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THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

CASE NO. 5454/2000
DATE: 30/1/2007

IN THE MATTER BETWEEN:

CH CHEMICALS (PTY) LTD	PLAINTIFF
And	
JOSE DUARTE COELHO DA SILVA	1ST DEFENDANT
RESINEX PLASTICS (PTY) LTD	2ND DEFENDANT
RESINEX SOUTHERN AFRICA (PTY) LTD	3RD DEFENDANT

JUDGMENT

SERITI, J

The plaintiff instituted action against the three defendants wherein plaintiff prays for an order in the following terms:

1. Directing the first defendant to account to plaintiff for any moneys, shares, benefits or profits received or derived by him as a result of or by virtue of :

1.1 his relationship with second and/or third defendants and/or

1.2 his relationship with Resinex NV and/ or

1.3 his relationship with Dow Southern Africa (Pty) Ltd and / or

1.4 his relationship with Du Pont Dow Elastomers and/ or

1.5 his relationship with Plastormark (Pty) Ltd.

2. Directing first defendant to make payment to or cession of in favour of plaintiff, all such moneys, shares, benefits, and/ or profits as may upon such account be shown to be due to plaintiff ;

3. Declaring the second and third defendants to be jointly and severally liable, together with the first defendant, for any amounts as may be shown to be owing by first defendant to plaintiff in terms of prayer 2 above.

4. Directing the defendants jointly and severally, the one paying the other to be absolved, to make payment to plaintiff of the sum of R 75.6 million.

5. Postponing the final determination of the relief sought in prayers 2 and 3 hereof, pending the finalisation of the accounting exercise referred to in prayers 1 and 3 above.

6. Directing the defendants, jointly and severally, the one paying the other to be absolved, to make payment to plaintiff of the sum of R 1 975 420 - 00.

7. Interest on the aforesaid amounts, *a tempore morae*, at the rate of 15.5% per annum.

8. Costs of suit.

9. Further or alternative relief.

In its particulars of claim, the plaintiff alleges that on or about 30th April 1987, plaintiff and first defendant entered into an employment contract, which was partly written and partly verbal in terms of which the first defendant was employed as the plaintiff's accountant.

On the date mentioned above, the plaintiff and the first defendant also entered into written agreement entitled "Employee Agreement Trade

Secrets and Patents," a copy of which was annexed to the summons and marked "CH 1." (The confidentiality agreement).

The plaintiff's further particulars further alleges that during 1992 the first defendant was promoted to the position of joint Managing Director of the plaintiff and during 1995 first defendant became the sole Managing Director of the plaintiff.

The following were express, or implied or tacit terms of the first defendant's contract of employment with the plaintiff:

1. First defendant will not use the plaintiff's confidential information which came into his possession by virtue of his employment with the plaintiff to the prejudice of the plaintiff, nor would he divulge such confidential information to any third party and more particularly, not to any competitor of the plaintiff.

2. First defendant undertook in accordance with his fiduciary duty to the plaintiff to

   2.1 advise the plaintiff of all and any information which came to his knowledge and which was material to the business of the plaintiff;

   2.2 act in the best interest of the plaintiff;

2.3 refrain from performing any act which would give rise to a conflict between the interests of the plaintiff and those of the first defendant and/or any third party;

2.4 advise the plaintiff of any such conflict of interest which may arise;

3. As a result of first defendant being employed by plaintiff in the capacity of Managing Director of plaintiff, first defendant owed plaintiff a number of fiduciary duties in terms of which he was obliged:

3.1 to act *bona fide* in the interests of the plaintiff;

3.2 to avoid placing himself in a position whereby he has or can have a personal interest conflicting with or which may conflict with his duty to act in the interests of the plaintiff;

3.3 to account to plaintiff for all profits, gains or advantages acquired by him by reason of his office unless such profits were acquired with full knowledge and consent of the plaintiff

3.4 to pursue and acquire on behalf of the plaintiff economic opportunities for the advancement of the plaintiff's business and/ or such economic opportunities as the plaintiff had an interest pursuing for itself, being under an obligation to:

3.4.1 inform the plaintiff of all such opportunities or of such knowledge which he had of such opportunities or of opportunities which might arise in the future; and

3.4.2 refrain from pursuing or acquiring such opportunities for himself or on behalf of others

3.4.3 to refrain from competing with plaintiff including being under an obligation to refrain from

3.4.3.1 acquiring any interest or holding any position or office in any entity which carries on business in competition with plaintiff;

3.4.3.2 setting up a business in competition with plaintiff;

3.4.3.3 assisting any entity which carries on business in competition with plaintiff.

Pursuant to his employment by the plaintiff, first defendant acquired information which was confidential to the plaintiff, including but not limited to information concerning the plaintiff's business and agencies, the plaintiff's business opportunities, the prices at which

products were supplied to and by the plaintiff respectively, the contractual arrangements between the plaintiff on the one hand and its customers on the other hand and between the plaintiff on the one hand and its principals on the other.

The particulars of claim further alleges that

On 1st April 1995 the plaintiff concluded a distribution agreement with Dow Southern Africa (Pty) Ltd, a subsidiary of Dow Europe Holding NV. In terms of the said agreement;

(a) the plaintiff was given a non-exclusive right, for a period of five years, to distribute products as specified therein and as varied from time to time in accordance with the terms thereof

(b) the said agreement was renewable for a further period of five years and was in fact so renewed by the parties thereto in accordance with the terms of the agreement

(c) The plastic products to be distributed by the plaintiff were mentioned or recorded on the said agreement.

(d) The said agreement *further* mentioned that it was the intention of the parties that new or additional products, not listed in the agreement, which would normally be handled by the plaintiff, would be preferentially offered to the plaintiff.

On 1st April 1996, the plaintiff concluded a distribution agreement with Du Pont Dow Elastomers (DDE). In terms of the said agency agreement

(a) the plaintiff was given the non-exclusive rights to sell DDE's products as specified in the said agreement and as varied from time to time by DDE in accordance with the terms of the agency agreement;

(b) either party was entitled to terminate the agency agreement on 90 days written notice to the other

1. CLAIM A

The plaintiff further alleges, in its particulars of claim that:

1. At all material times hereto, and more particularly, whilst first defendant was still employed as managing director of the plaintiff

1.1 plaintiff was pursuing an economic opportunity in the form of establishing a business venture or association with a Belgian company known as Resinex NV and

1.2 plaintiff was duly represented by, inter alia, first defendant in its attempts to establish such a relationship

1.3 plaintiff was interested in alternatively would have been interested in entering into a joint venture with Resinex NV in the manner and style of the joint venture established between first defendant and/or second and/or third defendants and Resinex NV; and

1.4 first defendant became privy to information relating to an economic opportunity in respect of which he knew alternatively he ought to have known that plaintiff would be interested in acquiring the said economic opportunity for itself, namely the establishment of a business relationship with Resinex NV

1.5 first defendant became privy to information relating to an economic opportunity in respect of which he knew

alternatively ought to have known that plaintiff would be interested in acquiring for itself, namely the establishment of a business relationship with Plastormark, and

1.6 first defendant became privy to information relating to an economic opportunity in respect of which he knew alternatively ought to have known that plaintiff would be interested in acquiring for itself, namely the release of additional products, which products would ordinarily have been distributed by the plaintiff and which ought to have been incorporated into the agreement between plaintiff and Dow Southern Africa (Pty) Ltd.

1.7 first defendant became privy to information to the effect that Dow Southern Africa (Pty) Ltd and/or Dow Europe Holding NV intended, in breach of the agreement between plaintiff and Dow Southern Africa (Pty) Ltd, to appoint second and/or third defendants as sole distributors for the plastic products recorded in the agreement between plaintiff and Dow Southern Africa (Pty) Ltd and

1.8 first defendant became engaged in discussions with Resinex NV with a view to establishing a business

relationship between himself and/or third persons and Resinex NV;

1.9 first defendant took steps towards establishing a joint venture and/or business relationship with Resinex NV and/or on behalf of second and third defendant. including but not confined to:

1. 9.1 negotiating with Resinex NV the terms of such a relationship;

1.9.2 registering and/or causing to be registered the second and third defendants;

1.9.3 acquiring a personal interest and holding office in second and third defendants;

1.9.4 establishing the platform from which he and/or second and third defendants and/ or Resinex NV would conduct business; and/or

2. first Defendant became engaged in discussions with a view to establishing a business relationship between himself and/ or second and third defendants and/or third persons and Plastormark

3. First defendant took steps towards establishing a business relationship with Plastormark and/or on behalf of second and third defendants; and/or

4. First defendant became engaged in secret discussions with Dow Southern Africa (Pty) Ltd and/or Dow Europe Holding NV

4.1 with regard to the intention of Dow Southern Africa (Pty) Ltd and/or Dow Europe Holdings NV to terminate plaintiff's position as a distributor of the plastic products recorded in the agreement between plaintiff and Dow Southern Africa (Pty) Ltd; and

4.2 with a view to establishing a business relationship between himself and/or third persons and Dow Southern Africa (Pty) Ltd and/or Dow Europe Holding NV; and/or

4.3 First defendant took steps towards establishing relationship with Dow Southern Africa (Pty) Ltd and/or Dow Europe Holding NV and/or on behalf of second and third defendants.

