REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2022-040174

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

DATE 25/11/2024 SIGNATURE

In the matter between:

DIMENSION DATA FACILITIES (PTY) LTD First Applicant

DIMENSION DATA INVESTMENTS SOUTH AFRICA (PTY) LTD Second Applicant

NTT LIMITED Third Applicant

And

IDENTITY PROPERTY CO (PTY) LTD First Respondent

IDENTITY FUND MANAGERS (PTY) LTD Second Respondent

IDENTITY PROPERTY FUND 1 Third Respondent

(*en commandite partnership*)

JEREMY JOHN ORD	Fourth Respondent
STEVEN JEFFERY NATHAN	Fifth Respondent
GRANT MARTIN CAMPBELL BODLEY	Sixth Respondent
ATHANASIOS MISSAIKOS	Seventh Respondent
BRUCE WATSON	Eighth Respondent
JASON MATHEW GOODALL	Nineth Respondent
IDENTITY PROPERTY CO SECURITY SPV (RF) PTY LTD	Tenth Respondent
STREBIS (PTY) LTD	Eleventh Respondent
MARTIN EPSTEIN	Twelfth Respondent
KULA INVESTMENT SOLUTIONS (PTY) LTD	Thirteenth Respondent
THE REGISTRAR OF DEEDS	Fourteenth Respondent

JUDGMENT

Summary:

Broad-based Black Economic Empowerment Act 53 of 2003 - Conspiracy by senior executives of a group of companies to use *en commandite* / Limited Partnerships and Private Equity Fund Management structures to circumvent the objects of the Broad-based Black Economic Empowerment Act 53 of 2003 and the codes of good conduct issued thereunder.

Held -Nominee arrangements and en commandite partnerships, whilst they have their place in corporate structures, should entail the implementation of checks and balances which serve to prevent them being used to make corrupt relationships possible and *in fraudem legis.*

Section 75 of Companies Act 71 of 2008 - operation of in the circumstances.

Held - The Legislature in enacting section 75 did not intend to limit the common law protections relating to conflict of interest but to codify and enhance them.

Held - The purpose of the requirement that an interest be "direct" in accordance with the definition of "personal financial interest" which is imported into section 75 is properly construed as being an interest which can be discerned by reference to the matter or transaction in issue to benefit the director directly.

Held - Section 75 cannot be evaded by clever structures which seek to conceal the interests of parties; a court faced with a complaint of conflict of interest must have careful regard to the financial structures implicated in order to determine where the beneficial interest actually resides; the nature and extent of the interest is to be determined on the facts of each transaction under consideration.

Held - The mischief which section 75 seeks to address is the same as that which the common law principles relating to conflict of interest seek to address: The board is protected from unwittingly entering into a contract where one of its number is conflicted between his own interest and that of the company.

Held - On the facts, whether the non-disclosure is treated under section 75 or in terms of the common law, the effect is the same notwithstanding that the mechanics are different: At common law the agreement is valid but voidable at the instance of the company; under section 75 the agreement is automatically void but can be ratified.

Held -Purpose of section 75(6) is statutorily to entrench the requirement of disclosure of the existence of a conflict.

Held - Not necessary, on the facts, to decide whether treatment of non-disclosure under section 75(6) entails automatic voidness ab initio as in section 75 or voidability.

Held – The Transaction is hit by section 75 and is invalid ab initio.

FISHER J

Introduction

[1] This is a uniquely South African (SA) story. It involves *Dimension Data,* a famous brand which has been part of South Africa's commercial history for more than thirty years. It puts at centre stage the functionality of the Black Economic Empowerment legislation and system which is crucial to the economic transformation of South Africa to an inclusive and sustainable constitutional democracy which seeks to afford redress to the economic inequities visited on Black South Africans in the past.

[2] The applicants allege that six white males, who can be described as Captains of Industry in South Africa, have conspired to gain surreptitious control over and beneficial ownership of the Dimension Data Campus, which is a flagship Johannesburg property in Bryanston.

[3] The Campus, prior to the Transaction which is the subject of this case, was owned by the first applicant (DD Facilities or the Seller). This ownership includes the interests in the rental enterprises which are operated from the property as well as certain movable assets including a valuable art collection. I shall refer to this collective of rights as "the Campus"

[4] It is alleged by the applicants that the acquisition of the Campus was achieved through a conspiracy which employed the mechanisms of *en Commandite* (also known as Silent or Limited) partnerships and which allowed the interests of these ultimate beneficiaries, in what was intended by the applicants to be an empowerment transaction, to be concealed not only from the public and the empowerment control structures and auditors but also from the applicants and their Japanese Holding structures.

[5] Nippon Telegraph and Telephone Corporation NTT Holdings (NTT Holdings) is a Japanese company that is the ultimate holding company of all companies operating under the names "*NTT*" and "*Dimension Data"* ("*DD"*) and including

the applicants. The third applicant (NTT), is a private company incorporated in the United Kingdom with its headquarters in London.

[6] It would serve no purpose to go into any great detail relating this Group structure and various intercompany holdings. It suffices to state that the South African business is conducted through various companies which bear the name *Dimension Data*. I will refer to NTT and the structures in the NTT stable downstream of it, including the third applicant, as NTT or the NTT entities.

[7] The companies in the Group that are implicated in this case, other than the three applicants, are NTT Holdings, DD Middle East and Africa (DD MEA) which is the holding company of the second applicant and DD Management Services.

[8] The six main protagonists accused of the conspiracy are the co-founders of the *Dimension Data* brand, Jeremy Ord and Bruce Watson, three of their co-executors in the Group - Jason Goodall, Grant Bodley and Athanasios Missaikos, and Steven Nathan who is a close business associate of all five men and who was employed as an independent contractor to provide management and advisory services to the Group. All are cited as respondents.

[9] I will refer to these six men collectively as “the Protagonists” for the reason that they dominate the narrative even though there are many other dramatis personae who are central thereto.

[10] In relation to the correspondence between the Protagonists, which forms the central basis of the case, it should be noted that Watson was not corresponded with together with the others. The reference to such correspondence with the Protagonists is thus to the six excluding Watson.

[11] It is not, however, disputed that Watson was ultimately one of the investors in the Campus Transaction and that he is a beneficial owner with the others.

[12] Nathan was ultimately called upon under his contractual obligations to the Group to identify an opportunity and in that context to negotiate a transaction which would allow for the improvement of the score of, at least, the South African holdings under the Broad-based Black Economic Empowerment Act (the BEE Act).

[13] In due course there was a negotiation to which Nathan was pivotal which resulted in a transaction which allowed for the improvement of the BEE score[1] of, at least, the South African business (the Transaction).

[14] The Transaction entailed the disposal of the Campus to what purported to be an empowerment structure which was 100% Black woman owned.

[15] The main relief sought by the applicants in this application is the setting aside of the Transaction. This relief is sought on the basis of section 75 of the Companies Act[2] alternatively, the common law relating to conflict of interest and fraud.

[16] The respondents include the six Protagonists, the purchaser of the Campus Identity Property Company (Identity Propco or the Buyer) which was set up in the context of the BEE opportunity identified by Nathan to be the Buyer of the Campus; Identity Fund Managers (IFM) which was the Private Equity Manager of the funds invested in the Transaction; Identity Fund1 (the Fund) which was a private equity fund established by IFM in terms of the funding structure underlying the Transaction; Strebis a company which is central to the narrative and of which Nathan is sole director and shareholder; Martin Epstein, who is

[1] At the centre of the implementation of the BEE Act is the "scorecard" according to which the compliance of individual businesses is measured. The Codes of Good Practice set out specific criteria which correspond to the seven categories on the scorecard. Each entity is measured against the scorecard to determine its BEE score, which in turn is used to determine its BEE level. The level is published in a certificate issued to the entity and valid for one year

[2] 71 of 2008;

a key figure in the alleged conspiracy; and his company Kula Investment Solutions (Kula) of which Epstein is sole director and shareholder.

[17] Sonya de Bruyn is a shareholder and director of Identity Capital Partners (Identity Partners) which is the holding company of IFM. De Bruyn is also a director and shareholder of IFM.

[18] Essentially, Identity Partners and IFM are interchangeable for the purposes of this narrative. Both were run by de Bruyn with the assistance of Janice Johnston who handled the direct negotiations and setting up of the private equity vehicles on behalf of IFM and, to the extent relevant, Identity Partners.

The nature of the proceedings

[19] The applicants seek to establish the disputed facts on which they rely by reference to email communications between or involving the Protagonists. They argue that these communications, which are not disputed to have been sent and received, reveal facts which are incontrovertible and capable only of the inferences which the applicants seek the court to draw from them.

[20] These inferences they say lead ineluctably to a finding that there was a conspiracy by the Protagonists to obtain secret beneficial ownership of the Campus and the rights and other assets arising from such ownership.

[21] It is obviously not in dispute that the involvement of the Protagonists in the conspiracy complained of is such that it would have required disclosure in terms of section 75 if it existed.

[22] The Protagonists, however, deny the conspiracy. They seek to offer innocent interpretations and explanations for the email exchanges which the applicants rely on as incriminating them.

[23] The applicants say that these proffered explanations and interpretations are such that they are palpably implausible, farfetched and that they can safely be rejected on the papers.

[24] The innocent explanations relied on by the Protagonists must be looked at in the context of the structure of the Transaction, which is not in dispute, and the facts which are common cause.

[25] Pivotally, the structure involved approvals of resolutions at board level by certain of the Protagonists, most notably, Ord. This has led to the challenge under section 75 of the Companies Act which concerns a director's duty not to have personal financial interests in future or existing contracts with the company.

[26] It is central to the case that it is not disputed that the Protagonists provided the investment funding for the Transaction from their personal funds. How this came about is also not seriously in dispute. It is furthermore not in dispute that this funding of the Transaction was never disclosed to those in control of the applicants and their holding structures.

[27] The Transaction was concluded on the basis that there would be monies obtained from investors which would fund the purchase of the Campus. The structure entailed the establishment of limited partnerships established in context of a Private Equity management of such funds. The applicants allege that it was always central to the scheme that the investments would come from the Protagonist. This is indeed what transpired.

[28] The defence raised to this section 75 issue is that, at the time the relevant resolutions approving the Transaction were taken by the Protagonists, they had not yet decided to become involved in the funding of the Transaction and thus cannot be said to have had the requisite interest which required disclosure.

[29] It is alleged that it was only after they gave the relevant board approval that they decided to become involved in the Transaction as investors.

[30] It is this central contention that the applicants seek to put a lie to with reference to the correspondence and the chronological features leading to the conclusion of the transaction.

[31] The balance of the relief is sought in terms of common law principles based centrally on the alleged conflict of interest and fraud.

[32] The applicants allege that their case emerges from and is proved with reference to the undisputed correspondence. They allege that this correspondence is such that it is not capable of the innocent interpretations which are sought to be relied on by the Protagonists.

[33] It is important that the competing versions are the conspiracy relied on by the applicants and the version of the Protagonists which is, essentially, as follows:

The Japanese holding structures, including NTT Holdings and NTT wished to dispose of their interests in SA. This would involve a reduction of their shareholding in the SA entities by way of a management buyout (MBO) which was to be led by Ord. All the exchanges between the Protagonists in relation to their possible involvement in the Transaction are explicable on the basis of this MBO process. The BEE negotiations took place in the midst of the negotiations relating to the MBO between Ord and his counterparts in Japan. The Japanese holding entities did not actually care who the investors in the Transaction were as they wished to dispose of their SA interest any which way and the fact that they now protest is disingenuous especially since they benefitted from the improvement in the BEE score which came about as a direct result of the Transaction.

[34] Because the case of the applicants is dependent on inferences to be drawn from the correspondence and because the applicants seek that final finding

involving dishonesty be made on paper, a careful analysis of the correspondence at a granular level is required.

[35] In motion proceedings a litigant is required to engage with allegations in an affidavit that he disputes, and a bare denial of relevant facts peculiarly within his knowledge is insufficient. The affidavits define the issues and constitute the pleadings and the parties' assertions must emerge clearly in them.

