

Reflecting on the corporate opportunity rule in company law through a jurisprudential review of *Modise v Tladi Holdings (Pty) Ltd* 2020 4 All SA 670 (SCA)

Justice Mudzamiri

LLB LLM LLD

Postdoctoral Research Fellow, Law Faculty and Commercial Law Department,
University of Cape Town

SUMMARY

Directors' fiduciary duties form part of foundational principles in corporate law. This concept has its foundations in the law of agency. Prior to the Companies Act 71 of 2008 (the Companies Act), fiduciary duties were governed under common law, however, the advent of the Companies Act resulted in the partial codification of fiduciary duties. One of the central fiduciary duties is the duty of directors to avoid conflict of interest. This duty restricts the directors of a company from having their personal interests impede those of the company. There are separate rules that flow from the directors' duty to avoid conflict of interests, including the corporate opportunity rule. The corporate opportunity rule dictates that directors must not use their position to unfairly benefit from the contracts and/or information that rightfully belongs to the company they are managing. The objectives of the corporate opportunity rule were clarified in *Modise v Tladi Holdings (Pty) Ltd* (the *Modise* case). In partially confirming the judgment of the court *a quo* the Supreme Court of Appeal held that the ambit of breaching the corporate opportunity rule includes the illegal use of the property and confidential information of the company by a director for personal gain. This article agrees with the reasoning of both the High Court (court *a quo* or trial court) and the Supreme Court of Appeal in the *Modise* case on the issue of prescription although the article raises concerns about the decision of the Supreme Court of Appeal on a similar issue. Further, the article concurs with the reasoning of both the court *a quo* and the Supreme Court of Appeal in concluding that the applicants breached their fiduciary duty when they appropriated a corporate opportunity that belonged to the company. One of the major lessons that could be learnt from the *Modise* case is that directors, especially those who serve on multiple boards, should exercise extreme caution with potential conflicts of interest.

Keywords: corporate opportunity rule, conflicts of interest, fiduciary duties, contracts, information and the best interests of the company.

1 Introduction

One of the most welcome developments in the Companies Act 71 of 2008 (the Companies Act) is the partial codification of the directors' fiduciary duties. This partial codification of fiduciary duties gives clarity

and certainty to the extent and interpretation of the directors' duties and in addressing the agency problem that may arise when directors are faced with impending corporate decisions.¹ The concept of a "company" and the way companies are managed naturally imposes duties on the directors and raises legitimate expectations for the company and its stakeholders.² Directors' fiduciary duties include acting in good faith and in the best interests of the company³ as well as avoiding conflicts of interest.⁴ This article focuses on the directors' duty to avoid conflicts of interest, particularly the "expropriation" of the company's corporate opportunity for personal gain. The court grappled with the said issue in *Modise v Tladi Holdings (Pty) Ltd.*⁵ In partially confirming the judgment of the High Court (court *a quo* or trial court) the Supreme Court of Appeal held that the ambit of the corporate opportunity rule includes the illegal use of the property and confidential information of the company by directors for personal gain. The Supreme Court of Appeal held that the fact that the corporate opportunity seized by the director would not have materialised for the benefit of the company is irrelevant to the directors' liability under the corporate opportunity rule. The Supreme Court of Appeal further held that the corporate opportunity rule requires the director to disclose the information to the company, and there is no legal requirement for the company to have proprietary interests in any information. Further, the article agrees with the reasoning of both the court *a quo* and the Supreme Court of Appeal in concluding that the applicants breached their fiduciary duty when they appropriated a corporate opportunity that belonged to the company. One of the major lessons that could be drawn from the *Modise* case is that directors, especially those who serve on multiple boards, should be extremely cautious when faced with potential conflicts of interest. The court *a quo* and the Supreme Court of Appeal dealt with the second issue of prescription, however, the said second issue does not directly deal with the concept of corporate opportunity, therefore, it is out of the scope of this article.

