of the business of these three entities on 6 December 2012 and 3

September 2013 respectively, in accordance with the provisions of s 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 (Protection of Funds Act).¹

[2] In his capacity as curator of TDI and PIF, he instituted various claims against the appellants and other defendants in the Western Cape Division of the High Court, Cape Town (the high court) under case number 10984/2014, flowing from their conduct in relation to the management and control of funds and trust property controlled by the trusts for the benefit of pension and provident funds.

[3] The first appellant, Wentzel Oaker (Oaker), is the key player behind various entities and a family trust, the Johnny Bravo Trust (Johnny), and was involved in several transactions that formed the subject matter of the proceedings. He was the sole director and Chief Executive Officer (CEO) of RAM, prior to its being placed under curatorship, and the sole director of the second appellant, Global Pact Trading 151 (Pty) Ltd (Global Pact). RAM and Global Pact are wholly owned subsidiaries of Rockland Group Holdings (Pty) Ltd (RGH), which in turn, is wholly owned by Johnny. Although Oaker is not a beneficiary in Johnny, his children and wife are. His wife, Rochelle Oaker NO, the fourth appellant, is his co-trustee in Johnny. Oaker was also the sole director of RGH. Oaker's cousin, Clint Oaker (Clint), the fifth appellant, was employed by RAM as its Chief Operating Officer (COO), while the sixth appellant, Daren Pillay (Pillay), was the Chief Investments Officer (CIO). Pillay performed various accounting and financial functions within the group of companies.

¹ Section 5(1) of the Financial Institutions (Protection of Funds) Act 28 of 2001 provides that '[t]he registrar may, on an *ex parte* basis, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution'.

[4] On 13 December 2004, RAM, represented by Clint, and Global Pact, represented by Oaker, established TDI and PIF as bewind trusts. Global Pact was appointed as the corporate trustee of both trusts and Oaker as the nominee trustee for Global Pact. RAM became the fund manager for TDI and PIF in terms of written management agreements. TDI's beneficiaries are various pension and provident funds largely drawn from the trade union sector, while PIF is TDI's sole beneficiary.

[5] RAM was a 'service provider' as contemplated in the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS) and a 'financial institution' as envisaged in the Financial Services Board Act 97 of 1990. Oaker was its key individual² and compliance officer for the purposes of the FAIS. Accordingly, he was subject to various statutory duties and was obliged to conduct himself with the necessary degree of honesty and integrity required of a person in that position.

[6] Oaker, Clint and Pillay were in terms of s 2 of the Protection of Funds Act, and by virtue of their employment with RAM, which controlled or administered trust property, obliged to observe the utmost good faith and to exercise proper care and diligence in relation to the trust property in the exercise of their powers and duties in their respective capacities as such fiduciaries.

[7] The claims in the high court pertained to: (a) the diversion of a corporate opportunity; (b) the excessive payment for shares; (c) the excessive payment of

² In terms of the Financial Advisory and Intermediary Services Act 37 of 2002, 'key individual' means 'in relation to an authorised financial services provider, or a representative, carrying on business as –

(a) a corporate or unincorporated body, a trust or a partnership, means any natural person responsible for managing or overseeing, either alone or together with other so responsible persons, the activities of the body, trust, or partnership relating to the rendering of any financial service; or

(b) a corporate body or trust, consisting of only one natural person as member, director, shareholder or trustee, means any natural person.'

management and performance fees; and (d) the irregular charging of fees. Another action, described as the 20% action, had been launched against the fourth and fifth appellants, the trustees of Johnny, the second appellant, Global Pact, Rapicorp 122 (Pty) Ltd (Rapicorp 122) and Rapicorp 123 (Pty) Ltd (Rapicorp 123), under case number 1534/2013, for cancellation of an option in Johnny's favour to acquire shares in PIF. Central to the actions was the acquisition of various erven in Schaapkraal, which is part of the Philippi Horticultural Area (PHA) near Cape Town.

[8] Other defendants who featured in the first action, but are not parties to these appeal proceedings, were RAM as well as the trustees of two other family trusts, Schuster's River Trust No 5 (Schuster) and Merlot 13 Trust (Merlot). Schuster's trustees were Heinrich Badenhorst (Badenhorst), Frederick Badenhorst and Etienne Badenhorst, while Merlot's trustees were Richard Horton (R Horton), Lauren Horton (Horton) and Franz Boonzaaier. For the purposes of the trial, the two actions were consolidated and the parties agreed that the trial of the trustees of Schuster and Merlot would be separated from that of the other defendants. At the end of a trial, which lasted 44 days and generated a record in excess of 8 000 pages, the high court made orders substantially in favour of the Curator. It subsequently granted leave to appeal and cross-appeal its various orders to this Court.

[9] On 4 August 2022, barely a few months before the hearing of the appeal and the cross-appeal, RGH, who was not a party to the proceedings in the high court brought an application to stay the hearing of the appeal and cross-appeal pending the determination by the Constitutional Court of a separate but apparently related application for leave to appeal. That application pertained to a decision of the full court of the Western Cape Division of the High Court, Cape Town (the full court).

The Acting President of this Court directed that the application be heard together with the appeal.

[10] This was the second application for the stay of the proceedings before this Court, the first one having been filed on 5 April 2022. The first sought a stay pending determination of a petition to this Court against the full court's judgment. When that application was dismissed by this Court, RGH then approached the Constitutional Court for leave to appeal. It also launched the second stay application pending determination of its petition to the Constitutional Court. Both applications were brought on the same basis and both were opposed by the Curator. Before considering these matters, it may be appropriate to provide a brief background.

Schaapkraal acquisition

[11] On 31 August 2006, Badenhorst, acting on behalf of a company to be formed (which was later incorporated as Rapicorp 122), concluded an agreement to purchase the remainder of erf 650 Schaapkraal, which comprised 21 subdivided erven, at a price of R34 633 034 from Cape and Transvaal Land and Finance Company (Pty) Ltd. Rapicorp 122 ratified the purchase agreement on 6 September 2006, after its incorporation.

[12] On the same day, another company, Rapicorp 123, was formed. On 17 October 2006, Rapicorp 123, also represented by Badenhorst, purchased erf 579 Schaapkraal at the price of R1 368 000 from Trans Hex Operations (Pty) Ltd. The total purchase price for the 22 Schaapkraal properties (the properties) was R36 001 034.

[13] At the time of the Rapicorp companies taking transfer of the aforesaid properties, the entire issued ordinary share capital of these companies, in each case being 120 ordinary par value shares, was held equally (ie 40 shares each) by Johnny, Schuster and Horton. Horton was later replaced by Merlot as a shareholder.

[14] On 23 April 2007, Schuster, Merlot and Johnny concluded a sale of shares agreement with PIF in terms of which Schuster, Merlot and Johnny each sold eight of their issued shares in Rapicorp 122 to PIF, ie a total of 24 ordinary shares, representing 20% of the then issued ordinary share capital for a total purchase consideration of R36 million (the sale of shares agreement).