In the said pleadings, the plaintiff further alleges that first defendant acted in a manner which is contrary to the fiduciary duties he owed to the plaintiff, in that, *inter alia*, he failed to act *bona fide* in the interests of the plaintiff, he placed himself in a position whereby his

personal interests were in conflict with the interests of the plaintiff and his duty to act in the best interests of the plaintiff, he failed to inform the plaintiff of the information to which he became privy to and which he ought to have disclosed to the plaintiff, he failed to disclose to the plaintiff his conduct and his other business interests which were to the detriment of the plaintiff, failed to pursue, on behalf of the plaintiff, economic opportunities he should have pursued on behalf of the plaintiff he pursued, on behalf of other parties, economic opportunities he should have pursued on behalf of the plaintiff, he established a business entity which was in competition with the plaintiff.

In the process of engaging in activities mentioned in the above paragraph, first defendant made use of and exploited resources and information of the plaintiff which were acquired by him by virtue of the position he was holding in the plaintiff company.

As a result of the conduct of the first defendant as aforementioned, first defendant is obliged to account to the plaintiff for all moneys benefits and/or profits received by him by virtue of his conduct as aforesaid and cede and assign and/or make payment to plaintiff of all such moneys, benefits, shares and/or profits.

The plaintiff in the particulars of claim further alleges that second and third defendants knew that first defendant owed to the plaintiff the fiduciary duties referred to above and that in acting in the manner in

which the first defendant did, first defendant was acting in breach of his fiduciary duties to the plaintiff and that first defendant was acting for and on behalf of second and third defendant and/or in furtherance of the interests of second and third defendants.

2nd and 3rd defendants acted wrongfully by aiding and/or assisting first defendant in breaching his fiduciary duties to the plaintiff, despite their knowledge that first defendant owes certain fiduciary duties to the plaintiff.

2. CLAIM B

In regard to this claim, the plaintiff in its particulars of claim alleges that the conduct of first, second and third defendants as mentioned above was wrongful and caused plaintiff to suffer damages in the form of loss of economic opportunities, and as a result, second and third defendants are jointly and severally liable to the plaintiff for the damages suffered by plaintiff as a result of the loss of the benefits of the economic opportunities.

In the premises, first defendant, second defendant and third defendant are jointly and severally liable to the plaintiff in the sum of R75.6 million as calculated in Annexure "CH5" attached to the plaintiffs particulars of claim.

3. CLAIM C

The plaintiff further alleges that, in breach of his obligations, the first defendant

3.1 in conjunction with the second and/or third defendant(s) and/or Resinex NV (acting on behalf of the second and/or third defendants) actively promoted the cancellation of the plaintiff's agency agreement with DDE and the conclusion of a similar agency agreement between DDE and the second and/or third defendants, whilst still employed by the plaintiff

3.2 despite his knowledge of the desire of other people to cancel the agency agreement between plaintiff and DDE, he failed to advise the plaintiff of the threat to the continuation of the agency agreement whilst he was still employed by the plaintiff

3.3 utilised the confidential information to facilitate transaction on behalf of the second and/or third defendant(s) in competition with the plaintiff during the period he was still employed by the plaintiff

3.4 used the confidential information unlawfully to enable the second and/or third defendant(s) to compete with the plaintiff by

3.4.1 appropriating the plaintiff's business opportunities;

3.4.2 soliciting the plaintiff's existing and prospective clients;

3.4.3 acquiring the plaintiff's existing and prospective clients;

As a result of the first defendant's breach of his obligations mentioned above;

(a) The agency agreement between plaintiff and DDE was cancelled by DDE with effect from 31st December 1999;

(b) The transaction reflected in the schedule annexed to the Summons and marked "CH 3" (being an invoice from Resinex NV for products called LLDPE addressed to 2nd defendant dated 23 August 1999) were conducted for the benefit of the second and/or third defendants which, but for first defendant's breach of his obligations, could and would have been conducted for the benefit of the plaintiff;

(c) Further transactions, the full and further details of which are at this stage not known to the plaintiff were similarly conducted on behalf of the second and/or third defendant(s)

which, but for first defendant's breach of his obligations,
would have been conducted for the benefit of the plaintiff

The plaintiff has suffered damages in the amount of R 1. 947 million, as
a result of the cancellation of the agency agreement, which amount is
calculated on the basis of the plaintiff's profits over the period 1997 to
1999 (inclusive) and on the basis that but for the cancellation thereof.
the plaintiff would have retained the agency for at least a further three
years.

The plaintiff suffered further damages in the amount of R28 420 -
00 as a result of the first defendant's neglect of his obligations by
diverting certain transactions mentioned in Annexure CH3 to the second
and/or third
defendant.

4. CLAIM D

The plaintiff further alleges in its particulars of claim that:

At all material times hereto, the Second and/or third defendant(s) knew
that

4.1 The first defendant was employed by the plaintiff as its
managing
director:

4.2 The first defendant was obliged not to divulge the confidential information either during the course of his employment by the plaintiff or thereafter, to a competitor of the plaintiff; including the second and third defendants

4.3 First defendant was precluded from assisting in the cancellation of any of the plaintiff's agency agreements and/or acquisition of such agencies for the benefit of any competitor of the plaintiff, including the second and third defendants.

The second and third defendants' use of the confidential information of the plaintiff and the first defendant's conduct in breach of his obligation, constitute wrongful and unlawful interference in the plaintiff's contractual arrangements with other parties and/or unlawful competition.

The plaintiff further alleges that as a result of the second and/or third defendant's unlawful interference in the plaintiff's contractual relationship with other parties and/or unlawful competition, the plaintiff has suffered damages and will continue to suffer damages in the amounts of R1.947 million and R28 420 - 00 respectively as mentioned earlier.

In its plea, the first defendant stated that on or about 30th April 1987 he entered into an employment agreement with the plaintiff, and added that he was promoted to the position of joint managing director in 1995 and later during the same year he became the sole managing director. He resigned as managing director and employee of the plaintiff on or about 11th June 1999 and *de facto* was thereafter no longer the managing director of the plaintiff. He further admitted the contents of the "Employee Agreement" attached to the Summons as annexure "CHI" and the contents of annexure "CH4", ("Distribution Agreement") entered into between Dow Southern Africa (Pty) Ltd and the plaintiff.

First defendant further admitted the following:

1. That he negotiated a contract of employment and he accepted an offer of employment after his resignation as managing director of the plaintiff had been tendered by him.

2. That the agency agreement between DDE and plaintiff was cancelled with effect from 31st December 1999 but denies that the cancellation occurred as a result of any breach on his part.

3. That second defendant imported the goods more fully set out in annexure "CH3", being off spec polyethylene material but

denies that the plaintiff ever imported or distributed for resale off spec polyethylene material.

First defendant denied all other allegations made against him.

In their plea, second and third defendants admitted that:

1. That the agency agreement between plaintiff and DDE was cancelled with effect from 31st December 1999.

2. That the second defendant imported the goods listed on annexure "CH3" of the plaintiff's particulars of claim.

3. That the first defendant was employed by the plaintiff as its managing director.

The rest of the allegation made by the plaintiff against the second and third defendants were denied by the said defendants.

The plaintiff requested further particulars for purposes of trial from the first defendant and the first defendant supplied plaintiff with following information:

1. That he commenced negotiations in respect of his new employment during June 1999 and that the said negotiations were concluded on or about 16th July 1999.

2. That on behalf of Resinex NV, a certain Benoit De Keyser negotiated the employment contract with the first defendant.

3. That the goods mentioned in Annexure "CH3" were imported during September 1999 and that the first defendant negotiated the order on behalf of the Second defendant

The agreement relating to the said goods was concluded during August 1999.

At the pre-trial conference held during June 2004 the parties agreed that a request will be directed to the court to separate issues of liability and *quantum* in terms of Rule 34 of the Uniform Rules of court.

At the said pre-trial conference it was agreed that the documents contained in the bundles shall serve as evidence of what they purport to be without admitting the truth of the contents thereof and without the need for proving same, subject to the right of each party, upon giving of reasonable notice, to challenge the authenticity of any document, in which event documents so challenged will have to be proved by any party intending to rely upon same.

The defendants agreed that annexures "CHI" (Employee Agreement between plaintiff and 1st defendant), "CH2" (Agreement between DDE and

plaintiff) and "CH4" (Distributor agreement between Dow Southern Africa (Pty) Ltd and plaintiff) were concluded on the dates and terms therein set out. They further admitted that the first defendant was appointed as the financial director of the plaintiff during 1988, and that he held the said position until 1st April 1995 when he was appointed joint managing director.

The defendants further admitted that:

1. on or about 1st April 1996 the plaintiff and DDE concluded the agency agreement, annexure "CH2" to the plaintiff's Particulars of claim on terms and conditions therein contained.

2. Either party to the said agreement was entitled to terminate the agency agreement on 90 days written notice.

3. The existence of Annexure "CH4" being the agreement concluded between plaintiff and Dow and terms therein contained.

4. That second defendant placed an order orally for the goods listed in annexure "CH3" during August 1999, and that the goods were ordered for the purpose of selling same. Second defendant paid for the ordered goods and the said goods

were sold and that second defendant made no profit on the said transaction.

5. Second and third defendants commenced trading on 1st September 1999.

At the commencement of the trial, the plaintiff's Counsel made an application, in terms of Rule 33(4) of the Uniform Rules of Court for the separation of question of liability and *quantum*, and the court ordered that question of liability be determined first and *quantum*, if necessary, will be determined at a later stage.

First witness to be called by the plaintiff is Mr Dennis Hellmann.

He testified that he was the Chairman of the plaintiff from 1987 to date. The plaintiff was formed in 1987 by Mr Columbine and himself. Mr Columbine became Managing Director and he became Chairman of the company.

At some stage, before the formation of the plaintiff, he amongst others worked for a company called Dow Chemicals in various capacities.

The said company was doing business in South Africa as a distributor of chemical and plastic products and it was a member of the Dow Group of International companies.