[36] It is well settled that an applicant seeking final relief has to accept the version set up by his opponent unless it does not give rise to a real, genuine, bona fide dispute of fact.

[37] Primary facts in affidavits are those that can be used to draw inferences relating to the existence (or non-existence) of other secondary facts. Secondary facts, unless they are inferred from primary facts, are nothing more than a deponent's own conclusions and are not evidence capable of supporting a cause of action.

[38] It is trite that, unless motion proceedings are concerned with interim relief, they entail the resolution of legal issues on common cause facts. Motion proceedings cannot be used to resolve factual issues because they are not designed to determine probabilities unless the respondent's version consists of un-creditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.[3]

[39] This careful examination as to the denials by the Protagonists and their version must be measured against this standard.

[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[40] Much of the argument on behalf of the Protagonists was aimed at persuading the court that it would not be competent to decide the case on paper given the serious allegations made against them.

[41] There was furthermore an argument proffered in relation to the correspondence, being that it was sought thereby to adduce evidence which was hearsay in nature.

[42] To my mind, there is no material hearsay evidence sought to be adduced. The case of the applicants is based on the email exchanges and contractual documents the former being admitted as having been sent and received; the latter being admitted as having been concluded.

[43] This evidence is examined on the basis of the undisputed primary facts and the inferences sought to be drawn therefrom.

[44] The applicants argue that the inferences of dishonesty invited are such that they are ineluctable. They submit that the version that the Protagonists seek to advance is, in the circumstances of these facts, so far-fetched and palpably implausible that it can and should be rejected out of hand and on the papers.

[45] With these parameters in mind, I turn to the evolution of the Transaction as it emerges from the documents.

[46] I have emphasized certain portion of the documents for ease of reference. Any underlining for emphasis is mine unless specifically stated otherwise.

The evolution of the Transaction

[47] Nathan is a key Protagonist. The story will begin with his involvement with the Group by way of an Independent Contactor Agreement (ICA).

Nathan's ICA

[48] On 22 August 2018 Nathan formally became involved in the operations of the business of the Group. His introduction came from Ord.

[49] To this end Nathan signed the ICA with DD Management Services on behalf of his company, Strebis.

[50] The intention expressed in the ICA was that Nathan use his experience and skill in relation to business enterprises, and especially mergers and acquisitions, in the conduct of any business of the Group where the application of such skills was required.

[51] Nathan would under the ICA report directly to fellow-Protagonist, Goodall who was the CEO of the Dimension Data Group from 9 June 2016 to 30 June 2019, and of NTT and its subsidiaries from 27 June 2019 to 1 April 2021. Goodall was also director of certain of the DD companies during the time of the Transaction.

[52] In consideration for this advisory function and the providing of services relating to mergers and acquisitions, Nathan was paid a retainer in the amount of US$ 33.333 (approximately R570 per month).

[53] In the event that Nathan performed well under the ICA, Nathan would qualify through Strebis for a "success fee" of up to a maximum amount of US$250 000 (approximately R4 250 000).

[54] It is not disputed that Nathan was ultimately paid a commission/success fee of R18 million purportedly under the ICA.

[55] It is also not disputed that he, through Strebis, obtained a commission in the form of the art collection which was part of the assets sold in the Transaction.

[56] These commissions are central to the narrative and are dealt with later in more detail.

[57] It is relevant that the ICA was entered into with a view to the possibility of Nathan becoming a permanent group executive at the discretion of Goodall and subject to the approval of NTT.

[58] At the time the ICA was concluded, Nathan had already been working as a consultant for the Group from May 2018.

[59] The ICA came about through an approach to Nathan by Ord who was of the view that the Group could benefit from his (Nathan's) experience and acumen in mergers and acquisitions.

[60] It was obviously anticipated by Ord that there would be scope for mergers and acquisition during this time.

[61] On the version of the Protagonists, the NTT holding structures were already considering divestiture of shareholding in the SA assets at this stage.

[62] Paragraph 6.5 of the ICA provided that should "an additional opportunity arise for Group executives to invest alongside the Group the Contractor [Nathan] will be eligible at the sole discretion of the Group CEO to participate on the same terms as the other eligible Group executives".

[63] It is not disputed that, at this stage, Ord was exploring the possible MBO of the shares in the SA companies and the Japanese Holding structures were entertaining this possibility.

The MBO discussions

[64] At a meeting held in London on 24 January 2019, Ord gave a presentation to executives including the most senior Japanese executives at the head of the Group.

[65] At this meeting Ord made it clear in his presentation that it was crucial that strategic equity partners with correct BEE credentials to be found. He emphasised to NTT that it was vital to get BEE accreditation urgently as the S A enterprises under DD MEA was being shut out of business because of its poor BEE rating which was then Level 3 of a possible four levels.

[66] Ord proposed that the south African assets be restructured in a manner that would entail BEE investment. The timeline suggested by him for this restructuring was that the new structure be confirmed by 1 July 2019.

[67] I reiterate that, at this stage, the NTT holding structures and Ord were contemplating that the restructuring would involve a MBO by a consortium of management led by Ord.

[68] At this juncture it is time to introduce the executives who occupied senior positions in the NTT entities and who would become involved in the Transaction on the basis that they represented the interests of such structures.

[69] The two most senior executives at the Holding Level at the time were respectively the Chief Executive Officer (CEO) and Deputy Vice President (DVP) of NTT Holdings, Jun Sawada-san and Tsunehisa Okuno -san.[4] Aki Hattori was also a high-ranking executive and Chief Financial Officer (CFO) at Holdings Level and was later also made a director of DD MEA.

[70] At the Group Level were Dave Sheriffs who was the CFO of NTT, Barry Curtin who was the CFO of DD MEA and a director of other DD companies; Ismail Moola who was the VP of Strategic Planning at NTT as well as a director of

[4] San is an honorific used in Japanese much in the same way Mr/Mrs/Ms is used in English. To avoid repetition and for the sake of brevity I have not used honorifics.

some DD entities including DD MEA; Zella Fuphe who was a director of various DD companies including DD MEA where he was employed as Chief Risk and Sustainability Officer; and Nick Caldwell who was General Manager and a director of DD Facilities.

[71] At the meeting of 24 January 2019 Ord suggested a team of multi-company executives of the Group be formed to attend to the BBE restructuring. It is reasonable to accept that, at this stage, this restructuring was understood, at least by Ord and the NTT entities, to entail management participation.

[72] The BEE team proposed by Ord was as follows. Ord (project Chairman), Goodall (oversight approval structure, brand, strategy), Sheriffs (oversight and approval structure and finance), Okuno (oversight and approval), Nathan (project lead and co-ordinator with assistant), Bodley, Missaikos, one or two NTT designates and a corporate finance designate to assist Nathan.

[73] It is important that Ord was instrumental in involving Nathan in the project as the Project Lead.

[74] Some of the Protagonists met at the Goring Hotel in London from time to time to discuss their participation in the mooted MBO. According to Ord, this started in February 2019. The Protagonists, for this reason, coined the moniker *Project Goring* to relate to the MBO negotiations which were ongoing at the time.

[75] However, from the correspondence it seems that the name fell into more general use - one sees the name *Project Goring* used in exchanges between the Protagonists, Standard Bank and others with reference to the Transaction.

[76] The attempt to elide the Transaction and the MBO is central to the factual case.

[77] The Protagonists contend that the exchanges which were entered into between the Protagonists in relation to their participation in the Transaction

are explicable on the basis that they were part of this MBO/ Project Goring which was known about constructively or otherwise by the NTT structures.

[78] The cogency of the Protagonists version depends on a finding that the MBO continued to be explored by the Group alongside the setting up of and negotiation of the Transaction. A lack of alignment of this version with the correspondence is inimical to the sustainability of the version.

[79] On 18 February 2019 there was written feedback in an email from Okuno to Ord in relation to the BEE proposals made by Ord at the meeting of 24 January 2019.

[80] The feedback was positive in relation to the proposed MBO. In essence, the suggestion by Ord that the NTT entities consider reducing its share in the SA business to 25% was, at this stage, accepted.

[81] Okuno stated that NTT wanted achieve this share divestiture by way of a single transaction by 1 July 2019.

[82] Further details as to the requirements of NTT in relation to the sale of shares were stated to be that the proposed share reduction in the SA business would entail that NTT would retain its own financial advisor to value the assets involved from its perspective. It was asked of Ord that the financial advisers advising on the disposal of the shareholding in the South African companies be put in touch with the NTT financial advisors so that they could begin negotiating.

[83] Thus, the implication was that Ord and his consortium of management buyers on the one hand and the NTT entities on the other would each have their own independent financial advice.

[84] As a brief overview of the acceptance, Okuno conveyed that the proposal to retain the Campus in a DD South African entity was accepted and there would be an agreed valuation of these assets.

[85] NTT agreed it would appoint two directors to the board of DD SA (apparently a reference to DD Investments or an entity to be formed for the transaction) to maintain the strategic/operational alignment between the two entities.

[86] NTT wished, Okuno said, to have a call option for the business to be sold if it so wished and wanted to be in a position to co-invest with “DD SA” on a case-by-case basis.

[87] It is clear from the tone of the letter that the NTT entities felt themselves to be in a position of negotiating power. This stands to reason.

[88] The appointment of a BEE team along the lines proposed by Ord in his presentation at the 24 January 2019 meeting which was to investigate and bring about the proposed restructuring was also accepted in terms of Okuno’s email.

[89] Thus, at this stage, the concept of the improvement of the BEE score alongside the possibility of a share divestiture which would include management participation had, in principle been accepted by the NTT entities.

[90] Importantly, it was stated by Okuno that, after the next board meeting, NTT would like to ask Ord to lead the project as a Board Member/ Executive of DD Investments which would then cover all costs and compensation for Ord and the project team working on the envisaged transaction.

[91] What is clearly conveyed in this correspondence from Okuno of 18 February 2019 is that Ord’s suggestions at the meeting of 24 January as to the BEE negotiations were agreed to and Ord was to lead the project with Nathan as Project Manager.

[92] As I have said, a central consideration in this case is whether the correspondence leading up to the Transaction and the structure of the Transaction can be explained in the context of Nathan and the other Protagonists negotiating some form of management participation in the normal course with the blessing of the NTT ownership structures.

[93] I find that, at least at this stage, i.e. February 2019, the NTT holding structures had accepted that there would be a BEE project together with a divestiture of shares in the SA business and this would involve an MBO led by Ord.

[94] What is vital to the narrative from the perspective of the applicants is that they allege that the evidence clearly shows that there was subsequently a change of heart on the part of the NTT structures as to the share divestiture at that time.

[95] This is another pivotal stage in the factual case.

NTT's Volte - face on the MBO

[96] On 09 April 2019 Hattori sent an email to Nathan stating that, after several discussions among key executives, NTT had decided to focus on only a transaction from BEE perspective for the time being.

[97] It was stated clearly in the email that NTT would <u>not</u> pursue the divestiture of shares in the short term.

[98] Hattori stated that this decision had been communicated to Ord by Sawada and that, the following day, Sawada and Ord would have a call to decide how to move forward on that basis.

[99] This, to my mind, is a clear indication that it had been decided by the beginning of April 2019 by the NTT holding structures that the MBO opportunity which

had initially been accepted by NTT as a possibility between January to March 2019 was not to be pursued for the moment.

[100] This correspondence makes it clear, in express terms, that the sale of 75% of the shareholding in the SA interests which would have allowed for management participation was put on hold pending the improvement of the BEE rating. It is not capable of any other construction.

[101] Essentially then, the NTT structures had reneged on the initial acceptance of the MBO which had been conveyed by Okuno in the email of 18 February 2019.

[102] This *volte face* must have been very disappointing for Ord who had expressed much excitement over the prospect of the MBO. By then, it appears that he had chosen the management consortium who were to participate in the MBO. It is likely that this comprised the Protagonists.

[103] It makes sense, on the other hand, from the perspective of NTT that, if there were to be a sale of the SA interests by NTT, whether to Ord's management consortium or otherwise, there would be an attempt by NTT to extract maximum value from the sale.