[15] In concluding the sale of shares agreement, Merlot and Schuster were represented by Badenhorst, while Oaker represented both Johnny (in his capacity as its trustee) and PIF (as the nominee for Global Pact, PIF's corporate trustee). Notably, the R36 million purchase price for the 24 ordinary shares in Rapicorp 122 mirrored the total purchase price payable by Rapicorp 122 and Rapicorp 123 for the properties under the two property sale agreements. Rapicorp 122 and Rapicorp 123 then had no assets (save for any rights as they may have acquired under the sale agreements).

[16] Notwithstanding the payment terms of the sale of shares agreement, the purchase price for the 20% of the shares under that agreement was not paid by PIF directly to the sellers of those shares but was paid by PIF to the transferring attorneys in respect of the aforesaid properties, and was thereafter employed to settle the entire purchase price owed by Rapicorp 122 and Rapicorp 123 to the sellers of the properties. The entire purchase price was reflected by Rapicorp 123 as a loan in

equal shares to Johnny, Merlot and Schuster. PIF took transfer of the 24 ordinary shares in Rapticorp 122.

[17] In terms of the sale of shares agreement, PIF was also granted a call option to acquire from Schuster, Merlot and Johnny an additional 35% of the issued share capital of Rapticorp 122 for a purchase consideration of R63 million at any time until 31 May 2007. On 23 August 2007, Schuster (represented by Badenhorst), Merlot (represented by R Horton), Johnny (represented by Oaker) and PIF (represented by Clint on behalf of Global Pact) concluded an addendum to the sale of shares agreement (the sale addendum).

[18] The sale addendum was made subject to the fulfilment or waiver of two suspensive conditions, namely, that, firstly, Schuster, Merlot and Johnny would each subscribe for six additional shares in the issued share capital of Rapticorp 122 for a total consideration of R30 543 581.49, which amount would be set off against their respective loan account claims against Rapticorp 122 at the time. Secondly, Schuster, Merlot, Johnny and PIF would enter into an option agreement in terms of which PIF would grant the sellers an option to repurchase 54.35% (ie 75 shares) of Rapticorp 122's issued share capital.

[19] In terms of the sale addendum, on the date of the agreement becoming unconditional, PIF would be deemed to have validly exercised its option referred to above to acquire 34.35% (instead of 35% as originally agreed) of the ordinary shares of Rapticorp 122 at the consideration of R85 million (instead of R63 million as originally agreed) and to have taken delivery thereof. PIF thereupon held 75 out of the 138 issued shares in Rapticorp 122.

[20] On 5 December 2007, each of Schuster and Merlot, which jointly held 42 ordinary shares in Rapicorp 122, transferred 21 of the said shares to PIF, in terms of an agreement of sale. The purchase consideration paid by PIF for each set of 21 shares was R36 059 064.58, totalling R72 118 029.16 for 42 shares. Schuster and Merlot further each transferred 40 of their shares in Rapicorp 123 to PIF for a purchase price of R3 170 426.73 and ceded all claims and rights to their respective loan accounts in Rapicorp 123 for a purchase consideration of R410 101.69.

[21] On 29 April 2008, Johnny sold its remaining 21 shares in Rapicorp 122 to PIF for a purchase consideration of R60 150 177.65 and 40 ordinary shares that it held in Rapicorp 123 to PIF for a purchase consideration of R4 593 133.08. As at 29 April 2008, PIF held 138 shares (the entire issued share capital) in Rapicorp 122 and 120 shares (the entire issued share capital) in Rapicorp 123.

[22] In each purchase of shares by PIF in the Rapicorp companies, TDI provided PIF with the funds required to enable it to pay the purchase price out of the proceeds of the capital investments made in TDI by their investors, and each purchase price was paid in full. At no time, in the course of the transactions, in terms of which PIF acquired 100% of the shares in the Rapicorp companies, were the TDI beneficiaries informed of the various positions and interests that Oaker held in respect of the entities, Johnny and the obvious conflict that presented itself. No consent was obtained from any of the beneficiaries of TDI for any transaction, notwithstanding Oaker's evidently conflicted position.

[23] In respect of the first claim being for the diversion of a corporate opportunity, the Curator contended that Oaker, Clint, Pillay and RAM breached their fiduciary

obligations in respect of TDI and PIF, by failing to acquire the properties, and which fell within the bewind trusts' investment mandate, for the benefit of these trusts, but instead devised and participated in or acquiesced in a scheme whereby Johnny, Schuster and Merlot (alternatively Horton), acquired the properties through Rapicorp 122 and Rapicorp 123 for their own benefit. These properties were acquired at a considerable discount to their market value.

[24] Further, the properties were acquired using funds entirely provided by TDI and/or PIF in the form of the purchase price for the 20% of the shares in Rapicorp 122 and were acquired with a view to disposing of the remaining shares in Rapicorp 122 and all the shares in Rapicorp 123 to PIF and/or TDI at a material profit. The high court did not allow the full claim of R232 622 338.96 (as adjusted). It granted the alternative relief sought in the amount of R77 540 779.64, which represented the maximum one-third share of or interest in the properties, being the shares acquired by Johnny. The high court did so on the basis that findings could not be made against Schuster (Badenhorst) and Merlot (Horton), whose trial had been separated. It apportioned 20% liability to Clint and 80% to Oaker, Global Pact and RAM jointly and severally, but excluded Pillay who was not involved in any of the transactions before September 2007. The refusal by the high court to grant judgment in the full amount claimed forms, in part, the subject of the cross-appeal by the Curator.

[25] In the partial alternative to the first claim based on the diversion of a corporate opportunity, the Curator advanced a claim against Johnny seeking to hold it jointly and severally liable with other defendants, for the taking of a secret profit to the tune of R94 550 025.96. Having initially found Oaker, Global Pact and RAM to be jointly and severally liable for payment of 80% and Clint for 20% of the amount to be

determined with reference to certain valuations, the high court later dismissed this claim, following submissions by the appellants that the Curator had not established an entitlement to relief on both of the alternative causes of action. The Curator cross-appeals this order as well.

[26] In regard to the claim for excessive management and performance fees, the Curator contended that RAM caused TDI to pay to it management fees and performance fees higher than contractually stipulated for the period during which TDI held the Rapicorp properties. This was done with the knowledge of the appellants, RAM and Johnny. These excessive amounts were paid on inflated values of the shares in the Rapicorp companies, which in turn were based on inflated values of the properties. The high court upheld this claim only in respect of RAM for excess management and performance fees in the amounts of R1 970 019.78 and R6 120 3545 (sic), respectively. This order is the subject of the Curator's cross-appeal with respect to both quantum based on the valuation as well as in respect of those defendants against whom the order was not made. The contention is that the order should have been made against all the appellants jointly and severally together with RAM.

[27] In respect of the claim for other fees irregularly charged, the Curator's contention was that RAM had irregularly charged TDI amounts as 'transaction fees' or fees over and above the management fees or performance fees as provided for in the management agreement. In this regard, the high court granted the claim for an amount of R22 274 884 against all the appellants excluding Johnny. The Curator cross-appeals Johnny's exclusion.