After his departure from Dow Chemicals (Pty) Ltd he remained a director of the said company until 1987.

During 1987 he was contacted by Dow Chemicals and they advised him that they want to sell their business and leave South Africa. Dow Chemicals had two divisions, namely the pharmaceutical division and the second one was the chemicals, plastics and general division.

After formation of the plaintiff, plaintiff entered into a written distributorship agreement with Dow Chemicals Africa. Plaintiff then distributed the products in South Africa that Dow Chemicals Africa up to that time had distributed.

From that time, the witness and Mr Columbine built up the plaintiff's business.

The plaintiff's company always had three main divisions of business namely the chemical division, plastic division and the polyurethane division.

Towards the end of 1994/beginning of 1995 Dow Chemicals International decided to come and do business in South Africa.

On 4th August 1994 Mr Vin Sinnot who was Vice President of Dow and in charge of Dow's operations in South Africa addressed a letter to Mr Peter Columbine wherein he dealt with certain aspects and the basis

on which Dow International wanted to do business in South Africa. The said letter from Dow International was copied to him.

On 11th August 1994, Mr Columbine sent him (the witness) his comments on the contents of the letter received from Mr Vin Sinnot. Mr Columbine, in his comments stated,*inter alia* that it is only logical that Dow underwrite an acceptable agreement with particular emphasis on the length or duration of the said agreement.

They have been with Dow for many years and when Dow wanted to come back to South Africa they wanted to have an ongoing relationship with Dow and also wanted to grow with them as they produce new products, and for these reasons, they wanted a long term relationship with Dow.

On 1st September 1994, Mr Vin Sinnot addressed a letter to the witness and Mr Peter Columbine. In the said letter Mr Vin Sinnot was confirming the meeting which he held with the witness and Mr Columbine and also recording issues on which they agreed. It was agreed, according to the said letter, that Dow and the plaintiff will enter into 5 years distributorship agreement, which could be extended for a further 5 years and that the extension was subject to agreed performance criteria.

On 12th September 1994, Mr P Columbine, who was the managing director of the plaintiff, sent an internal memorandum to all staff members of the plaintiff, including the first defendant.

In the said memorandum, Mr Peter Columbine stated, *inter alia* that Dow was going to come back to South Africa and the plaintiff was going to have a distribution agreement with Dow, that the main thrust of Dow's direct re-entry related to future opportunities both in terms of imported product development and local manufacture. In the said memorandum Mr Columbine also stated "CH Chemicals will continue to represent Dow for a significant part of their business in South Africa on a long term exclusive basis. The planned changes will become effective on April 1 1995."

On 7th October 1994 Mr Columbine sent him an internal memorandum dealing with the future distribution agreement of the plaintiff. In the said memorandum, he stated, *inter alia* "As discussed with Dow this is based on a ten year exclusive distributorship with normal and mutually agreed performance term."

Witness referred to a letter dated 1st November 1994, from Mr Peter Columbine to Messrs Vin Sinnot and Joaquin Schoch both of Dow which letter was copied to him.

In the said letter, it is stated "We see the work schedule as follows:

(a) A distribution Agreement between Dow and CHC commencing April 1, 1995 for a ten year period on an exclusive basis covering the Republic of South Africa as now constituted."

Mr Joaquin Schoch, who was in the commercial division of Dow, and later became the Managing Director of the new Dow company called Dow Southern Africa (Pty) Ltd replied to the above-mentioned letter of Mr Columbine on 2nd November 1994 and stated, *inter alia*:

"A Dow standard distribution agreement will be made exclusive for you for a period of 5 years and extension for further 5. We will have no problem in getting 10 years approved by Midland.

The exclusivity for one party implies also exclusivity for the other and as such, Dow will expect that the distributor does not promote competitive products, unless discussed and agreed beforehand

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A distributor is a Dow strategic customer and receives priority treatment. It operates there where Dow cannot serve and account properly. The relationship has to be transparent and based on

trust. Common and agreed strategy is a must."

On 28th March 1995 Mr Vin Sinnot addressed a letter to him wherein Mr Vin Sinnot advised him that Dow can only enter into a non exclusive distributorship contract because of certain reasons.

The distributorship agreement between Dow and the plaintiff was signed and it became effective on 1st April 1995.

On 30th March 1995 Mr Peter Columbine addressed a memorandum to the witness, Mr Da Silva and Mr Strzyby (who was joint managing director with Mr Da Silva early in 1995 for a short period and thereafter resigned during the course of 1995, leaving Mr Da Silva as the sole Managing Director). Paragraph 1 of the said memorandum reads as follows:

> "One day before the March 31st deadline I think we have more or less got it all together. Last night I had a telephone conversation with Mr Vin Sinnet and we agreed the wording of a side letter that covers our concerns regarding exclusivity for the distributor contract and ten year time period for both this contract and the urethane new supply contract."

He referred to the letter plaintiff received from Mr Vin Sinnet which letter is headed CHC/Dow Agreement which letter is dated 30th March 1995 and said that what was contemplated was a 5 year agreement which could be extended for 5 years and could be extended further

thereafter. The letter further stated that although the main agreement says that the contract is a non-exclusive one, the letter is saying it is actually an exclusive contract.

He further testified that Dow was in South Africa, they left South Africa and in 1995 they wanted to come back to South Africa - When they came to South Africa, the arrangements were that Dow will do business or distribute their products to big customers and the plaintiff will distribute Dow's products to smaller customers.

The witness referred to the Dow Distributor Agreement. There is a clause which refers to the list of products of Dow that the plaintiff was entitled to distribute, and also to a clause which provides that other items could be added to the list of products that the plaintiff is entitled to distribute. Plaintiff was not entitled to sell or promote goods of other companies which are covered by the agreement without prior consent of Dow.

Throughout the period of the existence of the distributorship agreement from 1995 up to 1999, the performance by the plaintiff was never an issue.

Plaintiff was also selling and distributing products of other companies, namely Dongbu (a Korean chemical company), Phillips Petroleum, Mobil Plastics, etc.

The plaintiff had an oral agreement with Dongbu - The Dongbu distributorship was taken away from the plaintiff after the departure of the first defendant. He believes same was given to Resinex.

Plaintiff had a written agreement with Mobil Plastics - The latter is still supplying the plaintiff with products.

The distributorship agreement with Phillips Petroleum was oral. After the departure of the first defendant Phillips Petroleum stopped supplying the plaintiff with products to sell and/or distribute.

During April 1996 the plaintiff entered into a distributorship agreement with Du Pont Dow Elastomers (DDE). The said agreement was effective from 1st April 1996. It was a three years contract, which was renewable after the expiry of the said period, and it was terminable on 3 months notice.

Mr Da Silva was employed by Dow Chemical before he joined the plaintiff.

At Dow Chemicals, all employees are required to sign secrecy agreements.

Mr Da Silva joined the plaintiff in 1987 and at that time, he signed a secrecy agreement with the plaintiff. He was employed as an accountant and later a financial director. He remained a financial director until March 1995. In April 1995 he became a joint Managing Director with Mr Paul Stribney, and later, after departure of Mr Stribney, during the course of 1995, Mr Da Silva became the sole Managing Director. He remained the Managing Director of the plaintiff until he left the employment of the plaintiff at the end of August 1999.

Prior to Mr Da Silva becoming the joint Managing Director, the Managing Director was Mr Peter Columbine, who left the employment of the plaintiff at the beginning of January 1997.

From April 1995 until his departure, Mr Columbine remained a shareholder and he was concentrating on some business development with overseas companies.

During the period of his employment by the plaintiff, Mr Da Silva was in possession of confidential information of the plaintiff namely information relating to strategies employed by the plaintiff, prices at which the company was receiving goods and prices that the company was charging its customers, all internal developments, information relating to the development of business in general, etc.

Mr Da Silva, who was a qualified accountant, and who signed
secrecy and confidential agreement, was aware of the fiduciary duties
that he owes the
plaintiff.

The auditors of the plaintiff were Deloitte and Touche and they use
to send circulars to the financial directors dealing with fiduciary duties of
the financial director. The said document would also be brought to the
attention of the managing
director.

Mr Da Silva, as Managing Director of the company was reporting to
the Chairman of the
company.

One of the duties of the managing director of the company was to
avoid competing with the company in any manner whatsoever and he
also had to protect the interests of the company and to consider
expanding the operations of the company and seek new business
opportunities
.

From 1995 the plaintiff was seeking ways and means of expanding
or increasing their plastic division and Mr Da Silva was involved in the
said
exercise.

Mr Haullzhausen was employed by the plaintiff in 1995. He worked
in different capacities and departments and he ultimately became second
in charge in the plastics division, reporting to Mr Da
Silva.

Mr Haullzhausen had complete knowledge of the plaintiff's plastic division including knowledge of the plaintiff's customers in the country.

The plaintiff's plastic division offices were situated in Cape Town Durban and Johannesburg.

The witness further testified about Resinex NV. It is a company registered in Belgium situated in Arendonk which manufacture, process and distribute plastic products.

Ravago NV was a company associated to Resinex NV also distributing plastic products and it was registered in Belgium and also situated at Arendonk.

Mr Benoit De Keyser was a director of Resinex NV and Mr Theo Roussins was the Managing Director of Resinex NV.

Plaintiff started discussions with Resinex NV for a possible business relationship in 1995.

Mr Peter Columbine, who was close to Resinex NV and Ravago NV started the discussions and later, Mr Da Silva took over the said discussions, although at all times, as Chairman of the company, he was advised about the said discussions.

Contents of any letter received or send out were discussed by Messrs Columbine, Da Silva and himself.