[104] It seems that the NTT parties decided that the success or otherwise of the BEE project would have an effect on the value of any MBO to NTT. This stands to reason.

[105] On the basis of the plans made pursuant to the meeting of 24 January 2019 and Ord's presentation there, and on 04 March 2029, Standard Bank had been appointed to act as financial advisor with regard to the planned BEE restructure.

[106] The letter of appointment of Standard Bank records that it is the intention of the Group to introduce "a consortium of Black investors" to be involved in a transaction pertaining to the SA interests.

[107] The investment advisors on the project from Standard Bank were Sam Pearson and Sthembiso Tshabalala of the Corporate Finance department of Standard Bank.

[108] On 10 April 2019 a meeting was held between Hattori and Nathan as to the way forward as to a BEE transaction. In an email Hattori set out what he referred to as "takeaways from our meeting today". Essentially it was a minute.

[109] There were three items addressed at the meeting being: (i) scope of transaction (ii) percentage share to be achieved (iii) valuation (iv) how to proceed and (v) Jeremy's [Ord's] role.

[110] These items were discussed to and fro by the two men on the emails with reference to the response of each of them. These were items of discussion which were entertained and responded to at this time by those in control of the NTT interests and Nathan.

[111] As to *Scope of transaction* the following was clearly recorded by Hattori:

> "We focus on a transaction with BEE partners which makes us best positioned from rating perspective. (not to pursue further reduction of shares to minority)".

[112] As to *percentage share to be achi*eved the following was recorded by Hattori:

> "[P]percentage share to be sold to BEE partners can be more than 30% to the extent that NTT can maintain majority stake from statutory perspective and continue to consolidate/control DD South Africa.
> We can consider the further reduction of shares beyond 50% when the continuing consequences expires."

[113] Written discussions continued between the NTT executives, and specifically Hattori and Nathan relating to the percentage of shares which NTT would dispose of.

[114] This was now not in accordance with an MBO but to “Black investors”. It was made clear that NTT wished to retain majority control in such sale to the Black investors.

[115] It is, furthermore, clear from these exchanges between Hattori and Nathan that Nathan is carrying out his function as Project Manager of the BEE transaction as had been suggested by Ord at the meeting of 24 January 2019 and Hattori is acting as overseer for the project from the perspective of the NTT holding structures.

[116] Nathan was also providing an advisory function in accordance with the ICA and was working with Pearson who was there to provide financial advice on the project.

[117] It must be understood that the concept of BEE and how its structures operate is foreign to the Japanese. It is clear from the correspondence that Japanese were relying heavily on the advice of Nathan in relation to the best structure of the transaction which was to ensue.

[118] On 13 April 2019 Nathan forwarded the email exchanges between him and Hattori to Ord, Missaikos and Bodley under cover of the following email:

> “Subject: Fwd: Summary of our discussion
> Gents have a look below.
> This sounds verbatim like the view of Ismail [reference to Ismail Moola the vice president strategic investments in the NTT Group]. This being said the next 2 weeks are going to be critical. It seems like they may have other ideas. I was with Jonathan Penkin of Goldman Sachs last night. He says word in the market is that NTT might look to sell DD brand outright?? Not sure of this though. I do believe they

have a clear idea of what they might not do and this is going to be a focused and tough negotiation.

Any views?"

[119] The question which arises in the context of the competing versions of the parties is why these separate communications with the Protagonists were necessary when there was meant to be one integrated team investigating the best BEE transaction possible and securing its closure?

[120] The applicants allege that the forwarding of these exchanges in relation to the negotiations between Nathan and Hattori is sinister. They say that it suggests a tension between the interests of the Protagonists and those of NTT.

[121] They allege that the reference to the negotiation which was "going to be tough" appears to be a negotiation against NTT rather than on behalf of NTT.

[122] On 01 May 2019 a meeting was held between Sheriffs, Nathan, Hattori, Pearson and other members of the committee established to investigate the restructure and BEE transaction (the BEE Committee). This included Nathan, Ord, Goodall and Okuno.

[123] After the meeting it was again reiterated to Ord, in writing, that NTT required the BEE transaction to be finalized before there would be any MBO but that Sawada would entertain negotiations for a MBO at a later stage. Ord was informed, in this writing, that Sawada considered that these MBO negotiations should begin again in April 2020. There was urgency expressed by NTT in such writing as to the completion of a BEE transaction before November 2019 given that was the cut-off annual audit date for evaluation of the BEE scorecard. The date of April 2020 was later extended by a further year to March 2021.

[124] In sum then, as at May 2019, NTT was committed to a BEE transaction in relation to its SA assets with the possibility of negotiations commencing after two years for a possible purchase by management of shares and the

consequent reduction of the shareholding of NTT in the SA entities to a minority shareholding.

[125] Ord was obviously regarded by the Japanese as being an import senior executive in relation to getting the BEE project done. the following instructions were given in correspondence to Ord by Sawada in relation to the part that he (Ord) was to play in the BEE project:

> "I would like you to focus on the negotiation with BEE partners as an executive of DiData MEA upon completion of next Board meeting of DiData on 15 May. Also, I would like to ask you to assign a counterpart on your side to discuss how to treat your current employment agreement as the executive chairman with our HR team."

[126] Ord thus, in accordance with these instructions, departed the position which he held at the NTT Group level at this point and took up a position as a director of DD MEA which held 100% of DD Investments on whose board he also sat. DD Investments owns 100% of DD Facilities which ultimately became the Seller in the Transaction. Ord sat also on the board of the Seller. Bodly and Missaikos also sat on the board of DD MEA and DD Investments.

[127] In the same email transmission Sawada stated:

> "While we continue to consider further reduction of shares in DiData MEA, I would like to decide whether to make such transaction after confirming the business operation of DDMEA under escalated BEE ownership shall be put on track to improve its performance/value. Considering the necessary lead time to reach such status, I believe it's feasible to start the negotiation for further reduction of shares from the start of FY2021or soon thereafter."

[128] To my mind there can, thus, be no doubt that, as at May 2019, the plan agreed to was that Ord would focus on negotiation with "BEE partners" as an Executive of DD MEA from 15 May 2019.

[129] It was made abundantly clear by NTT that the BEE transaction would be put on fast track to improve value whereupon the negotiations for the purchase of shares in the South African entity would commence – in approximately two financial years' time.

[130] At this stage, the BEE project was being proceeded with under the management of Nathan who was working with Pearson of Standard Bank on the desired financial structure.

[131] Standard Bank, from its perspective of financial advisor on the project, proposed three primary options to achieve the Black ownership objective being: (i)Equity sell down only; (ii) Property sale only; or (iii)property sale with top-up equity sell down.

[132] Around this stage, Martin Epstein entered the picture. Correspondence shows that was appointed to act as independent property expert on the project.

[133] There was some debate as to the value of the Campus being too high. It was reflected in the financial statements of DD MEA at a value of R1.6 billion. There seems to have been some acknowledgment by the NTT that this value may not necessarily be accurate but the NTT entities were obviously invested in obtaining the best price possible. This stands to reason.

[134] The option which was chosen by NTT, of the three options proposed by Standard Bank, was to sell the Campus rather than a sale of shareholding or a hybrid process involving sale of shares and assets.

[135] In an email from Pearson to Hattori on 30 May 2019 "Next steps" were proposed as being a restructure of the south African entities such that DD Facilities was put in place to be the seller of the Campus.

[136] As I have said this restructure took place with Ord taking the senior executive positions on both DD investments and DD Facilities. It is, inter alia, his

approvals relating to the Transaction which were given by him in these capacities that found the applicants case under section 75.

[137] Importantly under the “next steps” head in Pearson’s the email of 30 May 2019 the following was an item:

> “ 4. Sale of the Campus which includes valuing, review of leases, arranging finance and identifying suitable BEE property investors – Steve Nathan to lead (support from Standard Bank)”

[138] Thus, to sum up, as at 30 May 2019, Ord had been told in no uncertain terms that the MBO discussions were on hold until 2021; the proposed transaction would be centred around the sale of the Capus to Black investors; and Nathan was squarely put in charge of the sale on the basis that he was to identify the Black investors.

[139] Five days later, on 05 June 2019 there is an email from Janice Johnston of Identity Partners and Identity Fund Managers (IFM) which is the second respondent.

[140] From Johnston’s email it is clear that a meeting was held with her and Nathan on the afternoon of 05 June 2019 with a view to involving Identity Partners/IFM in the proposed BEE transaction.

[141] It is important that the offering of IFM was the opportunity of becoming involved in a Private Equity Fund structure with specific benefits relating to improvements in BEE scoring.

Private equity in the context of BEE?

[142] I shall say a bit about the nature of private equity management generally and the business of Identity Partners/IFM.

[143] A private equity fund is managed by a general partner (GP), typically the private equity firm that establishes the fund. In this instance it was be Identity Partners/IFM.

[144] The GP makes all of the fund's management / investment decisions. This is a hallmark of private equity management. The Limited Partners (LPs) have no say in the management. It is for this reason that the LPs in such a scheme have limited liability. This means that only the assets invested will be lost in the case of liquidation.

[145] The GP also usually contributes between 1% to 3% of the fund's capital to ensure it has an interest in the fund.

[146] In return for managing the investment fund the GP earns a management fee. This is generally set at 2% of the value of the fund. The GP may also be entitled to a percentage of fund profits above a preset minimum as incentive compensation.

[147] In the context of this case, it is important to examine the function of limited partnerships in the field of Black Economic Empowerment.

[148] Private equity plays a crucial role in the economy. A prime object is to infuse capital into struggling companies potentially saving jobs.

[149] Private equity in South Africa is a significant role player in the development of BEE. It allows for the required infusion of investment capital in a manner which supports and furthers the aims of BEE.

[150] Private equity management is recognised as an important part of the accreditation machinery under the BEE Act.

[151] In this regard, in terms of the Codes of Good Practice issued shares held by private equity funds which meet certain criteria and are managed by majority Black-owned fund managers are deemed to be 100% Black-owned.

[152] To allow for this recognition, the private equity fund would have to meet, inter alia, the following criteria:

a. at least 51% of any of the private equity managers' exercisable voting rights associated with the equity instruments through which the private equity fund holds rights of ownership, must be held by Black people;

b. at least 51% of the private equity fund's executive management and senior management must be Black people;

c. at least 51% of the profits made by the private equity fund manager after realising any investment made by it must, by written agreement, accrue to Black people;

d. the private equity fund manager must be a Black owned company; and

e. the private equity fund manager must seek to invest at least 51% of the value of the South African funds under management in companies that have at least a 25% direct Black shareholding, post-investment of the investment by the private equity fund.

[153] Thus, provision is created for a seller to conclude a transaction involving a sale of an asset, equity instrument or business with a separately identifiable related business to Black people and to claim the benefits in its own ownership scorecard.

[154] If the criteria set out above are satisfied, the entity will be entitled to receive points in respect of the voting rights and economic interest indicators contained in the ownership scorecard.

[155] The ownership points available following a sale of assets transaction will be recognised only if the transaction results in the creation of sustainable businesses or business opportunities for Black people and transfer of specialised skills or productive capacity to Black people.

[156] From a high-level overview, the structures and scores are such that encouragement of investment in Black owned entities is sought to be achieved.

[157] I now move to deal with Nathan's recruitment of the private equity model for the Transaction.

The sourcing of a Buyer for the Campus

[158] Pursuant to the meeting of 05 June 2019, IFM was invited by Nathan put together a presentation relating to the part that it could play in a BEE transaction involving the acquisition of the Campus.

[159] Importantly from Nathan's perspective, IFM was 100% owned by de Bruyn a Black woman assisted by Johnston. Nathan met with IFM with the object of securing its assistance in the context of the BEE project.

[160] Johnston sent a presentation to Nathan presentation on 09 June 2019 setting out what IFM could offer.

[161] On the same day at about 19h30, Nathan sent an email to Johnston in terms of which he sought to understand the following:

"i. Whether the golf course of c 18000 square meters [of the property] could be separated out from the transaction so that it could be sub-divided and sold off by the

LP's; ii Whether the data centre on the property and the art hanging on the walls of the property could be separated out and sold to the investors."

