



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 247/08
Reportable

VOLVO (SOUTHERN AFRICA) (PTY) LTD

Appellant

and

GERT YSSEL

Respondent

Neutral citation: *Volvo v Yssel* (247/08) [2009] ZASCA 82 (20 August 2009)

Coram: STREICHER ADP, NUGENT, JAFTA, MAYA JJA
& HURT AJA

Heard: 15 MAY 2009

Delivered: 20 AUGUST 2009

Summary: Fiduciary duty – circumstances in which such a duty exists.

ORDER

On appeal from: High Court Johannesburg (Berger AJ sitting as court of first instance)

The appeal is upheld with costs that include the costs occasioned by the employment of two counsel. The order of the court below is set aside and the following orders are substituted:

- ‘1. The respondent is ordered to pay to the applicant the sum of R775 107 plus interest on that amount at the rate of 15,5 per cent per annum calculated from 12 September 2006 to date of payment.
2. The respondent is ordered to pay the costs of the application, which are to include the costs occasioned by the employment of two counsel.’

JUDGMENT

NUGENT JA (STREICHER ADP, JAFTA, MAYA JJA and HURT AJA concurring)

[1] When it commenced operations in 2000 Volvo (Southern Africa) (Pty) Ltd (the appellant) was looking for a manager for its information technology division. A personnel placement agent introduced it to Mr Yssel (the respondent) and Volvo decided to appoint him to the position. Yssel did not want to enter into direct employment with Volvo. He preferred instead to be employed by a labour broker with which he was

then associated – Highveld Personnel (Pty) Ltd¹ – which would assign him to provide his services to Volvo. Volvo reluctantly accepted that arrangement and for the next five years or so Yssel worked for Volvo on that basis.

[2] In making the necessary arrangements Volvo had no direct contact with Highveld and dealt solely with Yssel who in turn dealt with Highveld. The relationship between Volvo and Highveld was regulated by sequential written agreements, the detail of which is not now important. The effect of the agreements, essentially, was that upon receipt of monthly invoices Volvo would pay Highveld a fee for the services of Yssel, and Highveld would in turn be responsible for remunerating Yssel. The services that were to be rendered by Yssel were described in the various contracts as follows:

‘The management of the [Information Technology] infrastructure of [Volvo] by means of:

User Support

User Training

Investigation and development of new [Information Technology] processes to stay abreast with technology

Liaison with Volvo information technology – Sweden

Staff management

Liaison with local suppliers

Work in close conjunction with line managers.’

[3] By 2004 there were six other personnel in the information technology division. They were similarly employed by labour brokers who assigned their services to Volvo. Mr van Rensburg, Mr van Rijswijk and Mr du Plessis were employed by a labour broker known as

¹ Highveld Personnel (Pty) Ltd was later taken over by a Dutch company and became known as Highveld PFS but I will refer to them interchangeably as Highveld.

Optimising Systems. Mr Steyn and Mr Streak were employed by Interg8 IT. Mr Coop was employed by ITSS.

[4] In about the middle of 2004 Yssel approached the Human Resources Manager of Volvo, Ms van Eeden, and told her that some of the personnel were unhappy with their labour brokers and that he could arrange for all the personnel to transfer to Highveld at no extra cost to Volvo. Yssel suggested the same to all the personnel concerned, pointing out that their remuneration could be more favourably structured if they were to transfer to Highveld. Volvo and the personnel were agreeable, and Yssel attended to making the necessary arrangements.

[5] A written master agreement (called a ‘temporary service agreement’) was concluded between Volvo and Highveld to regulate the new arrangement. It provided that Highveld would supply the services of personnel to Volvo in return for a monthly fee that was to be stipulated in each case in an annexure to the agreement (called a ‘confirmation of assignment’). At various times between August 2004 and April 2005 Yssel accompanied each of the personnel to the offices of Highveld where they were introduced to Ms Pieterse (Manager: Marketing and Support) and each signed a ‘confirmation of assignment’. They all said that they were given to understand that from the moneys received from Volvo in respect of their services Highveld would retain a fixed charge of about R425 per month and an administration fee of 3% of their earnings. None was apparently pertinently aware of the rate at which their services were being charged to Volvo.

[6] Volvo again had no direct contact with Highveld in making these arrangements and dealt at all times through Yssel who acted as what he

called a 'facilitator' or 'intermediary' between Volvo and Highveld. Once the new arrangements were in place Highveld would send invoices to Yssel each month for the services of the various personnel and Yssel would submit them for payment to the relevant department of Volvo.

[7] Unbeknown to Volvo, and to the personnel concerned, a large part of each monthly payment that was being made by Volvo was ending up in the pocket of Yssel. What Yssel had not disclosed to Volvo, nor to the personnel concerned, was that he had agreed with Pieterse that he would be paid what he called a 'commission' if he arranged for the personnel to transfer to Highveld. He had also agreed with her that the matter of the commission should not be discussed with the personnel or with Volvo.