He referred to a letter dated 15th November 1995 addressed by Mr Peter Columbine to Mr Theo Roussins of Ravago Plastics, after discussing with him and Mr Da Silva.

In the said letter, Mr Columbine, *inter alia*, stated:

> "The meeting in Arendonk has been discussed with my partners, Dennis Hellmann, and our Managing Director, Joe Da Silva. They join me in being positive about our serious intent to develop a joint venture in South Africa with your company and, with this in mind, it seems sensible for us to put more definition into the subject. Perhaps the best way of doing this is to formulate a Letter of Intent which expresses the mutual intentions so that both parties feel confident of exchanging information and doing preparatory work. We should also cover aspects of confidentiality relating to commercial and technical information ----------
>
> If intentions become a reality, we would be prepared to put all our plastics interests into a joint venture with you. Other possibilities involving chemicals and recycling could also be considered in due course"

He referred to a letter dated 8th December 1995 addressed by Mr Theo Roussis of Ravago Plastics to Mr Columbine. In the said letter, Mr

Roussis, amongst others, stated that in principle, the whole idea is exciting for their company.

On 13th December 1995, Mr Peter Columbine addressed a letter to Mr Joaquin Schoch of Dow Southern Africa, wherein he advised him *inter alia* that they are serious about developing a successful business relationship with Ravago and they would like to feel that Dow would be solidly behind them. Copies of all correspondence between plaintiff and Ravago were enclosed.

The said letter was copied to him (the witness) and Mr Joe Da Silva.

He referred to certain information which was prepared by Mr Da Silva, which information was sent to Resinex NV. There was also a memorandum attached to the said information.

In the said memorandum, it appears that Mr Da Silva was supporting the idea of a business relationship between Resinex/Ravago NV and the plaintiff.

On 25th January 1996, Mr Peter Columbine addressed a letter to Mr Theo Roussis. In the said letter he informed Mr Roussis that their

interest to form an alliance with them is as strong as ever and he also informed him about the discussion between plaintiff and Dow Southern Africa. He informed him that in their recent meeting with Dow they

discussed with Dow the possibility of the plaintiff getting distributorship
from Du Pont Dow Elastomers ("DDE"), and that Mr Joe Da Silva will be
in Europe in early February and he will attempt to meet with him (Mr
Roussis).

On 1st February 1996, Mr Columbine sent a memorandum to Mr
Da Silva instructing him, to see certain people when in Europe. He
stressed the importance of Mr Da Silva meeting with people from Ravago
NV and discussing the business opportunities with them, and other
people from other companies mentioned in the said memorandum.

As far as he knows, Mr Da Silva undertook the said overseas visit.

On his return from overseas, Mr Da Silva prepared a report,
entitled "Ravago Plastics - persons visited: Theo Roussis and Benoir de
Keyser - Date February 6 and 7,
1996."

In the said report, Mr Da Silva stated, *inter alia* :

> "The company's roots are in the recycling of plastics
> purchased from major producers, Dow being one of their
> biggest suppliers -- -- -- - -- - - - ---------- -- -- - -- -- - --- -- - - -
> The company, with its Resinex NV distribution of plastics,
> enables them to diversify away from recycling and add value
> to the company. It achieves this on the basis of forming joint
> ventures with management who are active in the business.

Their interest in forming a joint venture in South Africa is to
have a presence and
:

Develop possible opportunities for
recycle plastics - Local companies are
not too efficient - information from
Safripo
l

J. V. with CHC to source materials
from Europe for its C & PP and
Plastics
.

Participate in Dow projects and
evaluate compounding possibilities.

They have a close alliance with Dow and
are clearly trying to pursue distribution
--
Distribution is managed by Benoir de
Keyser who is ex-Dow and is a good
contact for Dow Du Pont joint venture as
he has a good relationship with Jean
Louis
Raynaud."

Jean-Louis Raynaud was President of Du Pont Dow Elastomers
(DDE).

The said report ends by saying that Resinex NV offers a full range of plastics and has good access to sourcing of products and that the plaintiff needs to evaluate the opportunities further.

On 26th February 1996, Mr Peter Columbine wrote a letter to Mr Roussis - **In** the said letter he refers to the meeting that Mr Joe Da Silva had with them (people from Ravago Plastics). He further said that Joe has told him and Mr Dennis Hellmann about Ravago's interest in acquiring chemicals and plastics part of their business (plaintiff), and made certain suggestions on how the discussions should progress, and what sort of company structure they could put in place.

On 4th March 1996, Mr Roussis wrote a letter to Mr Columbine, wherein he *inter alia*, requested figures of the company (plaintiff) and ideas on how the shareholders of the plaintiff will participate in the new anticipated business venture.

On 6th March 1996, Mr Da Silva wrote a letter to Mr P. Lederer of Du Pont Dow Elastomers France - **In** the said letter, Mr Da Silva said that he thanks Mr Lederer for the successful meeting they had in Paris on 16th February 1996 and also refers to a distributor agreement that could be entered into.

On 18th March 1996, Mr Da Silva wrote a letter to Mr Roussis and in the said letter he refers to a meeting between Messrs Roussis, de Keyser and himself. He further said that:

> "It was very exciting to hear of your ideas on a future joint operation and I still share the same enthusiasm of working together with yourselves and look forward to the next development stage."

At that stage, plaintiff was still interested in a possible joint venture with Resinex/Ravago NV. Plaintiff had Mr Da Silva investigating a possible business relationship with Resinex/Ravago NV and he had full confidence in Mr Da Silva.

On 1st April 1996 Mr Columbine wrote a letter to Mr Roussis. The said letter was copied to Messrs Joe Da Silva and Dennis Hellmann.

In the said letter, Mr Columbine *refers* to the balance sheet and income statement of the plaintiff. He further explained how they operate the plaintiff's business. He ends the letter by urging Mr Roussis to visit the plaintiff in South Africa.

Plaintiff's financial statements were sent to Resinex NV by Mr Da Silva's secretary on 3rd July 1996.

On 22nd July 1996, Mr Columbine wrote a letter to Mr Roussis of Ravago Plastics - copies of the said letter were sent to Messrs Dennis Hellmann, Joe Da Silva and Benoit de Keyser of Resinex. **In** the said letter it is stated:

> "Following the July 9 meeting between Benoit de Keyser and Peter Columbine, it seems appropriate that a summary is recorded.
>
> Resinex is interested in acquiring 50% of the CHC Chemicals/Performance Products (including Separation Systems?) and Plastics businesses as a first step with a second step resulting in total control. The second step would be accomplished over an agreed time period on a basis similar to that being ---- with Primoplast in Switzerland."

Before the above-mentioned letter was written contents thereof were discussed by Messrs Columbine, Da Silva and himself.

On 17th October 1996 secretary of Mr B de Keyser wrote a letter to messrs Columbine and Da Silva advising them that Mr B De Keyser will visit South Africa on 31st October to 3rd November 1996.

On 18th October 1996, Mr Peter Columbine wrote a letter to Mr Benoit De Keyser, wherein he advised him that they have made hotel booking for him - He further said the following in the said letter:

"Joe and I would like you to meet his two people responsible for our Plastics business, i.e. Paul Rogers and Deon Holtzhausen. They will be prepared to give you an overview of our business and the situation of the South African market. From our side, it is very important that we obtain a good understanding of how the involvement of Resinex can enhance our business."

Copy of above-mentioned letter was copied to Mr Da Silva.

On 6th December 1996, Mr Columbine send Mr De Keyser certain financial information of the plaintiff, balance sheets, income statements and financial statements.

The above-mentioned confidential information of the plaintiff was sent to Resinex NV in an attempt to show Resinex NV that the plaintiff could be a very valuable partner to Resinex NV in this country particularly because plaintiff's staff members knew the business, customers and South Africa and plaintiff could play a big part in selling products of Resinex NV in this country.

On 10th February 1997 Mr de Keyser wrote a letter to the plaintiff wherein he made certain proposals. The letter reads partly as follows:

"We wish to purchase 50% of these departments now, and 50% spread over the following 5 years, giving us total

ownership of the new company 5 years from now. We would appoint Joe Da Silva general manager of the new company. We can understand that at the beginning he would still be involved in current affairs for CHC Chemicals, but in 2 years he would be working entirely for the new company. ---- Our evaluation of the total value of the departments concerned of CHC Chemicals is 3,000,000 DEM."

The departments referred to above is C & PP and the Plastic Business.

On 17th April 1997, Mr Da Silva replied the letter of Resinex NV and advised them that the offer made by Resinex NV in the above mentioned letter was rejected but a proposal was made for plaintiff and Resinex to work together as plaintiff believed that it has made serious inroads in plastics business in this region.

Mr Da Silva and the witness were pursuing a chance to do business with Resinex NV on a distribution basis.

On 15th May 1997 Mr Joe Da Silva wrote a letter to Mr De Keyser wherein he advised him that he (Da Silva) will be in Europe from 16th June and he would like to see Mr De Keyser during the said visit. He further said that he will be attending a distributor meeting at Antwerp during the said period.

On 11th September 1997, Mr Da Silva wrote a letter to Mr De Keyser. In the said letter he refers to the discussions they had in June, and further says that he discussed with Dennis Hellmann that it would be in their interest that Resinex takes 50% or more shares of the CH Chemicals and Plastics Division.

Witness confirmed that Mr Da Silva had discussions with him as stated in the above-mentioned letter. He was supporting Mr Da Silva in his attempts to establish a business relationship with Resinex NV.