[162] As to the art collection, Nathan indicated to Johnston up front that he would like an agreement that once acquired by the buyer as part of the sale, the art could be on-sold to the LPs for a nominal amount of about R10 million. Johnston was told in the email: "It is mainly a few of the hanging pieces that the founders would like to acquire and they have been bought personally."

[163] It is not in dispute that Ord and Watson were the founders of DD as a brand. It is also not in dispute that Ord had a hand in choosing the art or at least some of it.

[164] These discussions and inquiries by Nathan were patently not made on behalf of DD or NTT.

[165] Why should Nathan have it in his mind to negotiate benefits for the investors in the transaction if they were not yet identified and the proposed investment was purportedly to come from, as yet, unsourced Black investors?

[166] To my mind this inquiry by Nathan of Johnston as to the carving out of these assets for the "LPs" and "founders" is explicable only on the basis that it was, at that stage, envisaged that the investment was to come from certain already identified investors and Nathan had those investors' interests at heart.

[167] Late on the same night (09 June) Nathan sent an email to the Protagonists attaching the IFM proposal which he said was 'highly confidential'.

[168] Pertinently, the email states " I think we can do well with this and buy the whole thing…" This is a defining piece of correspondence in the case.

[169] There can be no explanation for this statement other than that it shows that it was the intention by the Protagonists themselves to obtain the beneficial interest in the Campus.

[170] Simply put, the intention was that the Protagonists would be the investors who would fund the sale of the Campus. There would be no investment by Black investors as was required by NTT.

[171] Nathan wasted no time in negotiating with Johnston in earnest. The question of where Nathan's loyalties lay at this stage is pivotal to the case.

[172] The applicants allege that Nathan's bent in relation to the acquisition of the Transaction for the Protagonists can be discerned from the correspondence exchanged in relation thereto.

[173] Recall, Nathan was employed under the ICA to provide his services which included the putting together of transactions and negotiations on behalf of the Group. he was being paid for these services through DD Management Services. He had also been specifically charged with managing the project by NTT.

[174] One sees, however, at this important juncture that Nathan is no longer negotiating for the NTT structures and the Seller. He is acting for the Protagonists and in his own interest.

[175] To explain this more carefully the inherent conflicts in his acting for the investors in the transaction (of which he was one) and for the Seller of the Campus are clear. For the Seller he would be motivated to obtain the highest price and best terms; for the investors the price should be as low and possible and the terms favourable to their investment.

[176] Nathan's conflicted position is central to an analysis of the correspondence leading up to the structuring of the Transaction and the participation therein by the Protagonists. And recall, this structure is admitted as is their participation. It is only the timing of their involvement which they seek to dispute for the purposes of their defence in the section 75 issue.

[177] The next step was the negotiating of terms relating to the setting up of the Fund. Nathan took up an integral role in relation to these negotiations.

Nathan's part in establishing the Buyer

[178] The first step was to set about negotiating the best possible terms for the Protagonists/investors in their dealings with IFM. For example, Nathan got the fees to be paid to IFM reduced from 2% a to 1% of the fund invested.

[179] Significantly, Nathan made it clear to IFM that "[T]he only properties or assets to be in this fund are the ones that we will bring. "

[180] This is anathema to the private equity investment model in that it removes the autonomy of the fund manager.

[181] This autonomy factor is particularly important in the context of private equity management in the BEE sphere. The reason why BEE scorecard points are awarded when Black owned private equity managers are appointed is that there is the requirement that they will employ the funds invested in the interests of BEE. Once the private equity manager's investment options are dictated by the investors – this central tenet of private equity is circumvented.

[182] It is important that it was conveyed to Nathan by Johnston that IFM had set up its platform only in December of 2018 and then been licensed for BEE purposes but that they had not yet raised funds or made investments. Johnston put it that the fund envisaged by Nathan would be their "first -sub-fund". Thus, Du Bruyn and Johnstone were very new to the industry.

[183] Nathan having set about verifying that IFM would co-operate to achieve the aims of the Protagonists, instructed Pearson as financial advisor on the project in no uncertain terms that he “wanted to go with” IFM as the Buyer entity.

[184] The next step indicated by IFM was confirmation that they were the selected partner on the transaction and agreement regarding broad terms.

[185] On 13 June de Bruyn met with Ord and was directed to Nathan in relation to “the consortium” of investors.

[186] IFM was thus confirmed as the as the chosen private equity manager. However, it had no control as to the form the investment could take and neither did it source the investors.

[187] It is important that once the structure had been decided in principle and IFM were on board, Nathan instructed Shayne Krige of Werksmans corporate finance department to act for the investors including himself.

[188] Krige and Nathan met on 13 June 2019 for Nathan to instruct Krige. On14 June Krige sent Nathan a letter of appointment to be signed by Nathan.

[189] The terms of engagement of Krige by Nathan are central to the part or parts being played by Nathan and to the identities of the investors in the purchase of the Campus.

[190] The letter of engagement of Werksmans contained the following recordals and terms:

a. It referenced Nathan’s proposed investment as a limited partner in the structure to be set up for the Transaction
b. It was specifically stated for what it was worth: “ We note that the Fund needs to be operated as a genuine private equity fund in order to avoid any fronting”.

c. It noted that the fund to be established proposed to make an initial investment in the form of the acquisition the Campus.
d. It noted that investment of each of the investors would be ringfenced for selective participation in the fund.
e. The initial transaction would be funded by a bank loan;
f. The fund would not acquire the entire property and certain rights (notably the ownership of the golf course, the art and the rights to the lease in the data centre would be carved out of the transaction in such a way that they would be acquired by the investors in the fund personally.
g. The Limited Partner may have veto rights in relation to certain investment decisions and may have non-discretionary advisory functions on an advisory board of the Fund.
h. Krige had been advised that other investors may join at a later stage;
i. A fee estimate was given for advising and setting up the structures and the agreements.
j. It was sought that there be a signature of acceptance of the terms by signature of the letter.
k. The letter was to be signed on behalf of CNBB Venture Partners. It is not clear who this proposed entity is. It was, however, represented by Nathan.

The purported negotiation phase of the Transaction

[191] The Buyer structure being in the process of being set up, Nathan turned to the task of purporting to negotiate the terms of the sale of the Campus with this Buyer. For this he needed the co-operation of those on the team who had the interests of the NTT entities at heart.

[192] Nathan was at pains to represent to the NTT representatives and the non-Protagonist executors who were working on the project that he was at arm's length to this Buyer.

[193] It is clear from the correspondence that this was a delicate task. The applicants argue that the correspondence entered into during this phase of the operation is indicative of the level of deceit which was being undertaken.

[194] On 18 June 2019 Nathan sent an email to Hattori, Sheriffs and Goodall purporting to keep NTT abreast of the negotiations. The feedback provided as to negotiations as to price was as follows:

> "We are also unpacking Facilities [the Seller's] numbers to ensure the Black Women's Fund can afford to pay R1.3 billion for the Campus".

[195] Thus, according to the information which was conveyed by Nathan to NTT, the Buyer was to be a "Black Women's Fund" and that he was negotiating a price of R1.3 billion for the Campus.

[196] This is at a stage where the investors have been identified and even have attorneys of their own who are being instructed by Nathan acting on their behalf.

[197] This feigned arm's length is concerning as is the fact of Nathan's attempt to suggest to NTT that the negotiation as to price will be difficult. It emerges in later correspondence which comes into this analysis that Nathan was working to keep the price as low as possible.

[198] The maintaining of the secrecy around the true investors was an important part of the scheme.

[199] The stringent efforts employed to keep the involvement of the Protagonist investors secret at all times emerges from Nathan's correspondence with the various players involved in the negotiations.

[200] At this time, Johnston began asking who the Limited Partners in the fund would be.

[201] It had, however, been decided that Johnston would not be told of the involvement of the Protagonists at investment level. This is confirmed by Krige in an email to Nathan sent on 20 June 2019 in which Krige confirmed that he had told Johnston that Nathan himself was the only partner at the time.

[202] Thus, on any version, Nathan was both secret investor and representative of the Seller reporting to the NTT holding structures. The applicants argue that the conflict of interest could not be more glaring.

[203] At this stage, there were also suggestions by Nathan that a better financing deal than that offered by Standard Bank, which was the duly appointed financial advisor to the project, should be explored.

[204] On 25 June 2019 Curtin the CFO of DD MEA began expressing that he was concerned that the buyers were getting a significant discount on the price if there was agreement to sell at R1.3 billion. Nathan sought to appease him by stating the following:

> "… there is no significant discount and many of our BEE partners are going to be in the fund which will alleviate bigger discounts in future on equity deals."

[205] The implication of the exchanges at this time was that there was a long-term BEE strategy to be followed and it was thus better to get a lower price for BEE gains to come from the Black investors in the fund.

[206] Thus, the Transaction was on track save for Curtin expressing reservations on the price which was still under "negotiation" by Nathan.

[207] The indication that the DD entities' BEE partners were investors is simply a ruse. There can be no dispute about this.

[208] The time came for a binding contractual structure to be set up with a view to the transaction. The first point of business was to draft a letter of intent (LOI)

between the company which would be set up by IFM to be the Buyer of the Campus.

[209] Eversheds was engaged on behalf of the NTT/Seller entities to draft the LOI. Kelly Hutchesson of Evershed set about drafting the LOI.

[210] During this process there were the usual inquires to be expected from a draftsperson such as the precise assets included in the merx, the final price offered and how it was made up.

[211] Hutchesson, during these exchanges, expressed that the book value of movables was reflected in the financial statements at R174 million and thus the R1.3 billion price also seemed low to her. This amount did not even include the art as it had been written off in the books of the Seller at this stage.

[212] On 03 July 2019 a price was reluctantly set by Nathan at R1.4 billion as R1.475 billion was stated by Nathan to be a "bridge to far" because he said: "the buyers are really being stretched here".

[213] There is no indication at all from the IFM that there was any tense negotiation between it and Nathan as to purchase price. In fact, the only tension in this regard was between Nathan (who was working to keep the price low) and the executives on the side of the Seller, Curtin and Caldwell and the attorneys taking instruction from the Seller who were expressing that the price being entertained appeared too low.

[214] That Nathan was playing a double game and keeping the identity of the investors secrete is without any doubt and cannot but be accepted by this court in light of these exchanges.

[215] In the background, preparations were being made in the Protagonist investors camp towards the setting up of their ownership structure in the Fund and the agreement of the terms of engagement with IFM.

[216] This included the niceties of the setting up of the investment vehicle. The email communications between Nathan, Missaikos , Ord, Bodley and Goodall around that time show that it had fallen to Missaikos to come up with a domain name for the vehicle.

[217] Recall, they had been using the name project *Goring* but this had fallen into more mainstream use in the discussions around the sale. It was not purely associated with the investors. Missaikos expressed that it had been difficult to find a new name to replace *Goring*.

[218] There is some sentimentality expressed around this naming of the project through which the Protagonists would acquire and hold their ultimate beneficial interests in the Transaction. Missaikos stated that he had wanted *Jaffa* as this was a place which he had visited and "fallen in love with". The other possibility was *Areti* which was, with some irony, stated to be the Geek for "virtue". Nathan indicated his preference for *Areti*.

[219] *Areti* was the name of the *en commandite* partnership through which the Protagonists acquired and held their respective beneficial interests in the Transaction.

[220] In the meantime, a draft term sheet for the general and limited partnership structure (the Term Sheet) which was to govern the ultimate equity relationship between IFM and the investors was being prepared by Nicole Paige at Webber Wentzel acting for IFM.

[221] Krige, instructed by Nathan set about finalizing the terms of the Term Sheet on behalf of the investors with Webber Wentzel instructed by Johnston and de Bruyn.

[222] With this negotiation of the Term Sheet came certain troublesome issues relating to the disclosure of the identity of the investors.

[223] Competition Commission approval was required for the Transaction and required disclosure of the investors.

[224] Nathan was, however, adamant that the investors' identity could not be exposed even on the basis that this was part of a confidential submission to the Commission.