[28] As to the further claim, the Curator sought restoration of PIF's 100% shareholding after 20% of the shares in the Rapicorp companies were purportedly transferred to Johnny in settlement of a R150 million liability assumed by PIF in Johnny's favour under a second option cancellation agreement concluded on 16 August 2010. He further sought a reversal of the creation of a loan account under which PIF purportedly owed Johnny R6,7 million, and to also reclaim R500 000 paid by PIF to Johnny in February and March 2012 in purported reduction of the said loan account. The high court declared the option cancellation void *ab origine* and ordered Oaker and Johnny to reimburse PIF the value of the option. The appellants accept that the high court's order was erroneous in not granting the further consequential relief. For this reason, the order in this claim is also the subject of the cross-appeal.

[29] The high court also made various declaratory orders, relating to the valuation of the land in respect of the properties. It further ordered costs in favour of the Curator, including the costs of three counsel, jointly and severally, but limited the liability of Clint and Pillay to 20%. Each party was ordered to pay its own costs of the expert witnesses.

[30] For their part, the appellants appeal against all the orders of the high court except that which relates to the second claim, which was dismissed, and those relating to certain valuations and related variables.

[31] Against that background, it may be convenient to first deal with the application to stay the appeal and cross-appeal.

The stay application

[32] The stay application arises from an urgent application brought by RGH in December 2019 in the Western Cape Division of the High Court, seeking an order terminating the Curator's curatorship of RAM, alternatively of all the Rockland entities, and replacing him with another curator. The application served before Allie J, who dismissed it on 9 September 2020, upholding the Curator's contention that it did not owe a fiduciary duty to RAM, that the application amounted to an abuse of process, was *mala fide* and it was a strategy by Oaker to regain control of RAM and the bewind trusts, so as to thwart the whole purpose of the curatorship. Leave to appeal Allie J's order was granted by this Court to the full court on 12 February 2021.

[33] On 11 February 2022, the full court dismissed RGH's appeal finding that '[i]f the curator was to be removed from the business of the collective investment scheme, then in that event, the controlling mind of the business would simply again control the "business" and the various entities which conducted it, to the prejudice and ultimate detriment of the investors'.

[34] On 11 March 2022, RGH approached this Court for special leave to appeal the decision of the full court, which was dismissed on 9 June 2022. Subsequent to that dismissal, RGH applied to the Constitutional Court for leave to appeal, which is currently pending, as earlier mentioned.

[35] The essence of the relief sought in the stay application is that the Curator owed each of the entities under curatorship a fiduciary duty, which he could not properly discharge, as the interests of RAM, on the one hand, and those of TDI and PIF, on

the other, were mutually exclusive. It was contended by RGH that when the Curator commenced actions on behalf of TDI and PIF, comprising claims against RAM and various related persons, the latter defended these claims, but RAM could not do so. The Curator elected not to advance a defence on behalf of RAM to these claims. RAM was held to be liable together with other related defendants, in respect of the claims.

[36] Oaker, who deposed to the founding affidavit on behalf of RGH, alleged that the conflict of interest on the part of the Curator was exhibited by him causing and allowing judgment to be taken against RAM, whose business interest he was appointed to protect. This pattern, according to RGH, repeated itself when the appeal and cross-appeal was launched. The Curator prevented RAM from appealing the findings of liability against it and in fact sought to increase it, while precluding RAM from opposing the relief sought against it.

[37] The complaint is that, while the related persons were granted leave to appeal the orders of the high court, the Curator did not apply for leave to appeal on behalf of RAM, which resulted in it not being a party to the appeal. Furthermore, the Curator was granted leave to cross-appeal against certain orders of the high court. If he is successful, the findings of liability against RAM will be increased by an amount of R266 139 741.18.

[38] Counsel for RGH contended that RGH was not seeking to turn back the clock, as the high court proceedings had come and gone. He instead suggested that an unfairness would occur if the appeal and the cross-appeal were to proceed. There seemed to have been an insinuation, although not directly branded as tantamount to

a vitiation, that if the stay was not granted, the appeal proceedings would somehow be ‘affected’, because as counsel put it, RAM would be without representation in circumstances where adverse orders, particularly in the cross-appeal, were sought against it.

[39] The difficulty with RGH’s application is that the trial in the high court was allowed to run to completion over a period of 44 days without objection and with no intervention from RGH. The application to remove the Curator was lodged after the high court had delivered its initial judgment and only for the first time in that application in December 2019 did RGH raise the issue of the Curator’s conflict. It now seeks the stay of the proceedings at the appeal stage. It is not clear how proceedings can only for the first time become impaired at this stage whilst the integrity of the trial remained unaffected and preserved. Put differently, RGH seeks to obtain a stay order which, in its view, would prevent a failure of justice from occurring, while not seeking to undo the high court’s proceedings. Implicit in that must be an acceptance that there was no failure of justice in the high court.

[40] Further, RGH was unable to get around the fact that at the time the summons was issued, it did not apply to intervene in the action, knowing that RAM was a defendant against whom relief was sought jointly and severally with other related persons at that stage. The alleged conflict of interest exhibited by the Curator ought to have been evident upon the issuance of the summons.

[41] At no stage during the protracted trial was it brought to the attention of the trial court that RAM’s interests were not protected and therefore RGH would seek intervention, nor was the trial court requested to stay the actions pending the

launching of the intended application to remove the Curator. Furthermore, the removal application, once Allie J dismissed it, went through various stages, from leave to appeal having been sought and granted by this Court, which culminated in the judgment of the full court. In all of that time there was no complaint by RGH. No intervention was sought even at the application for leave to appeal stage before the high court. No explanation has been provided to us for the evident failure to raise the issue of ‘potential injustice’ to RAM earlier. Clearly, the nature and extent of the claims by the Curator against RAM, which are the subject of the cross-appeal, are not new, having been raised since the inception of the matter in the pleadings.

[42] The application for the stay is made pending determination of the application to the Constitutional Court for leave to appeal the full court’s judgment. It seems to be predicated on a number of assumptions: firstly, that there are reasonable prospects that the application for leave to appeal to the Constitutional Court will succeed; secondly, the appeal itself will be upheld and consequently the Curator will be removed; and, thirdly, the Curator’s replacement will, having weighed the options at that stage, consider it necessary to appoint legal representation for RAM in the appeal and cross-appeal. In any event, as counsel accepted in argument before us, even if the appeal to the Constitutional Court were to succeed, at best, any order for the removal of the Curator can only operate with effect from the date of Allie J’s order. That being a date well after the finalisation of the trial before Ndita J means that those proceedings as well as her judgment, the subject of this appeal, would remain unaffected.

[43] This must also be viewed against the backdrop that the process of appointing a replacement curator might take time, if the appeal is successful. This may prove to

be prejudicial to the investors who have waited for close to a decade to have this matter finalised. At the end of the day, if the appellants are liable, the Curator must be placed in a position where he is able to recover the misappropriated funds.

[44] Counsel for RGH contended that RAM's fundamental rights in terms of s 34 of the Constitution had been denuded. But, whatever superficial appeal there may be to that contention, it is not a question that is to be decided in the abstract. In this case, RGH's conduct over the period of eight years is telling. Besides its failure to raise the issues early in the action proceedings, the application before Allie J was not about RAM's lack of legal representation in the action proceedings but about the removal of the Curator from RAM, alternatively, from all entities for a variety of reasons including RAM's insolvency. The focus has now narrowed considerably: it is about the right to legal representation in the current proceedings.