In the letter by Mr Da Silva mentioned above, he also informed Mr de Keyser about Dow South Africa (Pty) Ltd attempts to acquire Sentrachem - He further said that there is a lot in Sentrachem that could be of interest at a later stage when Dow start selling off various parts of the business that it does not want.

Mr Hellmann then testified that the relevance of Dow acquiring Sentrachem was that they then acquired a big plastic manufacturer in South Africa and this is where the Plastomark part came into the picture - At that stage, Mr Da Silva was informing Resinex NV that some big opportunities were opening up in South Africa because of Dow's take over attempts of Sentrachem.

In the middle of December 1997, he went to Europe with Mr Da Silva. Amongst other people, they met with Messrs Roussis and de Keyser.

On 22nd December 1997 he wrote a letter to messrs Roussis and de Keyser thanking them for having shown him and Joe Da Silva what Resinex and Ravago are all about. He further said that Joe and him were impressed and Joe and him were confident that they can build a wonderful business with Resinex/Ravago South Africa.

He further advised them that Mr Da Silva will contact them in the coming week.

On 23rd December 1997, Mr Da Silva wrote a letter to messrs Roussis and De Keyser.

In the said letter, he thanked them for their kind hospitality and successful meeting they recently had in Ardendonk. He further confirmed that they agreed that Resinex and plaintiff will establish a joint venture. He further suggested that a method in which they can form the joint venture. He further suggested that the new joint venture should attempt to obtain Du Pont Dow/Chermserve business, which is the tyrin business which Chermserve obtained from Du Pont Dow Elastomers.

At that stage, plaintiff was also obtaining tyrin business from Du Pont Dow Elastomers.

On 15th January 1998, Mr Roussis sent a note to Mr Da Silva advising him that he will be in South Africa on 10th and 11th February 1998.

Mr Da Silva responded and made arrangements to meet with Mr Roussis in South Africa.

On 28th January 1998 he wrote a letter to Mr Jean-Louis Raynaud, the President of Du Pont Dow Elastomers, wherein he (the witness) advised him that he has made contact with Messrs Roussis and De Keyser and he is positive that Resinex NV and the plaintiff will form a joint venture in South Africa.

In a meeting that he had with Mr Jean-Louis Raynaud in Europe the previous year, Mr Raynaud encouraged him to meet with both Messrs Roussis and de Keyser.

On 28th February 1998 Mr Da Silva wrote a letter to Mr Roussis of Ravago Plastics.

In the said letter he refers to the meeting which took place on 11th February 1998 between Messrs Roussis, Bravo De Pauw, both of Ravago other staff members of plaintiff and himself, which meeting took place in South Africa. He said in the said letter that he believes that they have set the foundation for a successful plastics business with Ravago in South Africa.

After the meeting of 11th February 1998 referred to above, Mr Da Silva gave him a report of the said meeting. Mr Da Silva was enthusiastic about the possibility of getting the business relationship between Ravago and plaintiff going ahead full steam. Managers of plaintiff gave the Ravago people more information about products the plaintiff was selling in South Africa and their price structures.

During the period 1998, to 1999 the anticipated joint venture between the plaintiff and Resinex/Ravago never materialised. He kept on asking Mr Da Silva what was happening about the proposed joint venture and Mr Da Silva would tell him that he is still pursuing the idea.

On 11th June 1999, he was going overseas in the evening.

In the morning of the said date, he was in his office and Mr Da Silva came into his office.

Mr Da Silva advised him that he has received an offer for employment from Resinex and he was going to accept the said offer. He was shocked and he asked Mr Da Silva what are we going to do now and Mr Da Silva informed him that he will stay, continue with his duties until end of October 1999.

At that stage, he hoped that if Mr Da Silva was in the driving seat of the company that Resinex NV was going to start in South Africa, they (plaintiff) would be able to do some business with Resinex. Later it

turned out that the joint venture with Resinex that they were expecting.
Mr Da Silva took same for himself.

After his meeting with Mr Da Silva he sent an e-mail to all staff members at about midday.

In the said e-mail, he advised the staff that Mr Da Silva will be leaving the plaintiff having accepted a position with Resinex/Ravago and he will be leaving at the end of October 1999. This was in accordance with his discussions with Mr Da Silva.

The witness further testified that in the e-mail referred to above he further informed the staff that they have very friendly relationship with Resinex and Ravago for some time and they believe that Joe Da Silva couldn't refuse an offer from Resinex/Ravago because he (Joe) wanted to be more international and they could only wish him well.

On the same day, during a discussion with him, Mr Joe Da Silva asked him if he (Joe) can continue with his overseas meetings with some of their principals and he advised him (Mr Da Silva) not to continue with the said meetings as he could not see any reason for Mr Da Silva to go overseas to see their principals.

Mr Da Silva was going to stay on until October as the Managing Director performing all duties he was performing all along.

He went to Europe on **11**th June 1999 and came back at the end of June 1999.

Either towards the end of July 1999 or early August, he had a discussion with Mr Da Silva. He said to Mr Da Silva that he thought Mr Da Silva no longer had his heart in the business any more and since he had decided to leave maybe it was better that he leaves earlier than end of October. They then agreed that Mr Da Silva will leave the company at the end of August 1999.

On 27th July 1999, Mr Da Silva wrote him a letter wherein he said that he officially tendering his resignation as Managing Director and employee of the plaintiff, and his departure date will be 31st August 1999.

He did not receive the above mentioned letter. He saw it for the first time in September 1999. They found same in the personal file of Mr Da Silva.

Mr da Silva who was a director and public officer of the company, was removed from the said position as required by the Companies Act by resolution on 31st August 1999.

On Friday 27th August 1999 a farewell party was held for Mr Da Silva. At the said farewell party, Mr Da Silva was given a gift by the

plaintiff company and the staff of the company thanked him for his

that certain information has been deleted from the computer of Mr Da
Silva although there was a back-up of
it.

A day prior to the said farewell party he had lunch with Mr

After certain information was received, plaintiff launched an Anton
Pillar application - Certain documents were obtained as a result of the
Anton Pillar application, and one of the said documents is copy of an
agreement between Jose Duarte Coelho Da Silva (JDS) and Resinex NV.
In the said agreement Resinex NV was represented by Theo Roussis and
Benoit De Keyser and the said agreement was signed at Sandton on 16th
July 1999. The said agreement, *inter alia*, states the following:

"Whereas JDS and RNV desire to enter an agreement to start
an operation in South Africa with the objective of carrying on
a business in the distribution of plastic raw materials and
other products represented by the Resinex/Ravago Group.--

1. The Holding Company will be formed called Resinex
Holding (Pty) Limited, with the share capital being 75%
RNV and 25%
JDS.

2. A subsidiary company will be formed called Resinex
Plastics (Pty) Limited with the share capital being 90%
owned by Resinex Holdings (Pty) Limited and 10% by
Leon van der Merwe---------"

On the
Mr
Haullzhauze
Mr
Haullzhauze
informed
him that he
(Mr
Da Silva) wa
was
very evasive and
Mr
Haullzhauzen
not.

After the
certain
investigations,
correspondence
his telephone call
effect

Witness referred the Court to certain documents which were received from the back-up tape on Mr Da Silva's personal computer as well as his electronic diary and some expense account notes.

In one of the e-mails, which Mr da Silva sent to Mr Joaquin Schoch who was the Managing Director of Dow Southern Africa, it is stated by Mr Da Silva that he will be having guests from Du Pont Dow Elastomers from 8th to 10 June. The said e-mail is dated 27th May 1999.

The plaintiff's staff members were not aware of the meeting referred to in the above-mentioned e-mail.

Reference was made to the expense account of Mr Da Silva. He claimed from the plaintiff an amount of R 807 - 00 for dinner and drinks at a place called Buckle Boom on 5th June 1999, guests who were entertained at the said place is Mr Gabard of Du Pont Dow Elastomers, Mr Deon Haullzhausen and their wives.

He did not know about the said dinner.

On 6th July 1999 another e-mail was sent by Mr Da Silva re:meeting with Heinzi. The said e-mail states that "will arrange golf for the 16th with Joaquin & others". Same was copied to other employees of the plaintiff.

He referred to an entry in the electronic diary of Mr Da Silva, where it is noted that "Lunch LEON." He knows Mr Leon van der Merwe, a former employee of the plaintiff who was, at that time working for Dow as one of the employees working in the plastic division under Mr I Schoch.

Another entry in the said electronic diary refers to lunch with Mr I Schoch on 10th June 1999.

He was not aware of the lunch referred to in the above-mentioned entry in the electronic diary of Mr Da Silva.

He referred to an e-mail dated 30th June 1999 addressed by Mr Da Silva to Mr Patrick Lederer of Resinex - In the said e-mail Mr Da Silva is giving Mr Lederer the full particulars of potential customers in South Africa.

He further referred to certain correspondence between Messrs Da Silva, Haullzhausen and a representative of Lexicon, a subsidiary of Resinex, and said that Messrs Da Silva and Haullzhausen were attempting to secure a transaction for Resinex.

During July and August 1999 Mr Da Silva phoned Lexicon on several occasions and he does not why would Mr Da Silva been phoning that company for - He also phoned Resinex several times for reasons unknown to him

Mr Deon Haullzhausen sent an e-mail to Mr Jean-Paul Gabard and at the end of the said e-mail he said "keep well and see you on 7th September in sunny South Africa."

On 6th or 7th of September 1999 he (the witness) had lunch with Mr Gabard. At the said lunch, Mr Gabard told him that the plaintiff's distributorship agreement with Du Pont Dow Elastomers was going to be terminated with 90 days notice.

The Du Pont Dow distributorship agreement was for 3 years, effective from 1st April 1996 and they were hoping that it was going to be renewed.