[225] The advice taken from competition lawyers at Werksmans was to the effect that there had to be an assessment by the Competition Commission as to whether the transaction was an Intermediate or a Large transaction as defined in the Competition Act and that thus, it was critical for the Commission to understand who the ultimate limited partners were.

[226] Krige, in a telling communication advised Nathan as follows on this point:

> "I will work through this and get back to you, but it seems correct that the involvements would need to be disclosed and that JO's [Jeremy Ord's] involvement may turn it into a large transaction."

[227] This mention of Ord in this context is pivotal – clearly Krige had, at least, an indication that Ord may be involved.

[228] Nathan firmly instructed Krige as follows: "Some of my LP's definitely don't want to be recorded."

[229] He then inquired of Krige whether he (Nathan) could not interpose a company he owned with his brother as the investor and then, at a later stage, sell some of this investment to other parties.

[230] That he was getting involved in creating a front for the investors at this level is instructive as to the secrecy which was required at all costs and the conflicted situation which prevailed. The exchange is explicable only on the basis that the Protagonists were intent on concealing their participation as funders of the Transaction.

[231] On this basis Krige again took advice from the Werksmans “Competition people” and advised Nathan that the advice was that because the LPs were not controllers, they actually did not need to be disclosed in the main competition application after all.

[232] They would, however, probably have to disclose the LPs in a separate confidential submission.

[233] It was further explained by Krige that if an intermediate company were used it would have to have been self-funding – i.e. not funded by investors.

[234] There was also some debate with Krige as to the carved-out assets – i.e. the golf course, the data centre, and the art.

[235] Nathan instructed that there should be no mention of these carved out assets in the LOI between the Seller and the property company which it was envisaged would be used as the Buyer (referred to in the discussions at that stage as Propco). These carve-outs were to be dealt with in the agreement between Propco and the LPs only.

[236] Hence those concluding the sale on behalf of the Seller (which would include approvals at NTT level) were explicitly, on the instruction of Nathan, not to be told of the agreement relating to the on-sale by Propco of the carved-out assets to the investors – i.e. the Protagonists - personally.

[237] It is not entirely clear why these assets had to be carved away in the sale. It may have something to do with the fact that the Protagonists did not want to be dictated to by IFM in relation to the asset management. Recall, the autonomy of the asset management vehicle as general partner in the limited partnership as far as investment of the funds was concerned was an essential to the BEE scoring which was at the heart of and the *raison d'être* of the transaction from the point of view of NTT.

[238] A key provision required by the Protagonist investors was their right as LPs to terminate the GP and replace it with another GP with cause – i.e. commission of a crime, insolvency etc or without cause – i.e. if 75% of the LPs/ investors voted for termination.

[239] There is no indication that any other investors had actively been sought by Nathan or IFM. It is denied, however, by Nathan that other buyers were not explored by him as the person charged with the sourcing of appropriate buyers.

[240] Whist the negotiations were afoot to get the central terms agreed from the perspective of the Sale Transaction and behind the scenes as to the ultimate beneficial ownership in the *merx* sold and the *en commandite* structures which would enable the required secret investment, there was unsolicited interest expressed by other buyers.

[241] ARC (African Rainbow Capital) Real Estate had made proposals to Nathan as early as May 2019 but was rebuffed in writing on the basis that there "was already a deal concluded". On all the evidence this was simply false.

[242] In early July 2019 Sheriff's informed Nathan that Advtech had been expressing interest in the Campus. He asked Nathan: "Should we hear them out?"

[243] Nathan's response was clear and bears repetition verbatim because it is instructive as to where Nathans loyalties were invested:

" Hi Dave,

No we should not for the following reasons: we have put thousands of hours here to get a full BEE women's fund to buy the Campus. Identity Partners [IFM] are 87% black women owned and 13% RMB owned. We have letter of intent done. We

have had Investec look, Arc look and others. I have R 1,3 bn in the bag and I am pushing for R 1,4 bn mark, This would be a fantastic result in this climate with this asset. There are lots of issues. If something falls out of bed we can go back to others.

This helps our procurement points also on going and also the third party tenants.
We also have to submit to competition commission and get BEE rating agency to opine.
Timing is critical to meet our November 18th deadline. Honestly the fund idea never came from standard bank or our guys. I went to see Shayne Krige of Werksmans who is the person who did all the Oppenheimer fund structures and things. He showed me some stuff and I then went to see Sonja [de Bruyn] and her fund and put this together with them. It gives us the best possible result I believe and best optics. The fund is now meeting with various banks and financial institutions to raise money. I have deliberately not bothered you with the detail but I assure you this is no small amount of work. New leases need to be signed in the name of the buyer, notification of all existing tenants and then many admin and reporting funnies in facilities [the Seller] had to be verified. For eg. We charge 3 times for the same bay but there is never enough parking for visitors etc.
We need to get the best BEE deal here. We are not using modified flow through for the property so therefore this gives us the highest possible BEE points available out there. More than an ARC or Investec and others.
Does it make sense?"

[244] The applicants argue that the refusal by Nathan to consider other offers or to advertise the intended sale widely or go to tender is sinister in that it suggests that the Transaction was kept for the benefit of the Protagonists.

[245] From the correspondence referred to earlier, it is clear that the Fund idea did not come from Krige and thus the assertion that it did is false. In fact, the correspondence shows it to be incontrovertible that Nathan went to IFM directly and then instructed Krige to represent him and the other Protagonists.

[246] The purchase price of R1.3 billion had already been set when Johnston sent the original proposal to Nathan on 9 June 2019. The applicants allege that this

number could only have come from Nathan and that it was not an independently made offer.

[247] The draft Term Sheet was negotiated between Krige instructed by Nathan and Johnston assisted by Webber Wentzel. Aspects of the Term Sheet and the comments made thereon by Krige are instructive as to the intended scheme. The following bears mention:

a. The Fund was named Identity Fund 1 (the Fund) and was to be organised as an *en commandite* /Limited partnership pursuant to a partnership agreement. It is the third respondent in these proceedings.
b. The General Partner (GP) of the Fund was also to be an *en commandite* partnership which would act through its own GP which would be a private company;
c. The GP of the Fund (which as I have said was itself an *en commandite* partnership) would engage IFM which would provide portfolio management services that would include sourcing investment opportunities and acquiring and disposing of same.
d. <u>There was no detail as to who the investors were, but it was indicated in a drafting note that they would have to be disclosed to IFM.</u>
e. In a note Krige opined that given the detail in the Term Sheet, Nathan would have to make sure that all of the investors were on board.
f. The initial investor was to be a Limited Partnership and the only investor in that partnership would be Nathan himself.
g. The investment strategy was stated to be “investment in the property sector”.
h. It was expressly stated that it would be a condition precedent of the investors investment that the Fund has been classified by a verification agency acceptable to the investors as a Black person in terms of the Codes of Good Practice on BEE as published by the Minister of Trade and Industry in terms of the BEE Act.
i. The Fund’s initial investment was to be the acquisition of a property company (Propco) which would be established to acquire the Campus from DD Facilities using the capital invested in the Fund and loan funding.

j. Reference was made to a "commission agreement" involving the golf course, data centre and art the latter being described as that "(which was originally sourced by certain of the investors)". As I have mentioned, it is not disputed that the art was originally sourced by Ord.

k. Essentially, these assets were to be acquired by the Buyer (Propco) and then delivered to the investors in their personal individual capacities such that these assets no longer formed part of the Fund.

l. The investment of the initial investors would be R65 million, and the GP and its affiliates would contribute an additional 1% on that amount (i.e. R6.5 million) IFM would earn fees in the form of an annual management fee payable in advance equal to 6% of the investment plus VAT or 1% per annum of each investor's proportional share.

m. The removal provisions were key. It was provided that investors representing more than 50% of the capital commitments may elect to remove the GP for cause and the GP would then not be entitled to compensation for termination. The GP could be removed without cause after three years in which event there would be compensation.

[248] Nathan was pleased with the Term Sheet. On 9 July 2019 he sent it to the Protagonists under cover of an email that read:

> "This is the big one gents. Read the term sheet. Next is the structuring of the goring interests and trusts companies etc."

[249] *Goring* could only have been a reference to the deal which was being negotiated on behalf of the Protagonists. As is clear there was a name change for the project afoot – *Areti*.

[250] One sees with reference to the structure of the investment that the *Areti* name was ultimately used in relation to a partnership in which the Protagonists were the LPs and ultimate investors.

[251] On the same date Nathan sent an email to the Protagonists expressing that "we" are incurring serious fees" with Krige. He went on to assure them: "I am doing things watertight and properly for Goring." He stated that they all needed

to pay the fees in their ratios out of *Goring* once we are done. He stated that he would "pay all as needed and keep track of documents for all."

[252] This can mean nothing but that the ratios of participation had already been agreed to. This is pivotal in relation to the section 75 issue.

[253] On 10 July 2019 and in response to a query from Krige as to how the commission agreement in respect of the carved-out assets should be treated in the sale agreement, Nathan made it clear that he didn't "want Eversheds [i.e. the Sellers attorneys] "anywhere near" carve outs or Term Sheets between GP and LP etc."

[254] It was subsequently made clear that the carve outs should not be mentioned in the Sale Agreement and that the Commission Agreement was between Propco and the LP partnership only. This commission agreement was to be signed prior to the Sale Agreement. In terms of the Commission Agreement, Propco would agree to the carve outs purportedly in consideration for the LP Partnership referring the transaction to Propco.

[255] Clearly that assets forming part of the Campus were to be carved out and sold to investors personally was not something that could easily be explained to NTT.

[256] The structure of the Transaction having been agreed to, Johnston communicated with Krige and Nathan that the Banks that had been approached for financing were requesting more detailed information about the composition of the LP Partnership. This stands to reason in relation to the need for security.

[257] In an email of 17 July Johnston made it clear that these details were essential. She stated further as follows:

"The LOI states that the purchaser needs to secure the vendor financing loan but we are still unsure who is negotiating this financing on behalf of the seller as it should be someone independent of the purchaser.

In terms of related parties, if the LP partners are connected to DD/DD facilities then this will need to be disclosed.".

[258] Johnston was asking uncomfortable questions from the Protagonists.

[259] The LOI was ultimately produced on the basis that DD Facilities made an offer to Identity Propco, the latter to be formed by IFM. It was signed by de Bruyn on behalf of Identity Propco to be formed and by Caldwell on behalf of DD Facilities.

[260] Ord, as part of those sent the signed LOI which included Protagonists and NTT executives, was outwardly congratulatory to Nathan.

[261] Sheriffs, however, was less sanguine. He, once again, expressed doubt as to the price.

[262] Nathan responded by email that the document was going to the Competition Commission the next morning and that it may have already gone. He emphasised that it was a good deal and that the Fund was "at max".

[263] The email has a peevish tone. The suggestion by Nathan is that if the deal is not done the Fund will walk away from it. He also emphasises that exploring another deal will not allow for the BEE approval in time for the November 2019 BEE assessment period. He emphasised "Remember the BEE credentials of this deal are the best we can get."

[264] He followed up with an email on 28 July 2019 to Sheriffs where he said the following:

" I guess in the end you and Jason [Goodall] and Aki [Hattori] and Jeremy [Ord] will need to weigh up all calmly and as objectively as possible. I just feel bad because I

thought I had done the deal of a lifetime and after speaking with Arc, Blend, Fairvest, Spearhead and Investec I was sure the deal I have proposed is a good one. For sure it is unrivalled in this country from a BEE perspective which you pushed…"

[265] At the stage this email was sent it was clear from the correspondence that Goodall and Ord were part of the investors.

[266] The email chain was then sent in a private email to Goodall some twenty minutes later under cover of a mail which read:

"Have a look at this. He is pushing to push the value up."

[267] On 05 August 2019 Sheriffs circulated a document labelled "Project Goring – assessment of Campus sale" to Goodall, Hattori Ord and Nathan in preparation for a call to be had between the four of them as to the Transaction.

[268] The agenda was that Nathan provide an update and overview of the BEE Transaction and that Sheriffs would provide an update on the valuation and funding options for the Transaction.