The article is divided in the following manner. Immediately after the introduction, it unravels the doctrine and the rationales of relevant fiduciary duties with a specific focus on the corporate opportunity rule. Then, the article goes on to survey the *Modise* case and thereafter offers an analytical discussion of the corporate opportunity rule as enunciated in the *Modise* case. Further, the article gives concluding remarks.

1 Zhao "The curious case of stakeholder theory: calling for a more realistic theory" 2014 *International Trade and Business Law Review* 26.

2 Lee "Corporate law and the role of corporations in society: monism, pluralism, markets and politics" 2006 *The Canadian Bar Review* 7.

3 S 76(3)(b) of the Companies Act.

4 S 76(2)(a) of the Companies Act.

5 2020 4 All SA 670 (SCA) (the *Modise* case).

2 The doctrine of fiduciary duties re-examined

Section 66 of the Companies Act grants the board of directors all the power and authority to manage the affairs and business of the company, except, where the Companies Act or Memorandum of Incorporation (MOI) provides otherwise.⁶ The simplest structure of a company and its stakeholders is that shareholders contribute to the company's equity, creditors extend debt and directors manage the company. As stakeholders of the company, the directors function as fiduciaries who manage the company's day-to-day business on behalf of the company and other stakeholders. In South Africa, the directors' fiduciary duties are governed under the common law, and the partial codification of these directors' fiduciary duties in the Companies Act.⁷ It is accepted that fiduciary duties are mainly based on loyalty, good faith, and avoidance of conflict of interest.⁸ Accordingly, section 76(3)(b) of the 2008 Act requires a director to perform the functions in the company's best interests.⁹ This director's duty creates an obligation to the director to *inter alia*, avoid conflicts of interest when discharging their duties.¹⁰ Under common law and the Companies Act, directors are expected to act in the best interests of the company, hence, they ought to at least recuse themselves and in some instances be required to disclose the nature and extent of the interest to the shareholders when faced with conflicting business interests.¹¹

The concept of fiduciary duties is not clear, and sometimes courts err when attempting to define its scope. For instance, the court in *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (SOC) Ltd*,¹² respectfully erred when it held that directors owe fiduciary duties

6 S 66 of the Companies Act.

7 Coetzee and van Tonder "Advantages and disadvantages of Partial Codification of Directors' Duties in the South African Companies Act 71 of 2008" 2016 *Journal for Juridical Science* 3-8 define partial codification as "an orderly and authoritative statement of the leading rules of law on a given subject, whether the rules are found in statutes or in common law". The authors submit that "[p]artial codification ... entails adopting the general principles of law in the form of a statutory statement while allowing some room for the development of the common law by the application of legal principles". Partial codification leaves room for the judiciary to fill in the gaps, with which the statutory statement does not expressly deal and allows common law to be developed to improve the realisation of rights established under the Companies Act. Some of the advantages of partial codification include making laws easier, clearer, and more flexible. However, some demerits include overregulation and conflicting laws.

8 Cassim et al *Contemporary company law* 3 ed (2021) 686; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 (AD) 168 at 178-179.

9 S 76(3) of the Companies Act.

10 S 76(2)(a) of the Companies Act.

11 Ss 75 and 76(3) of the Companies Act.

12 2015 6 SA 388 (WCC) (the *Mthimunye-Bakoro* case).

to fellow directors.¹³ It should be noted that the correct position that directors owe fiduciary duties only to the company was reinstated in *Hlumisa Investment Holdings (RF) Ltd v Kirkinis*.¹⁴ According to Cassim et al, there are three main elements of a fiduciary relationship namely: (a) that a fiduciary is endowed with some discretion or power; (b) a fiduciary could unilaterally exercise power or discretion to the extent that it affects the beneficiary's legal or practical interests; and (c) beneficiaries could be vulnerable at the hands of a fiduciary.¹⁵ In agreement with Cassim et al, by design, any fiduciary relationship is highly dependent on trust and confidence.¹⁶