On 13th September 1999, they received a notice from Du Pont Dow Elastomers stating that the distributor agreement between them and the plaintiff will be terminated with effect from 31st December 1999.

Later, 6 months to a year after the termination of the distributorship agreement between DDE and the plaintiff, they discovered that Resinex South Africa was distributing the products of DDE.

The distributorship agreement between DDE and Chemserve was also terminated and the products of DDE which were distributed by Chemserve, were also given to Resinex South Africa to distribute.

On 3rd December 1999, Mr Joaquin Schoch of Dow Southern Africa (Pty) Ltd wrote a letter to the plaintiff and in the said letter he advised plaintiff that they are deleting or removing certain items from the list of items that the plaintiff was distributing for Dow Southern Africa (Pty) Ltd in terms of the distributor agreement plaintiff entered into with Dow. The said agreement was effective from 1st April 1995 and was valid for a period of 5 years and renewable for a further period of 5 years.

The practical effect of the above-mentioned letter was that Dow deleted virtually all plastic products that plaintiff was distributing in terms of the distributor agreement between plaintiff and Dow.

Later, the products which were deleted by Dow from the said distributor agreement were given to Resinex Southern Africa, (Pty) Ltd the 3rd defendant to distribute.

He disputed the fact that Dow removed certain items from the distributor agreement. He held meetings with senior executives of Dow International to resolve the problem. The end result of the said .. was that Resinex retained the distributorship of Dow's products and plaintiff lost out.

He referred to an invoice dated 9th November 1999. The invoice was sent to Resinex Plastics (Pty) Ltd by Dow. It referred to a product that was on the list of products that the plaintiff was distributing in terms of

the distributor agreement with Dow. At that time, the distributor agreement between plaintiff and Dow was still in force and same could only be terminated by June 2000.

He further referred to other invoices dated 1st, 26th, and 28th November 1999 sent by Dow to Resinex Plastics (Pty) Ltd which deals with the products that the plaintiff was entitled to distribute in terms of the agreement with Dow.

Mr Da Silva knew that the products referred to in the above mentioned invoices were on the distributor agreement between Dow and the plaintiff.

The agreement between Du Pont Dow Elastomers SA and the plaintiff was signed by Mr Da Silva on behalf of the plaintiff, as the managing Director of the plaintiff.

Mr Da Silva was aware and had full knowledge of the written agreement between Mobile and plaintiff, and the oral agreement with Phillips Petroleum.

After departure of Mr Da Silva, they received no products from Phillips Petroleum to sell in South Africa. The same applies to Dongbu Corporation, with whom they did not have a signed distributor agreement.

The two senior staff members of the plaintiff's plastic division was Messrs Da Silva and Haullzhausen and they both left and joined the second defendant.

Mr Leon van der Merwe a former senior employee in the plastics division of Dow South Africa, left Dow to join the second defendant.

At no stage did Mr Da Silva tell him of any danger of losing the distributorship agreements they lost.

The joint venture agreement between Mr Da Silva, second and third defendants was discovered as a result of the Anton Pillar application.

At no stage did Mr Da Silva tell him that he is negotiating the above-mentioned joint venture agreement with Resinex NV.

He was not aware that Mr Da Silva is negotiating with Resinex NV to start a company in South Africa which will compete with the plaintiff.

Paragraph 5 of the joint venture agreement referred to above, reads as follows:

> "Any future acquisitions with particular reference to Mobil or Plastomark, will be done through Resinex Holdings (Pty) Ltd and any new agencies obtained in future by either Resinex Holdings (Pty) Limited or any subsidiary or Group

> Companies of Resinex/Ravago where markets exist in the listed territories will form part of the Resinex Holdings Group and as such sales recorded into the appropriate Group Companies.
> "

After departure of Mr Da Silva Mobil continued to give them products to distribute.

Plastomark is one of the companies that Sentrachem in South Africa were operating and selling their plastics through it.

At some stage, Dow purchased Sentrachem - That could have been in 1994.

Plaintiff was hoping and trusting that the products would come to them for distribution as they had the Dow's distributorship agreement for all Dow's products and new products that Dow might introduce into the market.

Mr da Silva was aware of the agreement that plaintiff had with Dow.

Witness referred to a sale of business agreement entered into between Resinex Southern Africa (Pty) Ltd (3rd defendant in this case) and Plastomark (Pty) Ltd and the distributor agreement between Plastomark (Pty) Ltd and Resinex Southern Africa (Pty) Ltd. The sale

agreement was signed on 20th December 1999 and the latter agreement was signed on 1st February 2000 by Mr Schoch on behalf of Plastomark and Mr Da Silva on behalf of Resinex Southern Africa (Pty) Ltd.

Plaintiff would have loved to have been given the right to distribute products of Plastomark that the third defendant was authorised to distribute.

At some stage, he expressed the desire of the plaintiff to distribute the Dow /Plastomark products to Mr Joachim Schoch, as in terms of the Dow distributor agreement, plaintiff was entitled to distribute the said products, but their wish was ignored by Dow.

Under cross-examination he said that Mr Haultzhausen resigned from the employment of the plaintiff on 1st September 1999 and went to join the defendants. Mr da Silva ran the business of the plaintiff as Managing Director until he left the company.

For the first time he heard that Mr Da Silva might leave the employment of the plaintiff is on 11th June 1999 when Mr Da Silva advised him that he wants to resign. When Mr Da Silva informed him about his resignation he was worried that how is the plaintiff going to operate without its capable Managing Director.

In his absence, when he went overseas on 11th June 1999, Mr Da Silva was running the plaintiff's business as he used to.

When he came back from overseas he was told that Mr Da Silva has gone away on leave but Mr Da Silva never discussed that with him before he (Mr Da Silva) went on leave.

He was referred to the print out of Mr Da Silva's electronic diary where it is stated that Mr Da Silva went overseas from 20th July 1999 up to 23rd July 1999, and he was asked if he knew about the said trips and he said no and he further said that the plaintiff did not pay for the said trip.

When Mr Da Silva came back to the office, he realised that his heart is no longer in the business, and after discussing same with him, it was agreed that he will no longer leave at the end of October but he will leave at the end of August 1999. Mr Da Silva told him that he has an offer of employment from Resinex, and he was going to be based in South Africa and he knew that Resinex will be in competition with the plaintiff in the plastics business. He believed that Mr Da Silva was going to be employed by Resinex.

Previously when Resinex was considering coming to South Africa he was aware that Mr Da Silva will play an important role in Resinex's new entity. He was going to be appointed general Manager and he was going to get some equity in the new company.

On 11th June 1999, after informing him about his resignation, Mr Da Silva asked him if he (Mr Da Silva) could still go and visit principals of the plaintiff overseas, and he said no, you have resigned, there is no point in you going overseas.

At the end of August, on a Thursday, during lunch, he asked Mr Da Silva if he was going to take along Mr Haullzhausen and Mr da Silva replied in the negative. When Mr Haullzhausen told him on 1st September 1999 that he was also resigning, he told him to leave immediately as he did not want him to remain at the premises of the plaintiff as he did not trust him. He thought Mr da Silva had something to do with the resignation of Mr Haullzhausen.

As early as 1994 he was aware that Resinex NV has intentions of coming to operate in South Africa and the plaintiff was exploring the possibilities of doing business with Resinex NV in South Africa.

On 10th February 1997 Mr Benoit de Keyser of Resinex offered to buy two divisions of the plaintiff's business namely chemicals and performance products division and the plastics division. He offered to acquire 50% of the two departments initially and the balance over a period of 5 years, giving them total ownership of the new company - An amount of +- R8 million in today's terms was offered at the time offer was made to the plaintiff.

The said offer was not acceptable to the plaintiff, and plaintiff realised that if they do not accept the offer, Resinex will come into South Africa and compete with them.

The plaintiff's main principals were Dow, DDE and Mobile. They also had a written distributorship agreement with Mobile.

They also used to order products from Dongbu Corporation of Korea, Phillips Petroleum and American National Sodiac Ash Corporation on a need basis if the price was right. They had permission from Dow to do so, if Dow is unable to supply them with the said products.

The plaintiff never obtained any business from Resinex despite their efforts to obtain business from Resinex.

They were aware that Dow Chemicals Internationals had taken over Sentrachem and they thought that the new products which Dow acquired as a result of take over of Sentrachem will be given to them (plaintiff) to distribute

He was also aware during September 1997 that Dow, after take over of Sentrachem could sell Plastomark (Pty) Ltd.

During February 1998, the plaintiff believed that there is still a prospect of doing some business with Resinex. The plaintiff wanted to buy products from Resinex, sell them in South Africa, with the hope that

that will build a relationship with Resinex which will culminate in a joint venture between plaintiff and Resinex, but unfortunately that never materialised.

Contact between plaintiff and Resinex had tampered off during 1998.

Counsel for 1st defendant said that Mr da Silva will testify that during the Dow conference in Plimms (overseas), which conference Mr da Silva attended with the witness in December 1998, Mr Da Silva was informed by Mr Benoit De Keyser, privately (in the absence of the witness) that Resinex was going to come to South Africa and he (Mr Da Silva) was made an offer of employment; and the witness said that he cannot comment on that.

It was further said that Mr Da Silva told the witness about the said offer only during February 1999 during lunch, and the witness said that is not true.

After Mr Haultzhausen had resigned, he (the witness) phoned Mr da Silva and informed him about Mr Haultzhausen's resignation and Mr Da Silva informed him that he (Mr Da Silva) does not have a job for Mr Haultzhausen.