[45] As I have endeavoured to show, staying the appeal process will not address any defect that might already have arisen in the earlier proceedings. It must also be remembered that even if a new curator were appointed, such new curator on behalf of RAM would not have an appeal as of right to this Court. Leave to appeal would first have to be sought and obtained. This, in circumstances where the matter proceeded to trial against RAM on an undefended basis. In this instance, any prejudice that RAM may suffer (and in this regard it is important to emphasise that no actual prejudice was asserted) must be weighed against the interests of the other parties to the litigation, considerations of the convenience of this Court and the overarching interests of justice. It is difficult to resist the inference that this application is an opportunistic and perhaps even cynical attempt to delay finalisation of the matter. Why else would Oaker and RGH, purporting to act in the interests of

RAM, have waited until after the judgment of Ndita J, when the writing was clearly on the wall, before raising this challenge? I conclude, therefore, that the stay application has no merit. It will unjustly delay the finalisation of the appeal process and it must therefore fail. RGH is obviously liable to pay the Curator's costs in respect of both this application and the one preceding it. I turn to consider the appeal and the cross-appeal.

The appeal and cross-appeal

[46] As a starting point it is apposite to restate that this Court's power to interfere on appeal with the findings of fact of a trial court are limited 'but where the findings of a trial court are based on false premises or where relevant facts have been ignored, or where the factual findings are clearly wrong, the appeal court is bound to reverse them'.³ There is no suggestion that the judgment of the trial court suffers from any of those defects. Moreover, the high court made far-reaching credibility findings against Oaker, which were not challenged on appeal. The high court comprehensively set out the relevant facts and its assessment of the evidence in a judgment spanning some 280 pages. It is not necessary to cover that ground once again. It suffices to refer to the evidence only to the extent necessary to determine the issues raised by the appeal and cross-appeal.

[47] Two important questions arise in respect of the first claim, namely, whether the Curator had established that the properties were an investment opportunity for PIF and TDI and, if so, was he entitled to one third or 100% of the opportunity? In answering these questions, the relevant period (August and October 2006), when the

³ *Beukes v Smith* [2019] ZASCA 48; 2020 (4) SA 51 (SCA) para 22. See also *Santam Bpk v Biddulph* [2004] All SA 23 (SCA); 2004 (5) SA 586 (SCA) para 5.

properties were acquired, is important. At that time, the properties comprised 422 hectares of vacant land zoned agricultural. Although the land was zoned as such, it had never been used for that purpose. Also, as at that date there was no urban development or for that matter no urban development plan in the offing.

[48] Counsel for the appellants contended that while that may have been the case, four important events occurred between August 2006 and April 2007 that presented the land as an investment opportunity, which the relevant appellants accepted and upon which they based their decisions.

[49] The first was that on 22 September 2006, a sale agreement was concluded between Rapicorp 122 and an entity known as Coessa Holdings (Pty) Ltd (Coessa) to buy 21 erven for R145 million. Coessa's interest reflected the market thinking about the properties. The sale was, however, cancelled because of the purchaser's failure to put up a guarantee.

[50] The second development occurred on 2 February 2007 when Chris Veldsman (Veldsman), a valuer, was instructed by Badenhorst to provide an opinion on the open market value of the properties. He valued the land at R260 million based on a 'housing' development (township development method), taking that as the highest and best investment use for the land. He also gave an 'as is' value of R160 million for agricultural use.

[51] The third event occurred in February 2007, when Paul Olden, a town planner conducted a desktop analysis and identified a need to amend the structure plan of the properties from horticultural to development. In this regard, engineers were engaged

following which favourable strategic considerations were identified, which would serve as a potential development for the properties.

[52] The final development occurred in February 2007 when Metal Industries Benefit Fund Administrators (MIBFA), an administrator of trade union funds, decided to appoint RAM as an investment manager and invest R300 million with it.

[53] The appellants contended that all of these four events occurred after the transfer of money from TDI to the transferring attorneys of the properties. Before all these events, so it was contended, the opportunity was speculative and had Oaker embarked on this risky development for PIF and TDI, he would have been criticised.

[54] There is a fundamental incongruity in the appellants' stance. If the properties were not an investment opportunity for PIF, why were investor funds used to purchase them? In an attempt to answer, Oaker fared poorly under cross-examination. Having first attempted to obfuscate, he admitted that the purpose of the preference share transaction was to fund the acquisition of the properties and that TDI money was used. He testified that, through the preference share agreement, he wanted 'to get the TDI Fund a foot in the door'. Furthermore, the prospect of TDI investing in the properties was reflected in the Rockland TDI deal list already by 30 June 2006.

[55] The suggestion that the investment would have been risky at the time of the acquisition of the properties, contradicts the actions of the appellants. Money belonging to investors was paid from TDI into an attorney's trust account to settle

the purchase price on behalf of Rapicorp without any disclosures to the investors. TDI received nothing in return for the payment.

[56] The high court correctly concluded that on the facts, the properties did not appear to be of as high a risk as Oaker sought to make out. They were obtained at under R40 million, which was considered to be a bargain by the parties involved. As at August 2006, the intention was to resell them. It was the thought that they would be resold in September 2006 at a huge profit as evidenced by the Coessa deal. Offers to purchase the properties were received even before Schuster, Merlot, and Johnny became shareholders in the Rapicorp companies in September 2006. Had there been no diversion, TDI and/or PIF would have become, as either it or they should have, the shareholder or shareholders of the Rapicorp companies. Acquiring 100% of the shares in Rapicorp for R36 million would have been much less risky than acquiring 20% of the shares for much the same price.

[57] There was nothing in the TDI and PIF trust deeds, or in the management agreements that prevented RAM from making a short-term profit for the investors. It is ironic that on 23 September 2006, Oaker described the opportunity to acquire the properties to MIBFA's consultant as 'rare gems [that] fall squarely within our investment philosophy'. Therefore, the conclusion reached by the high court that there was a diversion of a corporate opportunity and hence breach of fiduciary duties by the respective appellants, excluding Pillay, cannot be faulted.

[58] The second question is whether the high court was correct in awarding one third of the claim instead of the full claim as pleaded. The premise upon which the high court declined to award 100% of the claim was erroneous. In terms of paragraph

3 of the consolidation order, the separation order did not preclude it from making findings against Schuster (Badenhorst) and Merlot (Horton). The evidence reveals ample basis for it to have concluded that there was a collusive relationship between Johnny, Merlot and Schuster to profit from an opportunity which fell squarely within the TDI/PIF investment mandate.

[59] When Badenhorst approached the owner of the 21 erven purchased by Rapicorp 122, he motivated the proposal in a letter dated 19 September 2005, on the basis that he and R Horton were acting as facilitators for ‘. . . Oaker, representing The Rockland Group, who is the financier and developer of the proposed scheme . . . The Rockland Group is a BEE developer and investor that is well-capitalized and astutely managed with close links to the City of Cape Town and local provincial government’.