This article reviews one of the pivotal fiduciary duties placed on directors: which is the duty imposed on directors to avoid conflicts of interest. One of the *locus classicus* case law in the area is *Keech v Sandford*,¹⁷ which discourages the directors from allowing their personal interests to impede those of the company.¹⁸ The duty to avoid conflicts of interest ought to be applied strictly because it is aimed to be preventive and prophylactic.¹⁹ The Companies Act provides that a director of a company must; under section 76(2):

(a) not use the position of a director, or any information obtained while acting in the capacity of a director to (i) gain an advantage for the director, or for any other person other than the company or wholly owned subsidiary of the company; or (ii) to knowingly cause harm to the company or subsidiary of the company.²⁰

Cassim et al, postulate that section 76(2)(a) covers the “no-profit rule” and the corporate opportunity rule under its scope.²¹ The “no-profit rule” prohibits directors from retaining any profits gained by them being directors and while they were performing their duties as directors.²² Whereas, the corporate opportunity rule prohibits the directors from usurping any contract, information, or other opportunities that properly belong to the company and that come to them in the capacity of a director.²³ Courts have established that it is immaterial that the company

13 S 76(3) of the Companies Act clearly provides that the directors must act in the best interests of the company for a proper purpose. Therefore, the decision in *Mthimunya-Bakoro* deviated from a well-established principle in the statute.

14 2020 ZASCA 83 (3 July 2020) (the *Hlumisa* case).

15 Cassim et al (2021) 691.

16 As above.

17 *Keech v Sandford* 1726 Sel Cas Ch 61.

18 Cassim et al (2021) 721.

19 *Aberdeen Railway Co v Blaikie Bros* (1894) 1 Macq 461 at 471; *Bhullar v Bhullar* (2003) EWCA Civ 424; *Canadian Aero Service Ltd v O'Malley* 1974 40 DLR (3d) 371 (SCC); Cassim et al (2021) 722; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 (AD) 168 at 178-179; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) at 66D.

20 S 76(2)(a) of the Companies Act.

21 Cassim et al (2021) 743.

22 Cassim et al (2021) 725.

23 *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 620 (SCA) (the *Da Silva* case) para 18. Cassim et al *Law of Business Structures* 2 ed (2022) 362.

would or could not take the opportunity.²⁴ The corporate opportunity would be either the one the company was actively pursuing, within the “existing or prospective business activities”, or within the scope or line of the business.²⁵ A corporate opportunity is treated as a company’s asset which extends from the property to information.²⁶ It is submitted in agreement with Cassim et al that the duty to avoid conflicts of interest by directors is a central one, in particular, it requires the fiduciary to account for any profit made in breach of his/her fiduciary duties.²⁷ In consolidating, one must remember that the policy rationale for the no-profit rule is to underpin the fiduciary duty on the undivided loyalty of the fiduciary to the company.²⁸ Similarly, the corporate opportunity rule prohibits a fiduciary from using confidential information obtained as a fiduciary for purposes that are detrimental to the company.²⁹ It is in this context that the corporate opportunity rule would be surveyed and assessed against the backdrop of the *Modise* case.

3 Fiduciary duties of a director on multiple boards: through the *Modise* case

3 1 Facts and issues

In the *Modise* case, the first and second appellants were Jacob Modise (Mr Modise) and Batsomi Power (Pty) (Batsomi). Mr Modise was one of Batsomi’s directors. The main issue was that Mr Modise who was also the respondent’s chairman, Tladi Holdings (Pty) Ltd (Tladi), had diverted a corporate opportunity belonging to Tladi to Batsomi.

The facts and events that gave rise to the issues are as follows. Mr Modise and Jonathan Sandler (Sandler) were the representatives and main witnesses of Batsomi and Tladi respectively.³⁰ Sandler and Mr Modise once previously worked together for Johnnic Holdings Ltd (Johnnic). Sandler left in the year 2000 and subsequently acquired a 68 per cent shareholding in Muvoni Contracting Services (Pty) Ltd (Muvoni), a small electrical company through a family trust.³¹ Sandler’s interests extended to doing business with municipalities and State-Owned Enterprises and to successfully do so it was supposed to be compliant

24 *Da Silva* para 19; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA); *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 (HL) at 389D, and 392H-393A.