[8] The amounts that were received by Yssel were substantial. In January 2006, for example, Volvo paid R27 400 to Highveld for the services of Van Rensburg, from which Van Rensburg was paid R12 000 and the balance of R15 400 went to Yssel. In other cases his portion was somewhat lower but overall he was receiving about 40 per cent of the moneys that were being paid to Highveld.

[9] All this came to light at the end of 2005 when Steyn came across a document reflecting the discrepancy between the amount that was being paid by Volvo for his services and the amount of his remuneration. Not satisfied with the explanation for the discrepancy that he received from Yssel he investigated further and discovered other documents to similar effect, whereupon he reported the matter to senior personnel of Volvo.

[10] The matter came to the attention of Van Eeden in January 2006 and she arranged a meeting with Pieterse. This was the first time that Van

Eeden had direct dealings with anyone from Highveld. Before then all dealings between Volvo and Highveld had taken place through the 'facilitation' of Yssel. When Pieterse was confronted with the discrepancies she at first denied knowledge of payments having been made to Yssel but later acknowledged that such payments had been made. After the meeting, as they left the building, they encountered Yssel, who asked Pieterse why she was at Volvo's premises. Pieterse told him that she could not speak to him then but would do so at another time. Later that day Van Eeden and another senior employee of Volvo were in the process of preparing a letter suspending Yssel when he delivered a letter of resignation. The six personnel subsequently terminated their arrangements with Highveld and entered the direct employment of Volvo.

[11] Investigations by an internal auditor of Volvo revealed that from August 2004 to January 2006 Volvo paid R1 967 900 to Highveld for the services of the personnel (excluding Yssel) of which they received R1 087 650. From the balance of R889 250 Highveld had deducted its own commissions of R114 143 and the balance of R775 107 had been paid to Yssel.

[12] Volvo sued Yssel in the High Court at Johannesburg for payment of that amount, alleging that it had been earned in breach of a fiduciary duty that he owed to Volvo to act in its interests and not in his own. The high court (Berger AJ) dismissed the claim and Volvo now appeals against that order with the leave of that court.

[13] Over a century ago in *Robinson v Randfontein Estates Gold Mining Co Ltd*² Innes CJ expressed, in general terms, the legal principle that is applicable in a case of this kind as follows:

‘Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other’s expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in *The Aberdeen Railway Company v Blaikie Bros.* (1 Macqueen 474), the doctrine is to be found in the civil law (*Digest* 18.1. 34.7), and must of necessity form part of every civilised system of jurisprudence’.

[14] Moneys that are earned secretly in breach of a duty of trust fall to be disgorged by the fiduciary and there is little room for him or her to avoid that consequence. Recently in *Phillips v Fieldstone Africa (Pty) Ltd*³ Heher JA summarised the position, as it has been articulated in various decided cases, as follows:

‘The rule is a strict one which allows little room for exceptions ... It extends not only to actual conflicts of interest but also to those which are a real sensible possibility ... The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice ... Because the fiduciary who acquires for himself is deemed to have acquired for the trust, ... once proof of a breach of a fiduciary duty is adduced it is of no relevance that (1) the trust has suffered no loss or damage ... ; (2) the trust could not itself have made use of the information, opportunity etc ... or probably would not have done so ... ; (3) the trust, although it could have used the information, opportunity etc has refused it or would do so ... ; (4) there is not privity between the principal and the party with whom the agent or servant is employed to contract business and the money would not have gone into the principal’s hands in the first instance ... ; (5) it was no part of the fiduciary’s duty to obtain the benefit for the trust ... ; or (6) the fiduciary acted honestly and

² 1921 AD 168 at pages 177-178.

³ 2004 (3) SA 465 (SCA) para 31.

reasonably ... (although English and Australian Courts make some allowance for equity in calculating the scope of the disgorgement in such cases).

[15] There is no dispute that Yssel received the sum of R775 107 in the circumstances that I have referred to. He alleges, however, that he did not stand in a fiduciary relationship towards Volvo, and was thus entitled to arrange for and earn the commission. His central contention in that regard – it is the recurrent refrain throughout his answering affidavit – is that he had no contractual privity with Volvo and thus had no duties towards it at all.

[16] While certain relationships have come to be clearly recognised as encompassing fiduciary duties there is no closed list of such relationships. As pointed out in *Randfontein Estates*,⁴ and in numerous other cases in this country and abroad, whether a particular relationship should be regarded in law as being one of trust will depend upon the facts of the particular case. Courts have nonetheless often sought to identify features, or characteristics, that impart fiduciary qualities to a relationship. In *Hodgkinson v Simms*,⁵ for example, La Forest J, writing for a majority of the Supreme Court of Canada, said the following of ‘situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship’:

‘In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former’s best interests with respect to the subject-matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

⁴ Page 180.