[269] The valuations compared according to the discussion document were the LOI price of R1.4 billion, an internal valuation of R1.542 billion; an internal valuation with updated rental of R 1 587 billion and an independent valuation of R1.612 billion.

[270] The funding options up for discussion were the Standard Bank Option and a Vendor Loan option.

[271] The Standard Bank option provided for a R 1 billion loan from Standard Bank plus a contribution of R70 million from the Fund and a vendor loan from DD Facilities making up the difference.

[272] The Vendor Loan option entailed the R70 million contribution from the Fund and a vendor loan from DD facilities of the entire balance of R1.333 billion.

[273] As to "Governance and timing" on the Transaction, the following was set out:

"

- Requires NTTL board and investment committee approval
- Recommend that this approval be delegated asap (by round robin resolutions) to a sub- committee comprising Jason[Goodall], Jeremy [Ord], Aki [Hattori], Dave [Sheriffs].
- Summary of key terms needs to be presented to sub-committee for approval
- What are the deadlines and critical path for BEE purposes?"

[274] On 16 August 2019 a telling exchange was had between Sheriffs, Nathan and Moola in relation to the structure of the Transaction:

> " Hi Steve, Ish
> I'm trying to work out who actually will be the economic beneficiaries of this deal
> Is this clear to you? "

[275] Nathan replied: "The beneficiaries are clearly the GP and the IFM here and if there is a profit to be had (after being forced to hold for three years min). I guess LP will participate. At the outset for sure the BEE fund."

[276] The reference to the holding for three years was a BEE private equity requirement.

[277] The reply from Sheriffs is telling:

> "These acronyms are all Greek to me – are they clear from the presentation itself? Main thing which I think [emphasis in text] is important to know is which individuals, or groups, are the ultimate beneficiaries. Is it just one or two individuals, or more widespread? [Emphasis added] "

[278] Nathan's reply is as follows:

" I think on balance it is widespread as one can get and also there may be hundreds of limited partners there. The fund construct is important and that it passes the empower logics and other rating agency tests is probably the most important for us."

[279] There can be no dispute that there were no "widespread" limited partner investors. There were not hundreds. The investors numbered the six Protagonists who had agreed their ratios of participation by then and were represented by Krige on Nathan's instruction.

[280] The sowing of these falsehoods by Nathan were a means to divert Sheriffs from the Protagonists' trail. He had disquiet as to the identities of the investors of the Transaction.

[281] Sheriff's disquiet was then expressed by him to Nathan to Goodall as follows:

" Hi Jas,
As discussed find attached (1) campus funding note (2) draft overall summary for Board (3) indication of property ownership structure – as you can see slide 2 I'm trying to get to the bottom of who the actual owners are"

[282] On 20 August 2019 Sheriffs having poured over the slide made the following observations/ asked the following questions in relation to his (Sheriff's) understanding of the ownership to Nathan:

" Effective ownership seems to be:

- General Partner which I presume gets some sort of management fee [this is a reference to Sonja [de Bruyn] 71%, RMB 13%, Lumka and Maxwell 11.2%, broad based 4.4%) I don't know how material this is to them i.e. what economic benefit they'd get in the end.
- General Partner has just 1% equity ownership which is not material
- 99% of equity ownership is in the hands of the Limited Partners. Do we have any idea who these are? Do we care? Do they need to be BEE?"

[283] Nathan's reply is typically obfuscatory. He says:

> " Your observations are correct. The limited partners are not actors at all and are irrelevant for BEE or the economics and will only participate if the property gets sold after the minimum three-year period and after fees etc
> Anyone can be a limited partner.
> I think they have Moss [a reference to Moss Ngoasheng who had sat on some boards of DD entities] and others. The Fund Manager and owner is critical and the General Partner is key. They will also have to take over facilities in the future. In terms of BEE and credibility, Sonja [de Bruyn] is rock solid. She is a long standing DD and Remgro board member and I am sure she has some good investors with her.
> Whatever happens please push Jas for an answer so we can communicate with them."

[284] This email patently had no truth to it. De Bruyn was not bringing "good investors with her"; Moss was not an investor; Nathan was acting for the Protagonists and they were the only investors.

[285] These untruths were put out by Nathan with the intention of pulling the wool over the eyes of Sheriff's as he struggled to understand who the investors were. Sheriffs was thus mollified.

[286] Everybody now being satisfied with the proposed Transaction a resolution (Round Robin) of DD Facilities was taken in terms of which DD (SA) Holdings (Pty) Ltd (DD Holdings) was recorded as holding the entire issued share capital in DD Facilities.

[287] The Transaction was approved by Ord, Sheriffs, Caldwell.

[288] There were no disclosures of interest by Ord.

[289] Between 23 to 27 August 2019 board approval of NTT Limited was obtained in relation to the formation of the sub-committee consisting of Goodall, Sheriffs, Hattori and Ord.

[290] This sub-committee was authorised to approve any and all transactions relating to the proposed BEE transactions, the sale of the Campus property to BEE investors and the provision of funding to any third party in order to facilitate the execution of the BEE transactions.

[291] The signatories to this approval which included Goodall and Ord declared that they had no direct or indirect interest which required disclosure in terms of the UK companies Act.

[292] It was also at this stage resolved by DD Investments that the Transaction be approved. Such resolution was signed by directors including Ord, Bodley, and Missaikos.

[293] De Bruyn disclosed her obvious interest in the Transaction and played no part in the approval. None of the others made any such disclosure.

[294] At the beginning of September 2019, the required resolutions now taken for the conclusion of the Transaction, Johnston began finalising the Limited Partner agreement and the terms of the IFM management agreement with the investors. For this she needed information as to the identity of the investors and their respective commitments.

[295] But the Protagonists would not allow their identities to be known. Their refusal to be exposed as the real investors has led to still further fronting and the need to put in place structures which can only have been necessary for the purpose of hiding their identities.

[296] The setting up of these structures, argue the applicant's, is incriminatory in itself in that they have no other feasible purpose but to hide the identity of the real beneficiaries of the Transaction.

[297] I move to examine this contention in light of the structures in question.

The refusal to disclose the identity of the investors

[298] On 04 September 2019 Johnston wrote to Krige under the subject heading "Confirmation of LP Commitments". She sought the identity of the investors and the extent of their funding commitments.

[299] Krige wrote back asking why the information was needed. He essentially refused to provide it.

[300] Johnston was however now insistent that the identity of the investors be disclosed to IFM. This was non-negotiable.

[301] This is the point where Martin Epstein suddenly entered the story as a key person relating to the beneficial ownership in the Transaction. Recall, Epstein had been employed by the Group to provide valuation and property advice in relation to the proposed sale of the Campus.

[302] On 12 September 2019 Krige wrote to Johnston stating that he had met with Nathan that afternoon and could now disclose that the sole Limited Partner would be Martin Epstein. The identity of the General Partner had not yet been finalised he said but Nathan was working on that.

[303] The applicants argue that the sudden entry of Epstein as the sole investor in the Transaction is perplexing for, inter alia, two reasons.

[304] First, Epstein had never previously been mentioned as an investor. Second, the investors had always been referred to by Nathan and Krige in the plural.

[305] The applicants argue that that the only explanation for this turn of events is that Epstein was used as a front to protect the identity of the protagonists when

it became clear that there would have to be disclosure in the context of the relationship with IFM.

[306] The structure involving Epstein and his entities is complicated. These complications are, say the applicants, explicable only on the basis that their only function was subterfuge.

[307] The following emerges from the web of agreements between Epstein and the entities which appear ultimately to be controlled by the Protagonists: Kula which is Epstein's company is the Limited Partner of Areti which, in turn, is the Limited Partner of the Fund; Kula holds 97% of its partnership interest in Areti as nominee of Strebis and 3% personally; Strebis (of whom Nathan is the guiding mind), in turn, holds the 97 %of its Areti participation as nominee of the Protagonists.

[308] It is not in dispute that Strebis and Nathan ultimately concluded nominee agreements with each of the Protagonists on the basis that Strebis held the 97% as nominee of the Protagonists in their proportions as to funding.

[309] These nominee agreements are clear on their terms: the ultimate interest holders in and to the rights under the Transaction were the Protagonists.

[310] This entailed the holding of the following percentages of Areti in relation to the percentage funding provided: Ord R23 .2 million for 30%; Goodall R10.8 million for 14%; Watson, R7.7 million for 10%; Bodley; R10.8 for 14%, Missaikos R10.8% for 14% and Nathan R11.2million for 15%.

[311] As I have said, the balance of 3% went to Epstein. This was presumably a fee for allowing Kula to hold as nominee for the protagonists.

[312] On 20 September 2019 Nathan communicated privately with Goodall and Ord that the conclusion of the sale Transaction was imminent.

[313] A further important development was that NTT would commit to a further seven year lease of rental property at the Campus. This allowed for security as to the continued viability of the business for the Buyer.

[314] The Transaction was ultimately concluded on the basis that there would be vendor funding of the transaction.

[315] Ord, as a member of the Seller's board, participated in the resolutions to conclude the vendor loan. He made no disclosure.

[316] Around this time, it appears that Nathan's focus came to be on his personal financial position. Recall, when he was appointed under the ICA it was as an independent contractor with a view to taking up a permanent position in the Group.

[317] The finalisation of the Transaction was at that stage imminent.

[318] On 11 October 2019 the Sale Agreement was signed by Caldwell and Curtin for the Seller and de Bruyn and Johnston for Identity Property Company (Pty) Ltd (Identity Propco), the Buyer or first respondent).

[319] Thus, as at 11 October 2019, the Transaction was completed from the perspective of the applicants and the first respondent.

[320] It is central to the analysis of the correspondence that it is not in dispute that he funds for the deposit, being the R70 million came from the Protagonists.

[321] To my mind, It stands to reason that this funding payments and would by this time (11 October 2019) have been guaranteed. The Sale Agreement would obviously not have been concluded by the Buyer represented by de Bruyn and Johnston if the funds were not in place and secured.

[322] The Protagonists allege that their payments were made on dates ranging between 4 November (Watson), 11 November (Bodley and Goodall);12 November (Missiakos), 15 November (Ord) and Nathan making split payments on 11 and 13 November.

[323] As I have said, Watson appears to have been a late entry into the Protagonist consortium as he is not mentioned in previous correspondence and there is no detail as to how he became involved.

[324] The case of the Protagonists as to the section 75 point is simple and based on two foundations.

[325] First they say that, as at the date of their formal board approvals relating to the conclusion of the Transaction there was no disclosable interest in that the establishment of the Fund and Areti and the advance of the capital had not yet occurred.

[326] Second, they say that the Protagonists participation in the structure is not a personal financial interest as contemplated by section 75.

[327] The merx, on the face of the Sale Agreement was the entire Campus enterprise which included the golf course, the Data Centre and the art collection.

[328] However, recall that it had been agreed that the art collection would be carved out so that it went to investors personally. There had been talk of this being the case in relation to the golf course and the data centre. This never materialised and it is not clear why. Perhaps it was thought a step to far.

[329] The device by which the art collection was to move from the Buyer to the investors was typically obfuscatory. It was to form the subject matter of a “commission” for Nathan through Strebis.

[330] On the same date as the conclusion of the Transaction, Krige sent a first draft of the Commission Agreement to Johnston and Nathan.

[331] Krige made the point that it would probably not be able to be signed on that day 11 October 2019 – i.e. the date of the Transaction– but opined that this was fine "provided the agreement is finalised before drawdown from Areti."

[332] This suggests that the funds were in place to be drawn down from Areti on 11 October 2019. These funds could have come from no source other than the Protagonists and ultimately the concession is that they were indeed the investors.

[333] Each of the Nominee Agreements between Nathan and Strebis on the one hand and each of the Protagonists on the other, in terms of which each derive their beneficial ownership in the Campus, have as their effective date 25 October 2019. In terms thereof the requisite capital amounts were advanced by each Protagonist.

[334] As I have said, the defence of the Protagonists is that they only became involved in the Transaction after they gave their approvals at board level. In light of the correspondence which has been analysed above, this version is entirely without merit and can be rejected out of hand.