[60] The appellants contended that because Badenhorst was central to the acquisition of the properties, he would not likely walk away from the deal. Not only did he identify the opportunity and negotiate the deal, so it was contended, he obtained the first valuation and conducted feasibility studies. Thus, it was doubtful that he and Horton would simply turn their back on the entire opportunity. This contention loses sight of the fact that the land was entirely paid for with TDI funds belonging to the investors. Also, Badenhorst and Horton were not called to testify in circumstances where they were obviously crucial witnesses.

[61] There was no evidence that any of Johnny, Schuster or Merlot would have taken up the opportunity using their own funds or for that matter that each even had the necessary funds to do so. Furthermore, having contributed no funds to the

purchase of the properties, the three family trusts took for themselves (to the exclusion of PIF) a VAT refund that had been paid to Rapicorp 122, in circumstances where PIF was already a 20% shareholder. It follows that Badenhorst and Horton had no claim to and were not entitled to insist on a share of ownership. Accordingly, the high court erred in not granting the Curator the full claim as pleaded.

[62] As to Clint's liability, the appellants confirmed that they did not ask for an apportionment of 20% as referred to in the high court's judgment. Clint was indeed under the same statutory obligation as Oaker in terms of s 2 of the Protection of Funds Act. Like the others, as an employee who controlled or administered trust property on behalf of TDI and PIF, he was also obliged to observe the utmost good faith and to exercise proper care and diligence in the exercise and discharge of his powers and duties. Clint did not protect the interests of the investors but acquiesced in Oaker's scheme. He cannot escape liability on the basis that he had deferred to Oaker. In this respect, there is no reason why he should not have been found jointly and severally liable with others. This reasoning applies in all instances where Clint is found to be liable jointly and severally with the other appellants and/or RAM.

[63] As for Pillay, the Curator conceded that he could not be included in this claim, as before September 2007, he was deployed elsewhere within the company. With regard to claims after that date, his position would be similar to Clint's.

Valuations and further claims

[64] The parties agreed that the market value of the Rapicorp companies at the relevant times is fundamental to the alternative claim based on the excessive payment for shares as also the claim for excessive payment of performance and

management fees. They agreed that the approach to be followed in arriving at the market value concerned is based on the determination of the net asset value (NAV) of the companies at the various dates. The parties handed up a joint note regarding adjustments required to the order made by the high court and variables to be determined in order to quantify the Curator's claim, in the event of a finding that the appellants were liable.

[65] The NAV depended on the land and sand values of the properties, which were subject to a number of variables. In the event that the appellants are found to be liable, further calculations would be required. In this regard, the parties agreed that it is not for this Court to quantify the claims. There is every indication that this can be agreed between parties. But, to the extent that agreement cannot be reached, these are matters that stood over and the parties are no doubt free to approach the high court for their resolution and final determination.

[66] Both parties led extensive expert valuation evidence during the trial. The Curator relied on two experts, Tobi Retief (Retief) and Jacques du Toit (Du Toit), while the appellants countered with Jerry Margolius (Margolius) and Olden for the determination of the highest and best use of the land during the relevant periods.

[67] All the experts valued the properties as at 31 December 2007 and 31 December 2011 respectively. The competing contentions between the parties was whether the highest and best use of the land at the two respective periods, was urban development or agricultural/horticultural.

[68] Olden's evidence, upon which Margolius also relied, focused on the potential of the properties for urban development. He acknowledged that as at December 2007 the land was designated 'horticultural' and that an amendment to the guide plan would be required to allow for urban development. He accepted that obtaining approval for urban development would be a challenge because the properties were located within the protected PHA. Having received specialist reports, however, he was of the view that there was a strong probability that an application would be approved. Indeed, by 2011, the urban structure plan was amended for urban development in Schaapkraal. Olden also received agricultural studies, which indicated no viable horticultural activity, notwithstanding the horticultural designation of the properties, as at December 2007.

[69] Relying on Olden and other specialist studies, Margolius concluded that urban development was the highest and best use at both valuation dates of 31 December 2007 and 31 December 2011. He valued the properties at R211 million and R626 million for those periods respectively. Retief's view, on the other hand, was that the highest and best use in the 2007 valuation was agricultural. It became urban developmental only in 2011, after the amendment of the urban structure plan. Du Toit concluded that the highest and best use was agricultural at both the 2007 and 2011 dates.

[70] The high court found that the value of the properties was the combination of the land value and sand value. On the land value, it accepted Margolius' view that the highest and best value was for urban development. It also preferred his valuation and escalated the 2007 valuation by 5% per annum from 31 December 2007 to May 2011 (when the guide plan was amended). It discounted the 2011 valuation at 5%

from 31 December 2011 and escalated it at 5% per annum for 1 January 2012 onwards.

[71] For the purpose of the appeal, the Curator's case is no longer based on Retief's and Du Toit's land values, upon which he previously relied. The focus of the Curator's submissions on appeal was in relation to the addition of the sand value as an asset in computing the value of the companies.

The inclusion of sand value

[72] It is common cause that the properties contained sand deposits on the land. These deposits would add considerable value to the properties, if they were to be mined. The Rapicorp companies were not in possession of a mining licence to exploit the sand at the relevant periods. Notwithstanding that, the appellants insisted that the sand deposits on the land had to form part of the quantification of the market value.

[73] Sand is classified as a 'mineral' for the purposes of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). Only a holder of a mining right may exploit mineral resources. In terms of s 3(1) of the MPRDA, the State is the custodian of mineral resources for the benefit of all South Africans. The State, acting through the Minister of Mineral Resources and Energy (the Minister), may grant, issue, refuse, control, administer and manage any prospecting right and/or mining right (s 3(2)(a)). It was not known whether Rapicorp's application to the Minister would have been successful. It might have been refused or granted with conditions. The requirements stipulated in s 23(1) of the MPRDA had to be fulfilled

for a mining right to be approved. It could not have been predicted whether Rapicorp would be granted a licence to mine, and if so, under which conditions.

[74] For these reasons, no value could be attributed to the sand deposits and for those to be treated as a resource in Rapicorp's hands, until sand could be lawfully mined. It follows, therefore, that any mining undertaken by Rapicorp at the time of the share transactions would have been unlawful. Under those circumstances, sand could not have been rightfully included in the quantification of the value of the properties.

[75] It follows that the high court erred by taking into account the sand value as a resource for the purposes of calculating the market value of the properties. This is a permissible ground to interfere with that finding of the court. Based on the conclusion I have reached on this issue, it is unnecessary to consider the other reasons advanced by the Curator as to why the sand value should not have been so included.

The land value

[76] The parties agreed that the variables relating to the land value are the market values on the land on the dates of the first, second and third share transactions of 23 April 2007, 23 August 2007 and 5 December 2007 respectively. The Curator contended that the market value is R160 million as per Veldman's 'as is' valuation. The appellants contended that the market value should be the Margolius 31 December 2007 valuation of R211 million discounted to the date of transactions in respect of the share transactions. The parties agreed that the land value for the

calculation of the NAV for the fourth transaction of 29 April 2008 is the Margolius 31 December 2007 valuation escalated to 5% per annum to the transaction date.