25 Cassim et al (2021) 727; *Da Silva* para 18.

26 Cassim et al (2021) 727.

27 Cassim et al (2021) 722.

28 As above.

29 Cassim et al (2021) 729.

30 *Modise* para 3.

31 As above.

with the requirements of Broad-Based Black Economic Empowerment (BEE).³² As Muvoni gained goodwill in the market, its major electrical supplier was ARB Electrical Wholesalers (Pty) Ltd (ARB).³³

In May 2004 ARB began negotiations to complete a BEE transaction through its Chief Executive Officer, Craig Robertson (Robertson), and Chief Financial Officer (CEO), Billy Neasham (Neasham).³⁴ The two sought Sandler's expertise and called Sandler for a meeting.³⁵ However, at trial, Robertson and Neasham could not recall intricate details of the said meeting, due to the time period on record, which was 14 years.³⁶ According to Sandler's testimony, ARB was to allocate 30 per cent shareholding valued at R30 million to a potential BEE partner, a transaction that was to be funded by Nedbank.³⁷ Against the backdrop of failures of other BEE ventures, the perception was that the deal negotiated between ARB and Umbani Mentis Electrical (Pty) Ltd (Umbani) would also fail.³⁸ Sandler was prepared to then exploit the potential ARB opportunity, should the failure of the ARB-Umbani deal materialise.³⁹ In August 2004 and unknown to Sandler, ARB managed to conclude a BEE deal with Umbani.⁴⁰ Hence, Sandler continued to pursue opportunities for Muvoni in the electrical field and focused on researching ARB, Cullinan Industrial (Pty) Ltd (Cullinan) a manufacturer of ceramic insulators, and Weltex specialising in boring underneath roads.⁴¹

In September 2004, Sandler approached his previous business partner and Ghanaian businessman Sir Sam Jonah to discuss the said opportunities and create an electrical conglomerate.⁴² The conglomerate would include Muvoni, ARB (should the Umbani deal flop), and three other entities, Aberdare, Altech, and Cullinan.⁴³ The two formed Empalane Investments (Pty) Ltd and invested R5 million each into the company. Empalane ultimately became a major shareholder of Tladi.⁴⁴

It was common cause that Mr Modise was a well-established black businessman, BEE compliant, and potentially interested party. Sandler in his testimony alleged that on 7 November 2004, he approached Mr Modise with the same business idea that was presented to Jonah.⁴⁵ The

32 As above. See also the objectives of the Broad-Based Black Economic Empowerment Act 53 of 2003.

33 *Modise* para 4.

34 As above.

35 As above.

36 As above.

37 *Modise* para 5.

38 As above.

39 As above.

40 *Modise* para 6.

41 As above.

42 *Modise* para 7.

43 As above.

44 As above.

45 *Modise* para 8.

related opportunities included the ARB one and the 68 per cent share ownership by Muvoni in the Electrical Holding Company which would be named Tladi.⁴⁶ This meeting was a bone of contention in the court *a quo* where Mr Modise refuted having discussed the ARB opportunity.⁴⁷ However, after cross-examination in the trial court, it was correctly held that there were inconsistencies and some evidence of circled words in Mr Modise's diary that directed the court to conclude that Mr Modise was actually at the meeting.⁴⁸

Sandler testified that there were further meetings that Mr Modise and himself held, including meeting all potential BEE partners, like Jonah and his son.⁴⁹ The initial agreements had a general and widely crafted "non-competition clause" because Sandler had explained that similar ventures existed between Sandler and Mr Modise.⁵⁰ How the ventures between Mr Modise and Sandler worked was as follows: firstly, they would continue to pursue their own interests and secondly, they would pursue mutual interests. Such mutual interests included the ARB opportunity.⁵¹ In his testimony, Mr Modise contended that he understood that the parties could still compete.⁵²