⁵ (1995) 117 DLR (4th) 161 at 176f – 177b.

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. This idea was well-stated in the American case of *Dolton v Capitol Federal Sav. and Loan Ass'n*, 642 p 2d 21 (Colo. App. 1982), at pp 23-24, in the banker-customer context, to be a state of affairs

... which impels or induces one party “to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger.” ... [and] ... has been found to exist where there is a repose of trust by the customer along with an acceptance or invitation of such trust on the part of the lending institution.’

[17] Features of the kind that were mentioned in that extract – the discretion that one party may have in relation to the affairs of another, the influence that he or she is capable of asserting, the vulnerability of one person to another, the trust and reliance that is placed in the other – receive frequent mention in judgments on the subject of whether a relationship was one of trust.⁶ But such references do not seem to me to advance materially what was stated in *Randfontein Estates* and do little more than to identify factors that were considered to be relevant to the enquiry in the particular case. And while the extract that I have referred to might suggest that a ‘mutual understanding’ between the parties concerned is a prerequisite for such a relationship to exist I think that would be to approach the matter too restrictively. What is called for is an assessment, upon a consideration of all the facts, of whether reliance by one party upon the other was justified in the circumstances. As pointed out by Gibbs CJ in the High Court of Australia in *Hospital Products Limited v United States Surgical Corporation*:⁷

‘I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of

⁶ See, for example, *Canadian Aero Service Ltd. v O'Malley* (1974) 10 DLR (3d) 371; *Pilmer v Duke Group Ltd (in liq)* (2001) 180 ALR 249 (HC of A); *Phillips v Fieldstone Africa (Pty) Ltd*, above, esp 482C-D. See, too, J.R.M. Gautreau ‘Demystifying the Fiduciary Mystique’ (1989) 68 *Canadian Bar Review* 1 and the references cited.

⁷ (1984) 156 CLR 41 (HC of A) 69.

different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.’

[18] Contractual duties owed by one party to another will no doubt often go a long way towards defining whether the relationship is one of trust but contractual privity is not indispensable to such relationships, as correctly observed by the court below. Having said that, the court below went on to find that Yssel indeed owed fiduciary duties to Volvo, but only in relation to the exercise of the specific functions that were assigned to him in the various agreements between Volvo and Highveld (the functions I have listed in para 2 above). Because his functions did not extend to the recruitment, employment or acquisition of staff, so the court reasoned, he was under no duty to act in the interests of Volvo when he engaged in the activities with which we are now concerned. That seems to me to view the matter too narrowly.

[19] Yssel occupied the most senior position in Volvo’s information technology division. That there was no contractual privity between him and Volvo seems to me to be of little consequence. It was the position to which he was appointed, rather than the nature of the contractual relationship, that defined what Volvo could expect of him. He had not been brought in to its offices so as to provide him with an opportunity to hawk his own wares but had been brought there in the interests of Volvo. That his functions might not have included recruiting, employing and acquiring staff does not seem to me to be material. No doubt he could not be compelled to accept instructions to engage himself in matters of that nature. But the fact is that he did engage himself in arranging matters between Volvo and its staff. And in doing so he did not purport to be

doing so as a stranger who was conducting his own affairs. He did so as an incident of his function as manager of the division. Indeed, there can be no doubt that Yssel was well aware that it was precisely because he was the manager of the division that Volvo could be induced to ‘relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger’.⁸

[20] Yssel was well aware that Van Eeden had made no independent enquiries relating to the arrangement with Highveld and was acting entirely upon what she was told by him. That he found it necessary to secure an agreement of secrecy from Pieterse makes it abundantly clear that he was well aware that Van Eeden believed that he was arranging matters pursuant to his ordinary managerial duties and not for his own account. In short, he was well aware that Van Eeden did not consider herself to be dealing at arm’s length with an independent broker who was arranging matters on his own account, but was dealing with the manager of the division concerned. It was only because Yssel was the manager that the transaction came about at all. I have no doubt that Yssel was in a position of trust when he engaged himself in the matter and was not entitled to allow his own interests to prevail over those of Volvo. He is obliged in those circumstances to disgorge his secret commissions and the appeal must succeed.

[21] The appeal is upheld with costs that include the costs occasioned by the employment of two counsel. The order of the court below is set aside and the following orders are substituted:

⁸ *Dolton’s case*, quoted in *Hodgkinson v Simms*, above.

- ‘1. The respondent is ordered to pay to the applicant the sum of R775 107 plus interest on that amount at the rate of 15,5 per cent per annum calculated from 12 September 2006 to date of payment.
2. The respondent is ordered to pay the costs of the application, which are to include the costs occasioned by the employment of two counsel.’

R W NUGENT
JUDGE OF APPEAL

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