[77] In his valuation dated 2 February 2007, Veldsman utilised a ‘township development method’ to establish the most likely and best development that could take place on the property. Based on the identified potential of development (subject to guidelines and regulations to realise that potential) Veldsman gave a rounded valuation figure of R260 million. In his executive summary, he provided a further figure, stating that ‘[i]n its existing “Agricultural” state a valuation of R160,000,000 is deemed to be market related’.

[78] The high court found that at the relevant time, there was no development on the properties, and no clear view on the prospects of obtaining developmental rights. Therefore, the assumption upon which the valuation rested was entirely premature. It had reservations about the appellants’ reliance on Veldsman’s R260 million valuation. It questioned amongst other things ‘whether or not Veldsman[’s] valuation of R260 million [was] sound in its factual and methodical assumptions and ultimately, its conclusions’.

[79] The high court noted that Veldsman’s report lacked clarity as to what information led him to the township development method, ‘but it would appear that the information relates to the four comparable sales reflected therein. Without the interrogation of his assumptions, it is difficult to make a finding as to whether they are logical or illogical or the weight that must be attached to the valuation’. These findings can also not be faulted.

[80] It is unclear what informed the choice of the higher value of R260 million when at the time, the prospects of development were still being investigated. Moreover, the ‘as is’ value of the properties which was based on the existing state of the properties and which was a lot more certain, had also been provided.

[81] On appeal, the appellants contended that the market value should be Margolius’ 31 December 2007 value of R211 million. Margolius, however, did not testify as to any earlier 2007 values. Therefore, the earliest point that the appellants could have theoretically begun to envisage development was 31 December 2007, when the preliminary studies were furnished by Olden. Even if that were so, the high court found ‘the properties had no development rights and Olden had not yet been able to express a clear view as to the prospects of obtaining those rights’.

[82] What is more concerning, though, are the inherently contradictory positions adopted by the appellants. On the one hand, the appellants argue that as at early 2007, it was clear that the properties presented a developmental opportunity. On the other, in response to the Curator’s claim that there had been a diversion of a corporate opportunity, the appellants contended that the opportunity was still speculative and very risky for it to be made available to PIF.

[83] As the high court found, the appellants could not have relied on Veldsman’s December 2007 valuation, which placed the value at R403 million, less than a year after his first valuation of R160 million ‘as is’ and R260 million (township development). This was also significantly above Margolius’ R211 million valuation. Added to that was the inclusion of R99 million for sand value.

[84] The high court's findings that the correct value to be applied in the circumstances was Veldsman's valuation of R160 million must be confirmed. No sand value is to be added.

[85] The parties agreed that the land value for the calculation of the NAV as at 31 December 2007 was Margolius' valuation of R211 million, escalated by 5% per annum thereafter. Based on the agreed method of calculation, the amount of overpayment in each case should be capable of easy quantification.

Partial alternative claim to the first claim

[86] The high court found all of the share transactions were tainted by breaches of fiduciary duties on the part of Oaker and the affected persons and that Oaker was manifestly in a conflicted position. I agree. Johnny was not a defendant in the diversion of a corporate opportunity claim, so this claim remains relevant in respect of it. Insofar as Johnny is liable, its liability would in effect be joint and several with that of the appellants in the diversion of a corporate opportunity claim, ie payment by Johnny would reduce the liability of the other appellants under that claim. Johnny is liable for having received payment for the share transactions from April 2007 to April 2008 paid by PIF in the amount of R105 076 644.06 including VAT (translated to the claimed amount of R94 550 025.94 exclusive of VAT) for its one-third shareholding in the Rapicorp companies. The Curator should therefore have succeeded in this claim.

Excessive management and performance fees

[87] As to this claim, the fees were determined by reference to the value of assets under RAM's management. I have already dealt with the difficulties presented by

the appellants' and RAM's reliance on Veldsman's 2007 valuations as well as the high court's erroneous inclusion of the sand value.

[88] Given their fiduciary responsibilities, the appellants could not escape liability by pointing to the acceptance of the values by auditors in the annual financial statements. Grant Thornton Cape Inc (Grant Thornton) and Alliot Andersen Nell Inc (Alliot Andersen)'s opinions were only requested in 2011. Therefore, they could not have been relied on when decisions were made as to what valuations would be relied upon to calculate the values of the properties. In any event, those opinions were not entirely accurate relative to the facts. For example, a letter from Grant Thornton to the TDI trustees dated 5 October 2011 stated that 'the company has not yet decided what it will do with the land'. Also, a letter from Alliot Andersen to the directors of Rapicorp 122, dated 6 October 2011, indicated that sand deposits were held by Rapicorp 122 as an asset and that it was held as an investment property. There is accordingly no reason to interfere with the high court's finding that RAM, Global Pact, Oaker, Clint and Pillay breached their duties to PIF.

[89] The last issue concerns whether Johnny can be held liable in respect of this claim, as submitted by the Curator. The Curator submits that its liability stems from the fact that it was the ultimate beneficiary of the excessive fees paid to RAM.

[90] Johnny did not have a statutory or contractual fiduciary duty towards the PIF and TDI investors as the other appellants did. It also did not directly participate in the management and control of the trust assets. In the strict sense, it cannot be held to be in breach of any fiduciary and contractual duties.

[91] While the relationship between Johnny and the investment funds was statutorily and contractually removed, it is apparent from the assets that it accumulated during the relevant periods that it was one of the ultimate beneficiaries of Oaker's scheme. It is not in dispute that monies were channelled to it by way of dividends received from RAM through RGH.

[92] The figures tell the story. On 28 February 2007, Johnny had assets of approximately R2,5 million. A year later, those had grown to an amount of approximately R84 million, with distributable reserves of R50,5 million. Dividends received from RAM increased from R1 million in 2007 to R15 million in 2008 and a profit on disposal of investments being R40 232 475.

[93] Johnny's assets increased to R113.5 million as at 28 February 2009. The profit on disposal of investment was R61.6 million. An allocation of that amount was made to the beneficiaries. Johnny's annual financial statements as at 28 February 2011 showed that its assets significantly increased to about R251 million from R104 million in 2010. The income statement reflected an amount of R150 million as 'proceeds from cancellation of option'. An allocation was made to the beneficiaries in the same amount.

[94] It matters not that Johnny did not directly have fiduciary responsibilities towards PIF and TDI and did not have a direct hand in managing and controlling RAM. It is evident that it was used as a conduit to channel profits made from the scheme orchestrated by its trustee, Oaker, together with the other appellants, which included the charging of inflated management fees and performance fees. It is irrelevant that Oaker was not a beneficiary in Johnny. His family benefited. The

breaches were aimed at ultimately enriching Johnny, which to all intents and purposes operated as Oaker's alter ego. Accordingly, it is befitting that Oaker and Johnny be ordered to disgorge the profits made from the investors' funds, and that they be held jointly and severally liable to do so with RAM and the other appellants. This has been pleaded as an alternative to the other appellants' and RAM's liability.

Other fees irregularly charged

[95] This claim is in respect of 'other fees' irregularly paid by TDI to RAM for services rendered between 2005 and 2010, which the appellants contended were not permitted by the mandate agreements. Clause 8 of the management agreement sets out the nature of the remuneration to which the fund manager is entitled for its administration and management of the fund.