He agreed that the DDE distributor agreement was effective from 1st April 1996 and had to endure for an indefinite period, but subject to

90 days notice period if one of the parties intends cancelling the agreement. The agreement further states that no amendment of the agreement shall be valid unless in writing and signed by both parties.

The abovementioned contract was terminated with due notice after 3 years 6 months. Plaintiff received notice of termination of the contract on 7th September 1999.

Witness further testified that, in their discussions, they regarded Resinex NV and Rovago NV as one and the same entity, although in reality, they are two different companies.

He was taken through the typed record of the proceedings and certain portion of his evidence on certain issues was corrected.

It was put to him that Mr Da Silva will testify that the reason for the departure of senior management staff is that the witness's son was playing a prominent role in the company, and he said that that cannot be true as his son was playing a prominent role only in a certain divisions of their business or company.

Witness conceded that 2nd defendant is a trading company and 3rd defendant is a holding company.

The written distributorship of Mobil was retained by them after the departure of Mr Da Silva. Plaintiff also retained the general

distributorship of Dow, except that certain products were removed from
list of products that the plaintiff was distributing on behalf of Dow. The
said distributorship was finally terminated in June 2000. Plaintiff had
oral agreements with Phillips Petroleum and Dongbu Corporation in
terms of which plaintiff buys from the said companies products as the
need
arises.

From his knowledge 2nd defendant is not doing any business with
Du Pont Dow
Elastomers.

Decision not to accept offer made by Resinex NV was taken by
shareholders of the plaintiff, namely the witness and Mr Columbine.

He referred to a letter dated 23 December 1997 addressed to
Ravago Plastics and marked for the attention of Messrs Theo Roussis and
Benoit De Keyser. In the said letter Mr Da Silva was proposing the
formation of a" joint venture partnership" between the plaintiff and
Resinex, and also made proposals relating to the co-operation of plaintiff
and
Resinex.

The proposals made in the above-mentioned letter never
materialised. He was referred to an e-mail message of 13 September
1999 addressed by Mr Schoch Joaquin, former Managing Director of Dow
South Africa to Mr Vin Sinnot head of Dow South Africa. In the said e-
mail, Mr Schoch expressed his displeasure about the behaviour of the

witness and states that if their contract with plaintiff expires, same should not be renewed as he is not interested in working with plaintiff.

Witness was further referred to an e-mail dated 01 November 1999 sent by Mr Joaquin Schoch to several people wherein he informed them that Resinex Ravago (RR) is one of favourite candidates to purchase Plastomark (Pty) Ltd as they meet certain important criteria they took into account when evaluating all the parties who were interested in buying the business division, namely Plastomark (Pty) Ltd.

The sale agreement between Resinex Southern Africa (Pty) Ltd (buyer) and Plastomark (Pty) Ltd (seller) was signed on 20 December 1999 and Mr Da Silva signed the said agreement on behalf of Resinex Southern Africa.

Negotiations leading up to the signing of the sale agreement mentioned above took place during November/December 1999.

Decision to sell Plastomark (Pty) Ltd was taken after Mr Da Silva had left the employment of the plaintiff.

Witness was asked to give details of prospective customers that Mr Da Silva is alleged to have diverted to 2nd and/or 3rd defendant(s), and he was unable to provide the said details.

He further testified that he does not know if Mr Da Silva has any relationship with Dow Southern Africa, Du Pont Dow Elastomers and Dow Europe, but what he knows is that Mr Da Silva is distributing plastomark products and he signed sales agreement on behalf of 3rd defendant.

The witness conceded that Mr Da Silva had nothing to do with the decision of Resinex NV to come into South Africa. He further testified that after Resinex NV had taken a decision to come into South Africa, it was no longer necessary for Resinex NV to pursue negotiations to enter into an agreement with the plaintiff.

He further testified that Mr Da Silva actively promoted the cancellation of plaintiff's DDE distribution agreement as Mr Da Silva had a meeting with them (DDE staff), and went overseas against his instructions. He conceded that their contract with Dow continued after departure of Mr Da Silva.

Plaintiff had an agency agreement with DDE for 3 years 6 months and if the said agency agreement was not taken over by Resinex, same could have continued for an indefinite period.

He conceded that neither the 2nd or 3rd defendant acquired the Dow and DDE distributorship agreements.

He was referred to certain invoices that 2nd defendant received from a company based overseas called Benelux NV, which is a subsidiary of Dow International (and not of Dow Southern Africa) and he said all products of any of the subsidiaries of Dow International, if they are destined for South Africa, must come through the plaintiff.

He expected Mr Da Silva to start working for Resinex on 1 September 1999, but his problem is that Mr Da Silva used plaintiff's time and resources to set-up a company in South Africa for Resinex.

Mr Deon Haullzhausen who was a senior employee in the plastics division of the plaintiff, resigned a day after the departure of Mr Da Silva. After resignation of Mr Holtzhausen, he phoned Mr Da Silva, who informed him that he (Mr Da Silva) does not have any position for Mr Haullzhausen. Mr Haullzhausen was the person dealing with Du Pont Dow Elastomers. To his surprise, Mr Haullzhausen joined the 2nd defendant in January 2000, and that gave him impression that Messrs Da Silva and Haullzhausen planned same long before their resignations from the plaintiff's employment.

He does not know if there is any distributorship agreement between Dow and any of the defendants.

Before the departure of Mr Da Silva, his son Neil was not employed by the plaintiff and he was also not a director of the plaintiff. He

appointed Neil as Managing Director of the plaintiff after departure of Mr Da Silva and after some of his staff members have requested him to appoint Neil as the Managing director.

During June 1997, either at or after the Antwerp conference, Mr Da Silva never told him that Resinex/Ravago are planning to establish business operations in South Africa.

Nobody discussed with him the possibility that Du Pont Dow Elastomers might reduce the number of distributorship agreements they entered into. If they had known that fact, plaintiff would not have continued selling their products.

He gave a history of how the animosity between him and Mr Joaquin Schoch started. Same started some- time between 1994 and 1995.

Plaintiff had several discussions and correspondence with Ravago NV and Resinex NV attempting to form a joint venture or partnership, but nothing materialised. By September 1998 communication between the parties ceased.

Plaintiff believed that after Dow had acquired Sentrachem there is a possibility of certain parts of Sentrachem will be sold off, but nobody knew when same was going to happen.

He did not have a good relationship with Mr Joaquin Schoch who was the Managing Director of Dow South Africa.

He was referred to an e-mail wherein Mr Schoch stated, *inter alia*. that it is not a good idea to do business with the plaintiff because of various reasons mentioned in the said correspondence.

He conceded that as at 1st November 1999 there was no decision as yet to sell Plastomark

He was referred to the process that was followed by Dow and criteria that was used by them to determine to whom they can sell Plastomark. According to the correspondence, Resinex met their criteria and the said business was sold to them. The agreement of sale was signed on 20 December 1999 and the said agreement was signed by Mr Da Silva on behalf of Resinex Southern Africa and Mr Schoch on behalf of Plastomark. Negotiations for the conclusion of the said agreement were conducted during November and December 1999.

He conceded that Masterbach SA were not customers of the plaintiff at the relevant period.

He said that he cannot give details of either existing or prospective customers that plaintiff alleges that they were solicited away from the plaintiff by 2nd or 3rd defendants. Mr Da Silva does not have any relationship with Dow South Africa nor with Dow Europe Holding NV. He

does not know if Mr Da Silva has any relationship with Du Pont Dow Elastomers. He further testified that he does not know if there is a distributorship agreement between Dow Southern Africa or any other Dow Company and either the 2nd or 3rd defendant.

Under re-examination he said that Mr Da Silva was the *de facto* Managing Director of the plaintiff until he left the employment of the plaintiff on 30th August 1999. He referred to several documents which indicates that Mr Da Silva was the *de facto* Managing Director of the plaintiff.

His son Neil, before the departure of 1st defendant was employed as a Director of a company called CHC Global and he became a director of plaintiff only in September 1999. During September 1999 he was approached by some of the plaintiff's employees urging him to appoint his son the Managing Director.

If they had known that DDE was going to reduce the number of companies with whom they had distributorship agreements, they would not have continued selling their products.

He referred to a meeting of 23 August 2000 between Messrs Vin Sinnot and Luciano Respini of Dow and himself. The two representatives of Dow agreed that Dow acted very badly by appointing Resinex/Rivago as their plastic distributor in South Africa, but unfortunately the said

decision was irreversible - They further said that they will try and find a way of compensating the plaintiff.

He further referred to an e-mail addressed by Mr Schoch to Messrs Vin Sinnot and Blackhurst wherein it is stated that plaintiff cannot be considered as a potential buyer of Plastomark for various reasons.

Next witness to testify on behalf of the plaintiff is Mr Neil Hellman. He testified that he is presently the Managing Director of the plaintiff and he is the son of Mr Dennis Hellman, chairman of the plaintiff - He is an engineer by training - At some stage, he was a shareholder and director of a company called CHC Global (Pty) Ltd and 1st defendant was the Managing Director. He held 49% shareholding, 1st defendant held 1% and the plaintiff held 50 %.

The 1st defendant was the Managing Director of the plaintiff and he ran day-to-day operations of the business.

He was appointed the Managing Director of the plaintiff on 6 September 1999. Prior to that he was not a director of the plaintiff.

After his appointment as Managing Director of the plaintiff, he had lunch with his father and Messrs Pierre Birrelli and Jean Paul Gabard both representatives of Du Pont Dow Elastomers (DDE). At the said lunch meeting, the representatives of DDE advised them that DDE is going to remove certain products from the products list of the plaintiff

and award same to Resinex South Africa. After the lunch, the two DDE representatives went to meet Mr Da Silva at the Holiday Inn.