[335] Indeed, even if this version were accepted, this does not explain why the existence of the opportunity to invest and the clandestine manner in which it was contrived by Nathan – which, on any version, was known about by the Protagonists -- was not brought to the attention of NTT by the Protagonists in compliance with their fiduciary responsibilities.

[336] The Commission Agreement was initially purportedly with Strebis on the basis that it was being paid a commission by the Buyer for introducing the Transaction to the buyer. The art was nominally valued at R5 million. A

previous valuation put the collection at in excess of R20 million and a more recent valuation at approximately R17 million.

[337] Nathan, at a later stage, perhaps realising that he could not ultimately be seen to be receiving a commission from both Buyer and Seller, asked that the Buyer cancel the Commission Agreement and conclude an alternative Commission Agreement with Epstein's company Kula.

[338] This was refused by de Bruyn and Johnston who were then in control of the Buyer. Nathan then asked that they consent to a cession of the existing Commission Agreement by Strebis to Epstein. This too was refused.

[339] Undeterred, during November 2021, Strebis purportedly transferred the art to Epstein "as consideration of all that he had done to assist Identity Partners in developing the competency to manage the Fund and the Buyer and the Campus."

[340] On 01 November 2022 the Fund and IFM were removed as GP and manager respectively by the Protagonists acting as Areti Limited Partners and replaced with an Epstein entity called K201953314 (Pty) Ltd (K2019). This was done without the consent of the Buyer which was required under the Vendor Loan Agreement.

[341] Epstein then took complete control of the Buyer, changed its name to Culross Property Co and was then appointed as its sole director.

[342] There can be no doubt that Epstein was acting and continues to act as front for the Protagonists. He has no real control. This is evident from the fact that the Protagonists state that they are willing reverse the Transaction on their terms, being their impunity.

[343] Epstein has not even made a pretence of autonomy in these proceedings. He has not made an affidavit to explain the part played by him.

[344] The applicants allege that the Vendor Loan Agreement has been breached by the Buyer, now named Culross in that there have been indications that repayments due thereunder will not be paid.

Nathan's reward

[345] On Saturday 14 September 2019 Nathan wrote an email to Goodall in terms of which he updated him on the work being done by him and then led into the following:

> "I don't want to push you or make you mad because I understand your load. I just don't want to fall through the cracks and let years pass and I don't know where I am. I have been at these 18 months! There has been no evis and no Ltip [a reference to bonus payments that he would have received were he an executive] and I am paying tax up the ying-yang. I also have proper zero dry powder! All spent on useless residential assets that I can't give away. And making some shit investments. Those Israelis are killing me! None of this is your problem but I do need to understand how we deal with stuff and what will be going forward.
>
> I would really like to understand the value you ascribe to the "LTIP" (please be fair with me). Let it be in line with the others. I gave up a bit to come and I am giving my ALL here.
>
> As a contractor I have had zero medical, pension, insurance nothing. I am covering all those costs myself. Including my massive cellphone bill and costs of my office and help. All paid by me.
>
> I seriously think we can put this cost easily as fees on the restructuring. Please ask Dave [Sheriff's] to put it into the IMO. There are massive costs there and the re-org has been assisted greatly by some of the initiatives I have been involved in.
>
> When you get a chance to breathe can we please sort?
>
> I hope you are not offended by me asking to resolve.
>
> Thanks.
>
> Ps. Let's talk tomorrow if you can. I will send you slides in the meantime. Let's catchup. I am tired and a but grumpy."

[346] Goodall replied the following day (15 September) and confirmed that he agreed that they needed to find a mechanism to reward Nathan.

[347] These payments obviously needed to come from the applicants' coffers. Goodall asked that Nathan think of some ideas which would allow him (Goodall) to motivate for payments to him by NTT.

[348] Goodall explained that they needed to link the charges to work being done by Nathan under the ICA. Goodall's tone is appeasing of Nathan but nothing concrete is posited by him.

[349] On 24 September 2019 Nathan again wrote to Goodall with regard to his personal reward payments. He stated that he had missed out on LTIP (Long Term Incentive Plan - i.e. a reward to employees for reaching specific goals)/EV (Enterprise Value) over the past two years as he was not employed by any DD entity.

[350] Nathan required that he be paid in similar vein to the other Protagonists and specifically as an executive earning at the level of the Group Holdings. He then set out motivations for these bonus payments for the purposes of Goodall convincing the Group's remuneration committee and Sheriffs.

[351] An important part of the motivation is the following statement: "Obviously tons of work outside on tax and structure for ARETI…"

[352] On 15 November 2019, Nathan sent a further letter to Goodall as to his personal remuneration. The letter had a more urgent and aggressive tone than the previous correspondence. Essentially, Nathan made clear that he was now demanding to be paid for all the work that he had done on the Transaction. He asked that Goodall not "be tight" in respect of the amount that he would get. He states "I trusted you and I was remiss to allow this

not to be buttoned and nailed. I know you have more important issues you have to deal with and now that 2 years is approaching, I have hurt myself."

[353] Nathan then suggests an addendum to the ICA to the effect that he would get a bonus for the successful conclusion of the Transaction if it entailed a sale to owners who are 51% BEE and should he be able to find a structure where the BEE buyer is Black women owned and more than 75% black women owned.

[354] These were purportedly the terms of the Transaction already concluded. At this stage it was a fait accompli.

[355] An addendum was then brought into existence by Nathan in terms of which he would earn R18 million on the basis that he had not been employed as an executive and thus not been included in the company LTIP and EVS.

[356] The addendum reflects that it was signed by Nathan on 14 January 2019. The key measurables were those that had purportedly been met. Simply put- the R 18 million was configured in accordance with the achievements which were met.

[357] The addendum was sent to Goodall and Michele Smith, the personal assistant to Ord. It was sent under cover of an email dated 09 December 2019 in terms of which Nathan stated that the addendum was to be held by Smith and attached to his contract. He states in the email that he has changed certain percentages and amounts – and that "This will make the R18 million achievable." Nathan instructed Smith that Goodall would have to sign it when next in Johannesburg even though it was agreed "some time back."

[358] There is no evidence that Goodall ever signed the addendum but it is common cause that the R18 million was paid to Nathan by NTT.

[359] Why should an addendum dated 14 January 2019 signed by Nathan and with instructions to Ord's assistant to attach it to his (Nathan's) contract be conceived of and sent in December 2019?

[360] This to my mind is explicable only on the basis that the addendum it was backdated by approximately 11 months. The purpose of this backdating is to create a basis for the R 18 million which Nathan was to get from paid by the NTT /DD group. It had to relate to payment for the Campus transaction because it had to be paid by DD Management under the ICA.

[361] Clearly the addendum was reverse- engineered to create the impression of a forward-looking obligation on fixed performance measurables which were already a fait accompli.

The Aftermath

[362] This purported BEE phase being finished the correspondence turned to the possibility of negotiations to begin for the MBO. Recall, this had been on the cards as something to be undertaken once the BEE Transaction had been completed.

[363] On 23 October 2020 Nathan communicated to the Protagonists through their @areti platform that he had spent a productive hour with Hattori at what was "a very sensitive time for NTT and all".

[364] It was conveyed to the Protagonists that Sawada and Okuno were concerned about Ord's role. They had firmly stated that "He cannot be an advisor to NTT and a buyer." This stands to reason and had been foreshadowed in the earlier discussions relating to the postponement of the discussions around the MBO.

[365] There were high level discussions as to the possible structure of the MBO had with Hattori. All this was conveyed to the Protagonists by Nathan

notwithstanding that it was reported that “He asked that this discussion be kept between him and I for now until we can find a good solution and present to NTT and Jeremy.”

[366] It appears thus that the Protagonists, having secured a secret interest in the Campus, now intended entering into to an agreement to acquire the remaining SA interests. Ord Communicated directly with Okunu as to this possibility in May 2020.

[367] Clearly in the circumstances of the discovery of the Protagonists interest in the Transaction these discussions did not progress.

[368] An interesting vignette arises from correspondence on an unrelated matter which emanated from Nathan in March 2021. Nathan can be seen erroneously to have used Goodall’s Jason@areti address. When Moola who is also copied notes that this is not Goodall’s email address this is hurriedly explained by Nathan with the following excuse “Sorry Jason I sent it to someone else in error.”

[369] It is undeniable that Jason@areti is an email address used by Goodall. The reference to it having been sent to “someone else” is clearly a lie told for the purpose of hiding Goodall’s involvement with Areti.

The Discovery by NTT of the involvement of the Protagonists

[370] The applicants state that they discovered that the Protagonists were involved as financiers and beneficial interest holders in the Transaction in about May 2021. Through their erstwhile attorneys Herbert Smith Freehills inc they conducted an investigation which uncovered the email correspondence relied on by the applicants in this application.

[371] In January 2022 there was a leak of the ongoing investigation to the press.

[372] At this stage the Group was enjoying its significant improvement to Level 2 BEE Certification as a direct result of the Transaction. Clearly a reversal of this Transaction would have a significant and detrimental effect on the BEE status.

[373] Werner Kapp, the CEO of DD MEA is observed doing damage control. He addressed an email to Ord on 25 January 2022 in which he referenced the failure of the investors in the Transaction to disclose the interest. He also indicated that Dimension Data – because of its commitment to BEE had taken the decision to ratify the Transaction "subject to us dealing with the exit of the executives involved in a manner which served to preserve the original objectives of the Transaction".

[374] It is common cause that no such exit could be agreed to.

[375] The Protagonists have now indicated that they will step away from the Transaction and allow it to be reversed provided they are not implicated in anyway. The applicants have refused to agree to allow the Protagonists to be so absolved.

[376] The applicants' BEE certification has reverted to level 3.

[377] I now move on to a consideration of the legal issues. The central contention is based on the conflict of interest which the applicants allege allows for the setting aside of the Transaction. The applicants rely on section 75 of the Act and the common law.

Legal principles - Section 75 and the common law principles relating to conflict of interest.

[378] There are two broad categories of duties that directors owe to the company in which they hold office: (a) fiduciary duties, and (b) the duty of care, skill and diligence.[5]

[379] Included in director's fiduciary duties is the duty to avoid conflicts of interests. This, in turn, includes a duty to disclose any interest in a contract with the company.

[380] The rule against conflict of interest– known as the "no conflict rule" - is old. It was elegantly espoused by the House of Lords (per Lord Cranston) in 1843 thus:

> " It is a rule of universal application that no one, having [duties of a fiduciary nature towards their principal] to discharge shall be allowed to enter into engagements which he has, or can have, a personal interest conflicting or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract entered into."

[381] This duty is now partially codified under section 75 of the Companies Act. The mischief which section 75 seeks to address is the same as that which the common law principles address. The board is protected from unwittingly entering into a contract where one of its number is conflicted between his own interest and that of the company.

[382] Where no disclosure is made of an interest in the matter in issue, any resultant contract is voidable (not void) at the company's instance at common law.[6]

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[5] *Atlas Park Holdings (Pty) Ltd v Taillifts South Africa (Pty) Ltd* 2022 (5) SA 127 (GJ) at paras 64 and 88.

[6] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para 16.

[383] Section 218 permits a court to declare an agreement void if it is 'prohibited, void, voidable or may be declared unlawful'.

[384] Thus, a contract which is voidable at common law where there is the necessary conflict of interest can be declared void under section 218.

[385] Section 75 applies to directors and prescribed officers. It provides as follows in relevant part:

> "(5) If a director of a company... has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter the director:
> (a) must disclose the interest and its general nature before the matter is considered at the meeting;
> (b) must disclose to the meeting any material information relating to the matter, and known to the director; [and]
> …
> (e) must not take part in the consideration of the matter;
>
> (6) If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board... the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.
>
> (7) A decision by the board, or a transaction or agreement approved by the board... is valid despite any personal financial interest of a director or person related to the director, only if –
> (a) it was approved following disclosure of that interest in the manner contemplated in this section; or
> (b) despite having been approved without disclosure of that interest, it—
> (i)has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or

(ii) has been declared to be valid by a court in terms of subsection (8). "

[386] Section 75, thus, creates a statutory mechanism whereby any potential risk to the company posed by a director's conflict of interest can be managed.