Mr Modise joined Muvoni's Board on 1 December 2004 as a Director and was appointed as a Chairman of Tladi on 14 December 2004, during that same day a shareholder agreement was concluded.⁵³ The parties to the agreement were Empalane, Batsomi Investment Holdings (BIH), Hapang Business Solutions, Lukhele, Bounomano, and Boomerang Trading 4 (Pty) Limited, which was later renamed Tladi.⁵⁴ On 22 February 2005, Hapang withdrew from the agreement, and a new agreement was signed effective from 14 December 2004.⁵⁵ Sandler testified that he spoke with Neasham after the coming into effect of the above agreements to inform him that Mr Modise was interested.⁵⁶ It appears that it makes sense to assume that since Mr Modise was now the Chairman of Tladi and on the board of Muvoni, which had a business relationship with ARB, he would not have skipped the conversation about the ARB opportunity.⁵⁷

46 *Modise* para 9.

47 As above.

48 As above.

49 *Modise* para 10.

50 *Modise* para 11.

51 As above.

52 *Modise* para 12.

53 *Modise* para 14.

54 As above.

55 As above.

56 *Modise* para 15.

57 As above.

On 27 October 2006, and in terms of the then section 220(3) of the Companies Act of 1973 (the old Companies Act) Tladi passed a resolution that Mr Modise breached his fiduciary duty and that he be removed from the board.⁵⁸ In particular, Mr Modise denied having been introduced to any member of ARB including Neasham by Sandler at a meeting held at a Christmas party in 2004, although in Mr Modise's testimony, there was an insinuation that he may have met Neasham (a board member of ARB).⁵⁹ It was gathered that further discussions about the ARB opportunity were held at Tladi's strategic meeting held in February 2005; at that time Sandler was unsure whether the ARB-Umbani deal was completed and Modise was tasked to pursue the ARB opportunity when it became available.⁶⁰ In May 2005, about 9 months after the ARB-Umbani deal was sealed, their relationship started failing.⁶¹ Then ARB sought to terminate the relationship with Umbani in order to find another BEE partner.⁶² In doing so Robertson identified Mr Modise as an ideal candidate, hence, Robertson invited Mr Modise to a meeting with him and Alan Burke, ARB's chairman.⁶³ In the meeting, Burke offered Mr Modise and his company (Batsomi Power) a deal, the one that Sandler had earlier identified as a possible opportunity.⁶⁴

Mr Modise did not disclose the said meeting to Tladi, even though Sandler asked about the progress of the ARB deal.⁶⁵ In his testimony, Mr Modise stated that in the meeting ARB was not willing to sell shares to Sandler or companies he was associated with because he was white and Burke wanted to deal only with black persons.⁶⁶ However, in his testimony, Mr Modise failed to give a plausible explanation of how the sale of ARB shares to Sandler arose at the meeting.⁶⁷ The unreliability of Mr Modise's testimony, inability to recall Robertson, and failure to call Burke to testify cemented Sandler's testimony and decisions of both the court *a quo* and Supreme Court of Appeal to draw a negative inference on Mr Modise's evidence.⁶⁸ In December 2006, unbeknown to Sandler, Mr Modise, and Batsomi Power concluded a deal with ARB in which Batsomi acquired 26 per cent shareholding in ARB.⁶⁹ Notably, Sandler only became aware of the ARB-Batsomi deal through the newspaper after which he sent a letter to Mr Modise to which Mr Modise did not respond. The omission by Mr Modise led to Tladi's board convening a meeting that passed a resolution that Mr Modise had appropriated a corporate opportunity in favour of his company.⁷⁰

58 *Modise* para 16.

59 As above.

60 *Modise* para 17.

61 *Modise* para 19.

62 As above.

63 As above.

64 *Modise* para 20.

65 *Modise* para 22.

66 As above.

67 As above.

68 *Modise* para 23.

69 *Modise* para 27.

70 *Modise* para 29.