[96] The first payment relates to the amount of R820 800 for the screening and investigation of investment opportunities, which were ultimately not pursued (broken deal). No argument was pursued in relation to these fees, rightly so as there was no basis to charge for these services over and above the ordinary management fee under the management agreement.

[97] Other fees charged between January 2005 and April 2008, in the amounts of R6 066 225, R997 499.45 and R2 850 000, were paid pursuant to separate mandates concluded between TDI and RAM relating to 'potential investments' by TDI.

[98] According to the appellants, these fees were to be regarded as 'fund transaction expenditure' in accordance with clause 8.1.4 of the management agreement. Clause 8.1.4 provides that '[t]he trust shall be responsible for the

payment of all *expenditure incurred by the Fund manager* from time to time in relation to all Start Up Costs, Trust Organizational Expenditure and Fund Transaction Expenditure’.

[99] Fund transaction expenditure is defined as ‘[i]n relation to every existing or prospective portfolio investment, all expenditure and disbursements relating thereto (inclusive of value added tax thereon)’. RAM described the three amounts in its invoicing as ‘corporate finance fees’.

[100] The high court found that professional services provided by RAM cannot be viewed as ‘expenditure incurred by the Fund Manager’ because clause 31 of the Trust Deed provided for the reimbursement of the fund manager by TDI ‘to the extent [of] any such costs and expenses paid by it’ and goes on to detail the out-of-pocket costs and expenses and third-party expenses in different categories. Any fees charged by the fund manager are excluded. This interpretation is in my view businesslike and reasonable.

[101] The high court further found that clause 8.1.4 could not extend to professional fees charged by the fund manager, as they were not expenditure incurred by the fund manager, nor did they fall under the ambit of fund transaction expenditure, which was limited to expenses and disbursements relating thereto.

[102] The RAM fees could not be described as either expenses or disbursements incurred by RAM on behalf of TDI. Accordingly, such payments under the mandate agreements were not validly claimed from TDI under the management agreement. The court further found that in any event, even if it were wrong, those services fell

squarely and were largely within the standard fund management services covered by the management agreement or were not services that were actually required to be performed in relation to the transactions in question.

[103] The high court's interpretation is a sensible one and there is no reason to interfere with it. Furthermore, as the high court correctly found, it was within RAM's powers and obligations under the management agreement to 'screen, select and investigate appropriate investment opportunities for the trust'. Oaker's evidence was vague as to what was actually done by RAM in regard to these transactions.

[104] There was clearly no basis established for charging these additional fees. The finding that these mandates were designed to extract value for the benefit of RAM and, in the end Johnny, is inescapable. The high court correctly concluded that these agreements were in breach of the appellants' fiduciary duties because they were disadvantageous to TDI and did not reflect an arm's length fee.

[105] The final amount of R11 400 000 was paid as a fee for an alleged property asset mandate concluded between RAM and the property-owning entities. TDI was not a party to the mandate. In terms of the mandate, Rapicorp 122, Rapicorp 123 and C-Max were responsible for paying the fee earned by RAM. According to the appellants, the fee was paid by TDI as the beneficial owner of the property-owning entities.

[106] These entities, so it was contended, generated no income to pay their own expenses. TDI generally paid the expenses of its subsidiaries. In the books of Rapicorp 122, this amount was dealt with as a loan from its shareholder. In PIF's

books it was reflected as a loan to a related party. The appellants submitted that the Curator's claim lies against Rapicorp 122, on whose behalf the amount was paid, and not against them.

[107] The appellants also contended that as far as the Curator's allegation that the property asset mandate was unenforceable or invalid, this is a claim which only the Rapicorp companies may raise against RAM. Counsel for the appellants argued that this claim stands on a different footing to the others in that the Curator is required to show that TDI suffered a loss and he has not done so.

[108] During the argument, counsel for the Curator appeared to concede that this was not a good claim for the Curator. This claim accordingly warrants no further consideration.

[109] The high court ordered an amount of R22 274 884, for the total claim. It erroneously did not deduct the full amount of R1 078 440, which formed part of the original claim and which the Curator had disavowed during the trial. The high court order has to be adjusted to reflect this deduction as well as by removing the R11 million plus amount, discussed in the preceding paragraph.

[110] Insofar as Johnny is concerned, liability is extended to it on the same basis as found in relation to the claim in relation to management and performance fees. Pillay was excluded from liability in respect of 'other fees' paid prior to September 2007. At the hearing of the appeal, the Curator did not seem to quarrel with that.

The 20% action

[111] This claim was directed at Johnny. In December 2007, when Schuster and Merlot's options to reacquire shares in Rapicorp 122 were cancelled for no consideration, Johnny assumed that it then held 100% of the option to reacquire 54.35% of the PIF shares. On 16 August 2010, six days before the option was to expire, ie on 22 August 2010, Johnny, Rapicorp 122 and PIF concluded a second option cancellation agreement. PIF agreed to pay Johnny R150 million plus VAT in consideration for cancelling the option. In lieu of paying this amount, PIF transferred 20% of the shares in both Rapicorp companies to Johnny and created a loan account of R6,7 million in Johnny's favour. In reduction of the loan account, PIF paid R500 000 during February 2012 and March 2012 respectively.

[112] In the circumstances, three issues arise: (a) whether Johnny had the financial resources to exercise the option; (b) whether Johnny had the intention to exercise the option; and (c) the value of the option. It is acknowledged by the appellants in their heads of argument that if Johnny lacked the resources or the intention to exercise the option, there was no legitimate reason for PIF to pay to cancel the option. In that event, if the finding of the Court is against the appellants on those two issues, it is not necessary to deal with the issue of the value of the option.

[113] The high court found that, based on the evidence tendered, it had not been shown that Johnny at the relevant time possessed the financial resources to exercise the option. The only thing that Oaker could say in this regard was that he had held discussions with financial institutions. He provided no calculations or documentation to support this assertion. Further no details as to what was precisely discussed with the financial institutions were given. There is no evidence of any

application for finance having been made on behalf of Johnny. The high court concluded that ‘in the absence of the content of the discussions, it is . . . difficult to discern whether those discussions yielded a basis upon which it can be said that Johnny was convincingly able to meet the obligations of the option cancellation’. The high court accordingly rejected Oaker’s evidence as an afterthought and found it to be unreliable.

[114] The appellants were found to have misinformed the Financial Services Board and the Curator as to the circumstances under which Johnny came to be a 20% shareholder in the two Rapicorp companies. They were found to have peddled lies by trying to cover the option cancellation and that in itself pointed towards the fact that there was never any intention to exercise the option in the first place. These findings are unchallenged and there is no reason to interfere with them. Furthermore, as the high court correctly found, Oaker, Clint and Pillay owed PIF a fiduciary duty and acted in breach thereof. The second option cancellation was baseless, the cancellation fee payment of R150 million illegitimate, and the creation of the loan amount of R6,7 million, unlawful. The high court was justified in nullifying the agreement.

[115] Both parties agreed that the high court’s order was erroneous in that it granted relief directed at Oaker and Johnny to reimburse PIF for the value of the option instead of restoring PIF’s 100% shareholding in the Rapicorp companies. In the circumstances, the high court’s order must be rectified.