[387] There the conflicted director may be allowed to retain his interest, provided he makes the disclosure and recuses himself from deliberation on the issue.

[388] If the vote of the board in his absence is against the acquiring or retaining of the interest in issue, the director may not do so. He would obviously have the election, in such circumstances, to resign from the board and take up the interest. But he must make an election.

[389] If the board decides that the director can be involved in the matter notwithstanding the interest, then it makes an informed decision for the good of the company and its shareholders.

[390] The section is prescriptive – the director must disclose his interest and if he does not, the transaction is void unless there is ratification by the board subsequently.

[391] The court can also be approached by interested parties under section 75(8) to approve the transaction notwithstanding the non-disclosure. The Protagonists have not brought such an application. On all the facts, this is unsurprising.

[392] On the facts of this case, the effect of the non-disclosure under section 75 is the same as at common law, notwithstanding that that the mechanics are different. At common law the agreement is voidable at the instance of the company; under section 75 it is void but can be ratified by the board.

[393] The disclosure obligations under section 75(5) of the Act arise when there is a personal financial interest in the matter concerned or knowledge that a related person as defined had a personal financial interest.

[394] I understood van der Nest SC who acted for the applicants to focus, in argument, on the personal financial interest of certain, if not all, of the Protagonists, at the board approval stages in relation to the Transaction and the vendor funding thereof.

[395] There can, in my view, be no doubt that the Legislature, in enacting section 75, did not intend to limit the common law protections. Rather it was intended to give them even more force and clarity because of the opprobrium which it considered such conduct should attract.[7]

[396] To the extent that any interpretative exercise is required, on all the legal principles pertaining to such interpretation, section 75 must be understood purposively and in accordance with the common law principles which it seeks to codify.

[397] Section 75 must be read together with the definition of “personal financial interest” contained in s 1 of the Companies Act. This provision provides as follows in relevant part:

> '"personal financial interest", when used with respect to any person —(a) means a direct material interest of that person, of a financial, monetary or economic nature or to which a monetary value may be attributed;”

[7] *Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd* 2022 (5) SA 127 (GJ) at para 54; Mthimunye- Bakoro v petroleum and Oil Corportation of SA (SOC) and another 2015 (6) SA 338 (WCC)
2015 (6) SA p338

[398] Something was sought to be made on behalf of the Protagonists of the use of the word “direct” in the definition of personal financial interest.

[399] The submission on behalf of the Protagonists is that, given the complex web of interests in the structure of the Transaction, the interests held by the Protagonists do not qualify as being sufficiently direct.

[400] To my mind the word direct is properly construed as being an interest which can be discerned by reference to the matter or transaction in issue to benefit the director directly.

[401] This will, as in this case, often involve following the intricacies of transactional relationships which have been structured deliberately for the purposes of concealing the personal interest of the director.

[402] What the requirement of directness does not mean is that the director has to from a technical perspective hold the interest in his personal capacity. Section 75 cannot be evaded by clever structures which seek to conceal the interests of parties.

[403] A court faced with a complaint of conflict of interest must have careful regard to the financial structures implicated in order to determine where the beneficial interest actually resides.

[404] The nature and extent of the interest is to be determined on the facts of each transaction under consideration.

[405] A compelling factor to be taken into account in such determination is evidence which is not explicable on any basis other than that it is a device which has, as its primary purpose, the concealment of the interest in issue.

[406] On the facts of this case, whether the non-disclosure is treated under section 75 or in terms of the common law, the effect is the same notwithstanding that the mechanics are different: At common law the agreement is valid but voidable at the instance of the company; under section 75 the agreement is automatically void but can be ratified.

[407] There may be cases where this distinction has an effect but this is not one such case.

[408] On the undisputed facts and regardless of the Protagonists' allegations that they were not interested in the Transaction at that time of their respective approvals at board level, the conclusion is irresistible that the structure of the Transaction was orchestrated by Nathan acting in the interests of the Protagonists and if not on their express instruction, then at least with their full knowledge and acquiescence.

[409] The complexity at the level of the *en commandite* partnerships within en *commandite* partnerships and the interposition of the Epstein parties which came at a time when the disclosure of interests of the investors was inevitable is explicable only on the basis that it was designed to conceal the interests of the Protagonists.

[410] It is not disputed that the Protagonists were the direct source of the funding for the purchase of the Campus. That this investment secured their beneficial holding of the interest in the Campus is also not in dispute.

[411] That Epstein has not seen fit to take the court into his confidence in relation to the role played by him in the structure is telling. His role is explicable only on the basis that he and the companies controlled by him -

[412] The assertion by the Protagonists that their participation in the scheme came after the relevant approvals relating thereto were given at their respective

board levels is simply preposterous in light of the undisputed correspondence between the Protagonists in relation to the setting up of the scheme.

[413] The fact is that as early as June 2019 the Protagonists had their own attorney in the form of Krige who acted for them qua investors in the Transaction and ultimate beneficial interest holders of the Campus, on the instruction of Nathan.

[414] That they were required by Nathan to commit to making payment of Krige's fees personally and in accordance with their share participation in the investment scheme is, on the correspondence, indisputable.

[415] The approach taken on behalf of the Protagonists in relation to their secret participation in the Transaction is by degree cynical and contradictory. They cannot say that they are not the controllers of the scheme and at the same time offer to reverse same in exchange for their impunity.

[416] The applicant's raise that, even if one were to accept that their participation came after their approval, such participation is still hit by section 75(6) which calls for prompt disclosure to the board of the nature and extent of their interest and the material circumstances relating to the director or related person's acquisition of that interest.

[417] Van der Nest argues that the failure to make a section 75(6) disclosure has the same result as a non-disclosure under section 75(5) – being that the transaction in issue is automatically void subject to ratification.

[418] The argument goes, that if there were no voidness or voidability which ensued from non-disclosure, section 75(6) would have no purpose in the context of a conflict of interest which arises after board approval.

[419] It is not necessary for this court to decided what the automatic consequence of a non-disclosure of a subsequent conflicting interest is - ie whether it is

automatically void or voidable - in that my finding is that the impugned interest was present at each step of the approval process of the Transaction at board level and thus that the Transaction falls to be set aside under section 75(5).

[420] In any event, it seems to me that the purpose of section 75(6) is to provide for a statutory obligation to disclose of the existence of a conflict when it arises. Whether the consequences of the non-disclosure then falls to be determined on common law principles or whether it triggers the automatic voidness which comes about in terms of section 75(5) is immaterial on these facts.

[421] It remains for me to dispose of the last argument advanced on behalf of the Protagonists that being that, regardless of the conflict or otherwise, the Transaction has been ratified.

Ratification under section 75

[422] The highwater mark of this argument is that when pressed for comment by the press and generally after the leak of the conflict of the Protagonist in relation to the Transaction, a statement was made to the effect that NTT was committed to the BEE initiatives and gains which had been the true purpose of the Transaction from its perspective and that it wished to continue with any gains which may be salvageable.

[423] The Protagonists argue that this is an indication that there was a resolution to ratify taken after all. They say that the matter should be referred to evidence on this point at least so that they can enter into cross examination as to whether there was a resolution to ratify.

[424] There is no evidence of any ratification either behind the scenes or otherwise.

[425] Kapp's guarded optimism to the effect that if the Protagonists were co-operative it may be possible somehow to preserve the BEE nature and spirit of the Transaction was unrealistic for at least two reasons.

[426] First, the BEE Act and its scorecard and codes of good practice were deliberately subverted by the Protagonists at the origin and conception of the Transaction. It is an aberration and not capable of being remedied.

[427] Second, the Protagonists have shown themselves to be anything but co-operative in relation to their taking of responsibility for the structure which was set up to serve their interests.

[428] On the undisputed facts the purpose of the Transaction was to benefit the six white Protagonists. It had nothing to do with BEE. The expression of the will to revive some non-existent BEE value is, on all the undisputed, facts simply impossible.

Conclusion

[429] In all the circumstances and on the undisputed facts, the Protagonists entered into an illegal scheme designed to appropriate for themselves a secret financial benefit which placed them in conflict with their boards both from a section 75 perspective and their common law duties as directors.

[430] The scheme was brazen and dishonest. It was orchestrated without due regard to the relationships between the Japanese holding entities and the SA interests.

[431] If this kind of flouting of foundational and universal commercial values remains unchecked and unpunished this would represent a travesty of South Africa's commitment nationally and internationally to the upholding of the values of honesty and integrity which are so intrinsic to proper commercial relationships.

[432] From a South African Black empowerment perspective, it is of grave concern that these White Captains of Industry have subverted the empowerment legislation for their own benefit.

[433] This is a cautionary tale for those who apply and regulate the BEE infrastructure which is so vital to the development of our constitutional democracy.

[434] Nominee arrangements and secret *en commandite* partnerships such as those which have been abused – whilst they have their place in corporate structure – must of necessity entail the implementation of checks and balances which serve to prevent them being used to make corrupt relationships possible.

Costs

[435] The conduct which emerges from the undisputed facts is such that there should be a punitive cost order.

[436] Furthermore, the complexity of the matter is such that it warranted the use of at least three counsel. Costs are sought by the applicants jointly and severally against those respondents who have opposed the application.

[437] The opposing parties are the first, third to ninth and eleventh respondents.

Order

[438] In all the circumstances I make the following order:

1. The following transactions are declared to be void and invalid:

1.1. the sale of rental enterprise agreement concluded between the first applicant and the first respondent on 11 October 2019;

1.2. the property management agreement concluded between the first applicant and the first respondent on 19 September 2019;

1.3. the sale of bulk agreement concluded between the first applicants and the first respondent on 18 February 2020;

1.4. the facilities agreement concluded between the first applicant, the first respondent and the tenth respondent on 19 November 2019; and

1.5. the Transaction to which the above transactions cumulatively give rise – namely the sale of the Rental enterprise (as defined in the agreement referred to in paragraph 1.1 above) by the first applicant to the first respondent.

2. The first applicant is entitled to restitution of the Rental Enterprise (as defined in the Sale Agreement), comprising:

2.1. The campus property situated at Erf 5517, 57 Sloane Street Bryanston (“The Campus”);

2.2. The art listed in Schedule A2 to the Sale Agreement;

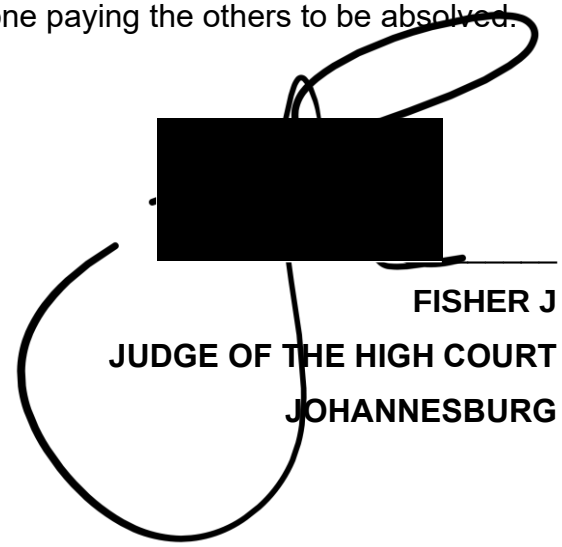
2.3. The infrastructure assets listed in Schedule A3 to the Sale Agreement; and

2.4. The goodwill attaching to the Rental Enterprise.

3. The first respondent and, to the extent necessary, the twelfth and/or thirteenth respondents are ordered to restore the Rental Enterprise to the first applicant.

4. The fourteenth respondent is directed to do all things necessary to procure the re-registration of title in The Campus in the name of the first applicant.

5. The first, third to ninth and eleventh respondents are to bear the costs of this application on the scale as between attorney and own client and on scale C, such liability for costs to be so borne by the first, third to ninth and eleven respondents, jointly and severally, the one paying the others to be absolved.



FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 25 November 2024.

Heard:	9, 10 & 11 September 2024
Delivered:	25 November 2024

APPEARANCES:

Applicant's counsel:	Adv. M van der Nest SC
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