Mr Modise contended that neither he personally nor Batsomi had the fiduciary duty to procure the ARB opportunity for Tladi.⁷¹ He argued that this was so because the corporate opportunity did not accrue by virtue of his association with Tladi.⁷² Further, he argued the opportunity was not available to Tladi because ARB clearly did not want to do a BEE deal with Sandler because he was white.⁷³ Mr Modise further argued that he did not use confidential information in which either Sandler or Tladi had a proprietary interest.⁷⁴

3 2 Supreme Court of Appeal: reasoning, rationales, and functional purposes of fiduciary duties

The court *a quo* and the Supreme Court of Appeal surveyed the fiduciary duties under common law and codification of these duties under section 76(3)(c) of the Companies Act, which specifically deals with the fiduciary duty of directors to exercise their powers in good faith and in the best interests of the company.⁷⁵ I submit that the court *a quo* and Supreme Court of Appeal correctly reinforced that the director's duty to act in good faith and in the best interests of a company as codified in section 76(3)(c) of the Companies Act is one of loyalty and is "unbending and inflexible" to ensure that it is not abused.⁷⁶ In the same light, the Supreme Court of Appeal correctly upheld that the duty encompasses three rules, namely: directors may not place themselves in positions of conflicts of interest or duty (the no-conflict rule); make secret profits (no profit rule); or acquire economic opportunities for themselves (the corporate opportunity rule) that properly belonged to the company.⁷⁷ These rules often overlap even though they are distinct.⁷⁸

The court correctly confirmed the established position that the no-conflict rule does not require an actual conflict to be established; the test is that a reasonable person must think that there was a real sensible possibility of conflict.⁷⁹ Similarly, the no-profit rule applies even if the company would not have made a profit, that is, even if a director has not profited at the company's expense.⁸⁰ In this context, profit is not confined to money but includes every advantage or gain obtained by the offending director.⁸¹ Similarly, the corporate opportunity rule is not confined to assets or property only but extends to confidential information used by directors for personal gain.⁸²

71 *Modise* para 34.

72 As above.

73 As above.

74 As above.

75 *Modise* para 35.

76 As above.

77 As above.

78 As above.

79 *Modise* para 36.

80 As above.

81 As above.

82 As above.

The Supreme Court of Appeal referred to *Da Silva v CH Chemicals (Pty) Ltd*⁸³ in confirming the prohibition of directors from expropriating the economic opportunities of a company for their personal interests.⁸⁴ The principle is that directors must acquire economic opportunities for the benefit of the company and such “corporate opportunity” is equated to the “property” of the company.⁸⁵ Should the corporate opportunity be acquired by a director for personal interests at the expense of the company, the company has a claim against the director in breach to disgorge any profits which the director may have made as a result of the breach and damages suffered thereby.⁸⁶ The Supreme Court of Appeal correctly held that the company could not have taken up the opportunity but that such an opportunity should be properly categorised as a “corporate opportunity”.⁸⁷ I confirm that the Supreme Court of Appeal correctly held that defining the scope of corporate opportunity is cumbersome; for instance, defining the extent of an opportunity that the company was “actively pursuing” or one “that falls within the company’s existing or prospective business activities;”⁸⁸ or which related to the operations of the company within the scope of its business” or falling within “its line of business”.⁸⁹

Remarkably, the position in *Da Silva*, which was confirmed in the *Modise* case, is that it is irrelevant that the corporate opportunity would not have materialised.⁹⁰ Regardless, the director remains under a duty to disclose its existence and information pertaining to the opportunity to the company.⁹¹ The inquiry would involve a close and careful examination of all the relevant circumstances, including the opportunity in question⁹² to determine whether the exploitation of the opportunity by the director, whether for the director’s own benefit or that of another, gave rise to a conflict between the director’s personal interests and those of the company which the director was then duty-bound to protect and advance.⁹³

The Supreme Court of Appeal agreed with the court *a quo* that Sandler initially, and then Tladi, had actively pursued the ARB opportunity as one of the four opportunities open to the company.⁹⁴ ARB was within Tladi’s business strategy and Mr Modise was tasked with pursuing the opportunity.⁹⁵ The offer by Burke of the opportunity to Mr Modise in May 2005 created a conflict of interest between his interests and that of Tladi,

83 *Da Silva* para 18.