Cross-appeal on interest

[116] The Curator rightly no longer pursues his cross-appeal in relation to the interest, as the award thereof fell within the court's discretion. The high court ordered interest to be calculated at 15.5% from the date of the issue of the summons on 25 June 2014.

Conclusion

[117] For all the reasons given in this judgment, the appeal must fail and the cross-appeal succeed with the necessary adjustments having to be made to the order. At the hearing of the appeal, counsel expressed confidence that to the extent that some of the claims still required to be finally quantified, that could be achieved by agreement. To the extent that such confidence may in time prove to have been misplaced, I propose to remit the matter to the high court so that failing agreement it can make those determinations in the light of this judgment. The order that issues will accordingly cater for that eventuality, should it arise. Moreover, given the inordinate passage of time, the fact that we are concerned with funds that belong to vulnerable workers and the obviously dilatory conduct on the part of the appellants, it is necessary to direct that the various orders for payment shall be executable immediately upon delivery of this judgment. The order that issues will also cater for that.

[118] It remains to consider the issue of costs. In view of this Court's findings in relation to Clint and Pillay's liability, the high court's order limiting their liability for costs to 20% must be adjusted. Secondly, as not all the defendants in the action under case number 10984/2014 were parties in the action under case number 1534/2013, it is necessary to differentiate in respect of the costs arising prior to the

consolidation of the two actions and those thereafter. Save for those adjustments, there is no reason to interfere with the high court's discretion as regards costs. In particular, costs of three counsel, where so employed, in the high court were justified, as the matter is factually complex.

[119] Given the seriousness of the conduct of the appellants, which involved a pattern of self-enrichment at the expense of PIF and TDI and most importantly TDI's beneficial owners, which had entrusted to the appellants their invested funds, I direct that a copy of this judgment be forwarded to the National Commissioner of the South African Police Service and the National Director of Public Prosecutions for investigation and, if so advised, prosecution.

Order

[120] In the result, the following order is made:

- 1 Each of the two applications to stay the appeal and the cross-appeal is dismissed with costs, including the costs of two counsel.
- 2 The appeal is dismissed with costs, including the costs of two counsel, such costs to be paid jointly and severally by the appellants.
- 3 The cross-appeal is upheld with costs, including the costs of two counsel, such costs to be paid jointly and severally by the appellants.
- 4 The high court's order is set aside and replaced with the following:
 - '1 In respect of the claim for diversion of a corporate opportunity, the first, second, third and twelfth defendants in case number 10984/2014 are jointly and severally liable to the plaintiff for payment in the amount of R232 622 338.96, together with interest thereon at the rate of 15.5% per

annum from the date of the issue of summons on 25 June 2014 to date of payment.

2 It is declared that the fourth and fifth defendants in case number 10984/2014 are jointly and severally liable with the first, second, third and twelfth defendants for the aforesaid amount of R232 622 338.96, to the extent of R94 550 025.96, together with interest thereon at the rate of 15.5% per annum from the date of the issue of summons on 25 June 2014 to date of payment.

3 In respect of the claim for excessive management and performance fees, the first, second, third, twelfth and thirteenth defendants, and the fourth and fifth defendants, in case number 10984/2014 are held to be jointly and severally liable to the plaintiff for the payment of such amount as may be agreed between the parties or failing agreement, determined thereafter by the high court to be due, owing and payable together with interest thereon at the rate of 15.5% per annum from the date of the issue of summons on 25 June 2014 to date of payment.

4 In respect of the claim for other fees irregularly charged, the first, second, third, twelfth and thirteenth defendants, and the fourth and fifth defendants, in case number 10984/2014 are jointly and severally liable to the plaintiff for payment of the amount of R10 734 524.45 together with interest thereon at the rate of 15.5% per annum from the date of the issue of summons on 25 June 2014 to date of payment. The thirteenth defendant is excluded from any liability for fees paid prior to September 2007.

5 The second option cancellation agreement, the transfer of shares in Rapicorp 122 (Pty) Ltd and Rapicorp 123 (Pty) Ltd pursuant to that agreement, and the creation of a loan of R6 700 000 in favour of the fourth

and fifth defendants are declared to be void *ab origine*, and the plaintiff is authorised to reverse the said loan account and alter the share register accordingly.

6 The fourth and fifth defendants are liable for payment to the plaintiff in the amount of R500 000, together with interest thereon at the rate of 15.5% per annum from the date of the issue of summons on 25 June 2014 to date of payment.

7(a) Regarding the costs incurred prior to the date upon which it was agreed that the actions under case number 10984/2014 and case number 1534/2013 be consolidated for the purposes of trial (the consolidation date), the first, second, third, twelfth and thirteenth defendants, and the fourth and fifth defendants, in case number 10984/2014 shall be jointly and severally liable for the plaintiff's costs in that action; and the first and third defendants, and the first defendant in his representative capacity with the second defendant, in case number 1534/2013 shall be jointly and severally liable for the plaintiff's costs in that action.

(b) The costs incurred after the consolidation date shall be regarded as indivisible as between the two actions.

(c) The first, second, third, twelfth and thirteenth defendants, and the fourth and fifth defendants, in case number 10984/2014 are jointly and severally liable for the plaintiff's costs incurred after the consolidation date, including the costs of three counsel where so employed.

(d) Each party shall bear the costs of its own expert witnesses.'

5 The orders for payment set out in paragraphs 1, 2, 4 and 6 of the judgment of the high court, as altered by this order, shall be executable immediately upon delivery of this judgment.

6 In respect of the claim for excessive payment of performance and management fees, the parties are directed to make further calculations, debate them, and apply to the high court for determination of them if agreement on the amount is not reached within 30 days of this order. The input into the calculations for land value shall be R160 million, or any lesser amount that might have been actually used at the material time, up to 31 December 2007; and R211 million as at 31 December 2007, to be escalated at 5% per annum thereafter. No sand value shall be included in the calculations. No set off shall be allowed of instances of overcharging against any instance of undercharging.

7 The monetary claim for payment of excessive performance and management fees shall be executable upon the making of an order for such payment by the high court, whether it be for an agreed amount or one determined by the high court.

8 The matter is remitted to the high court.

9 The Registrar of this Court is directed to forward a copy of this judgment, accompanied by copies of the judgments of the high court, to the National Commissioner of the South African Police Service and the National Director of Public Prosecutions for investigation and, if so advised, prosecution.

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

Appearances

In the application to stay

For the applicant: J Dickerson SC and F Gordon-Turner
Bradley Conradie Halton Cheadle, Cape Town
Claude Reid Attorneys, Bloemfontein

For the first and second
respondents: E Fagan SC and M Janisch SC
Werksmans Attorneys, Stellenbosch
McIntyre Van der Post Inc, Bloemfontein

In the appeal and cross-appeal

For the appellants: L A Rose Innes SC and D Goldberg
Instructed by: Bradley Conradie Halton Cheadle, Cape Town
Claude Reid Attorneys, Bloemfontein

For the respondent: E Fagan SC and M Janisch SC
Instructed by: Werksmans Attorneys, Stellenbosch
McIntyre Van der Post Inc, Bloemfontein