84 *Modise* para 37.

85 As above.

86 As above.

87 As above.

88 As above.

89 As above.

90 *Modise* para 38.

91 As above.

92 As above.

93 As above.

94 As above.

95 *Modise* para 39.

and Mr Modise should have realised it.⁹⁶ The Supreme Court of Appeal found not only that Mr Modise failed to disclose the ARB opportunity and concealed the fact that he was pursuing the opportunity for his personal interests.⁹⁷ Even after concluding the deal with ARB in 2005, Mr Modise actively avoided Sandler,⁹⁸ who only discovered the ARB-Batsomi deal through a media release.⁹⁹ The Supreme Court of Appeal correctly confirmed that Mr Modise appropriated the ARB deal instead of acting in good faith and in Tladi's best interests.¹⁰⁰

Mr Modise's two remaining contentions were that: First, it is argued that the opportunity did not arise by virtue of Modise's association with Tladi and was in any event unavailable to Tladi.¹⁰¹ Secondly, the information pertaining to it was not confidential because Tladi had no proprietary interest in it.¹⁰² It is submitted that the Supreme Court of Appeal correctly upheld that it is irrelevant that the opportunity would not have materialised or for that matter, it had been initiated by ARB.¹⁰³ Once Mr Modise was aware that Tladi was pursuing the opportunity, the fiduciary duty was triggered since when the opportunity became available he was a fiduciary to Tladi.¹⁰⁴ Accordingly, the court was correct when it held that Mr Modise was not entitled to act in his personal interest without disclosing it or getting the approval of Tladi.¹⁰⁵ When dealing with Mr Modise's second contention the Supreme Court of Appeal reinforced the position that a breach of the corporate opportunity rule existed even if Tladi had no proprietary interest in the information. Accordingly, such a position as held by the Supreme Court of Appeal is correct in that there is no legal requirement in the corporate opportunity rule for a company to have a proprietary interest in any information.¹⁰⁶ It is sufficient that the acquisition of the ARB opportunity was integral to Tladi's business strategy for Mr Modise to be saddled with a fiduciary duty.¹⁰⁷ Therefore, I submit that the Supreme Court of Appeal should be applauded for correctly concluding that in the given circumstances, Tladi established its claim against Mr Modise.¹⁰⁸

3 3 Reflective assessment of the decision in the *Modise* case

Directors, especially those serving on multiple boards must be extra vigilant when presented with corporate opportunities during the

96 As above.

97 As above.

98 As above.

99 As above.

100 As above.

101 *Modise* para 40.

102 As above.

103 As above.

104 As above.

105 As above.

106 As above.

107 As above.

108 As above.

subsistence of their directorship. The *Modise* case holds lessons for directors who sit on multiple boards requiring them to understand the rules surrounding handling corporate opportunities before expropriating one. The wisdom behind the difficulty to serve two different boards is well-established and its roots can be traced back to more than a thousand years ago. For example, the difficulty to serve two boards can be likened to the analogy given in the King James Bible, by Jesus Christ of Nazareth himself on one occasion where he pointed out that “No man may serve two masters; for either he will hate one and love the other or else he will hold to one and despise the other”.¹⁰⁹ Directors who sit on different boards of companies competing in the same market face extreme difficulties in pursuing opportunities because the pursuit of the same will normally be tainted with conflicts of interest. Therefore, section 75(3) of the Companies Act could be a catch-all provision that requires directors in the named circumstances to recuse themselves and in other scenarios disclose such conflicts of interest.

This article argues that once a director accepts that position in a company the fiduciary duty is triggered, thus, any personal interest should be expressly disclosed and authorised; otherwise, every act should be in the best interests of the company. The rules of the corporate opportunity ought to be stringent to ensure that anyone who signs up as a company director is compliant. Accordingly, this article concurs with the straight-jacket nature of the judgment in the *Modise* case because it does not allow directors to misrepresent expropriated corporate opportunities as opportunities that were not obtained by virtue of their position.

The decisions of both the court *a quo* and the Supreme Court of Appeal are jurisprudentially significant in the context of fiduciary duties and in particular the corporate opportunity rule because they further clarify the position of directors when faced with potential conflicts of interest.¹¹⁰ This article further agrees with the decisions of the court *a quo* and the Supreme Court of Appeal because by holding that it is irrelevant that the opportunity would not have materialised because ARB initiated it, the courts closed the gap where directors at fault may find an escape hatch.¹¹¹ The court *a quo* and the Supreme Court of Appeal were correct when they held that the moment a director becomes aware that the company is or was pursuing the opportunity, the fiduciary duty is automatically triggered.¹¹²

The court *a quo* and the Supreme Court of Appeal also reinforced the principle that there is no legal requirement in the corporate opportunity rule for a company to have a proprietary interest in any information.¹¹³ Such a decision ensures that directors are on the lookout for the company

109 Matthew chapter 6 verse 24 of the Holy Bible, *King James Version*.

110 *Modise* paras 38-40.

111 *Modise* para 40.

112 As above.

113 As above.

and acting in the best interests of the company whenever faced with any corporate opportunity.¹¹⁴ In this case, the court *a quo* and the Supreme Court of Appeal correctly held that Mr Modise was under a fiduciary duty to Tladi because he was a director and he unlawfully expropriated a corporate opportunity that belonged to the company. Further, the courts confirmed the legal position that requires directors in the position of Mr Modise to disclose to the company or seek express permission from the company should they be faced with potential conflicts of interest in the pursuit of corporate opportunities.¹¹⁵

This article supports the reasoning of both the court *a quo* and the Supreme Court of Appeal which confirm and advance one of the broader objectives of the Companies Act on directors' duties, namely, "to promote the best interests of the company".¹¹⁶ The Supreme Court of Appeal and the court *a quo* decisions are in line with the statutory objectives under section 158 of the Act, which provides that courts ought to interpret the law in a manner that improves the realisation and enjoyment of the rights enshrined in the Act.¹¹⁷ I submit that by looking beyond South African borders for guidance in corporate opportunity, the court *a quo* and the Supreme Court of Appeal committed themselves to developing the law within the context of corporate opportunity rule. Accordingly, the judgments by the court *a quo* and the Supreme Court of Appeal are in accordance with the law since both the Constitution and the Companies Act encourage the courts to look into foreign law for guidance and development of the laws.¹¹⁸ The sanction of disgorgement of ill-gotten profits is best suited for circumstances where directors unlawfully appropriated the corporate opportunity belonging to the company.

4 Conclusions

The importance of the partial codification of fiduciary duties in the Companies Act must not be undermined. Partial codification has merits and demerits. For example, partial codification has brought some certainty and clarity in the context of directors' fiduciary duties, however, there are some demerits associated with partial codification like inconsistencies in the law and overregulation. It is reiterated that the overarching policy objective of ensuring that directors act in the company's best interests is because directors are agents that ought to serve the company's interests and not compete with the same company they ought to represent. Against the backdrop of the overarching policy rationale, this article dealt with the corporate opportunity rule in company law by reflecting on the *Modise* case. Both the court *a quo* and the Supreme Court of Appeal reinforced the principle that directors, as

114 As above.

115 S 75 of the Companies Act.

116 Ss 76(3)(b), and 76(4)(a)(iii) of the Companies Act.

117 S 158 of the Companies Act.

118 S 5(2) of the Companies Act; s 39(1) of the Constitution of the Republic of South Africa, 1996.

fiduciaries, must ensure that they do not expropriate a corporate opportunity at the company's expense. This article welcomes the firmly established principles that were confirmed in the *Modise* case for the reasons discussed earlier and these will not be repeated here.