Later, plaintiff received a letter from DDE dated 13 September 1999. In the said letter DDE gave plaintiff notice that the agreement between the parties signed on 1st April 1996 will be terminated on 31st December 1999.

He further testified that from January 2000 the products of DDE were distributed by Resinex Plastics (Pty) Ltd. He referred the Court to a Magazine called "Plastic news, an official journal of the Plastic Institute of Southern Africa" of June 2000. In the said magazine, Resinex Plastics advertised that they deal and distribute products of Dow Plastics, Du Pont Dow Elastomers, Ravago and Montell. The person quoted in the said advertisement is the 1st defendant.

After lunch appointment with the two representatives of DDE, he had a discussion with Mr Gabard. He started suspecting that Mr Da Silva had breached his fiduciary duties - He made arrangements to get access into the computer which was used by Mr Da Silva whilst he was still working for the plaintiff.

He gained access to the said computer and he noticed that all sorts of e-mails relating to the plaintiff's business were on the said computer but e-mails relating to Dow plastics business, DDE business, Dongbu

and Philips Petroleum businesses had been deleted from the system. The computer file folders relating to the above-mentioned 4 businesses were empty.

He established that there were about 6 back-up tapes which were kept at other premises. On one of the tapes, he found information dating back to July 1999 that was stored in the computer file folders referred to above. He found e-mails from or to Mr Da Silva. He made copies of the said e-mails. He is not aware of any reason why the said e-mails were deleted. Mr Deon Holtzhausen also deleted his e-mails from the computer system when he left employment of the plaintiff. On discovering that Mr Haullzhausen has also deleted some of his e-mails from the computer system, he arranged an interview with Mr Holtzhausen. He (the witness) was accompanied by an attorney. They asked Mr Holtzhausen why he deleted e-mails dealing with the plastics business, he merely shrugged his shoulders and said that he did not think that they were necessary. He discovered that Deon had deleted all files relating to Dow, DDF Phillips Petroleum and Dongbu.

Later an Anton Pillar application was brought against 1st, 2nd and 3rd defendants. An order was granted.

He referred to several itemised telephone accounts billing of Mr Da Silva, relating to both his landline and cellular telephone.

The plaintiff paid for all the said telephone calls. He has no personal knowledge of this fact, but, based on the records of the company, he assumes that plaintiff paid for the said telephone calls. except the private telephone calls.

Under cross-examination he said that prior to 6th September 1999. he had no personal knowledge of the affairs of the plaintiff.

He referred to the e-mails which were downloaded from the computers of Mr Da Silva and Mr Deon Holtzhausen by an IT expert. He said that some of the said e-mails, he cannot say whether they form part of the e-mails which were deleted by the above-mentioned gentlemen or not. He did not look at everything that was downloaded from the said computers. He only looked at what he thought was important for the case.

Folders relating to the plaintiff's plastics business were all empty.

He referred to other e-mails which they downloaded from computers of Messrs Da Silva and Haullzhausen and said that he was suspicious about motive for the deletion of the said e-mails.

Under re-examination he said that the plaintiff has proper filing systems and all records are properly kept and as Managing Director, they are all under his control and supervision.

He referred to other e-mails which were deleted by Messrs Da Silva and Haultzhausen and later retrieved by him, which do not form part of the bundles.

He further referred to a copy of an e-mail which was retrieved from the computer of Mr Da Silva. The said e-mail was from Mr Da Silva to Lexicon and cc to Mr Philippe Guerineau of Resinex and same is dated 29 July 1999. The said e-mail was dealing with sourcing a product called GPPS, and said that according to the records of the plaintiff plaintiff never made any transaction with Resinex.

Next witness to testify is Mr Daniel De Wet Hayward.

He testified that he was a partner and director at the law firm Deneys Reitz. He was involved in the preparation of the Anton Pillar application.

He was present when Mr Neil Hellman had a meeting with Mr Doon Holtzhausen.

He is the attorney who accompanied the sheriff during the execution of the Anton Pillar order at the offices of the 2nd defendant at Midrand.

At the offices of the 2nd defendant they found, amongst others, Messrs Da Silva and Holtzhausen. Prior to the Anton Pillar application, he was not doing any work for the plaintiff.

Under cross-examination he said that he ceased acting for the plaintiff during exchange of pleadings when he left practice.

Plaintiff closed its case.

The defendants brought an application for absolution from the instance, which application was refused by the Court with costs which costs, are to include the costs of 2 counsels.

The first defence witness to testify is the first defendant.

He testified that he is a qualified chartered accountant.

He confirmed the date on which he joined the plaintiff, the different capacities in which he was employed by the plaintiff and that he left the plaintiff's employment at the end of August 1999.

He described the business of the plaintiff, and that the plaintiff's main suppliers of products were Dow Chemicals, DDE, Dongbu and Phillips Petroleum.

He further testified that Dow Chemicals is one of the top 3 chemicals companies in the world and has several subsidiaries all over the world and has a huge annual turn-over.

Dow Chemicals International had an operation in South Africa and it was called Dow Southern Africa. **In** 1994, it disinvested in South Africa, and re-entered the South African market in 1995. At that time, he was the Financial Director of the plaintiff and later same year he became the Managing Director of the plaintiff.

When Dow Chemicals International disinvested in South Africa, plaintiff bought some of Dow's business division and when Dow International re-entered South Africa it wanted its business back from the plaintiff but it was not prepared to pay for the said business.

Later plaintiff gave back Dow Chemicals International its
for free. Thereafter, plaintiff entered into a written
"Distributor
Agreement" with Dow Southern Africa (Pty) Ltd on 1 April
1995.

After conclusion of the abovementioned agreement, Dow
Southern
Africa (Pty) Ltd, a subsidiary of Dow Europe Holding NV supplied
with products and that constituted a substantial part of the
plaintiff's
business.

Du Pont Dow Elastomers (DDE) also concluded
"Distributor
Agreement" with the plaintiff on 1 April
1996.

Mr Dennis Helman was chairman of the plaintiff and he was
active
in the affairs of the plaintiff. He reported to Mr Dennis Hellman,
whose
office was on the same passage, next to his
office.

He was paid by the plaintiff a certain package, and he later,
during
1997 bought shares in the plaintiff. He paid for 4% shareholding
and he
was given another 4% for free. He was given an option to acquire
further

7%. He acquired the said shareholding after the departure of Mr Columbine, who was one of the shareholders. Mr Hellman bought Mr Columbine's shareholding.

He was going to pay for his shareholding if dividends are declared.

He paid for his shareholding out of dividends and bonuses.

When he left the plaintiff, he had 8% shareholding and an option to acquire a further 7%.

Du Pont Dow Elastomers (DDE) was a joint venture formed between Dow Chemicals International and Du Pont, and same was formed in 1996, with their offices based in Geneva.

Du Pont is also one of the leading chemicals company in the world.

Du Pont Dow Elastomers (DDE) is a company marketing various Dow Chemicals International and Du Pont.

Resinex NV was based in Belgium, and was a distribution arm of Ravago NV, based in Arendonk. It was also distributing products of other companies, and their main supplier of products was Dow Chemicals International. It also distributed products of DDE in about 22 countries.

At some stage, Resinex NV decided to enter the South African market. They started talking to Dow Chemicals, and Mr Peter Columbine got in touch with people from Dow Chemicals and Ravago NV. The said discussions were initiated by Dow Chemicals. Resinex NV was their main distributor and consequently Dow Chemicals thought that Resinex NV will be important for them in South Africa, but at the same time, recognised a possible conflict with the plaintiff with whom they had a "distributor agreement".

Resinex NV who wanted to come to South Africa had discussions with the plaintiff, and Resinex NV made a formal offer to acquire, initially 50% of certain business divisions of the plaintiff and after a certain period increased their shareholding. They further proposed that he (Mr Da Silva) would be appointed general manager of the new company

and he would be offered an opportunity to buy shares in the new company. Plaintiff did not accept the offer, as according to the plaintiff. the proposed purchase price was inadequate.

He referred to a letter dated 11 February 1997 addressed to Mr Hellmann and copied to him by Mr Peter Columbine. In the said letter. Mr Columbine stated, *inter alia,* "my response to the offer is negative event if Resinex sets up an operation here and competes in this market. Our C & **PP** /Plastics distribution is now worth more than the Resinex offer and future growth should underline this position".

He was aware, at that stage that if plaintiff did not establish a joint venture with Resinex NV, Resinex NV will come into South Africa and compete with the plaintiff and consequences thereof will be that plaintiff would lose their distributorship agreements with Dow Chemicals and DDE as Resinex NV had strong relationships with the said companies Messrs Hellmann and Columbine were aware of the said consequences but they did not negotiate for a purchase price which they deemed appropriate or adequate.

The plaintiff wrote a formal letter rejecting offer of Resinex NV
17 April 1997. The said letter was written by him. Besides rejecting the
offer, he stated that the plaintiff was in an ideal position to market some
of Resinex NV's brands, particularly polyolefins, and he suggested that
they should have some form of representation agreement. He asked for
their thoughts as soon as
possible.

On 15 May 1997 he wrote a letter to Mr Benoit De Keyser advising
him that he will be in Brussels from 16 June and he would like to meet
him during the said period. Purpose of the meeting was to make contact
with the Resinex
NV.

During the course of 1997, Dow Chemicals International came
back into South Africa and acquired Sentrachem, which was carrying on
business in , *inter alia,* chemicals and
plastics.

On 11 September 1997 he wrote a letter to Mr Benoit de Keyser,
wherein he advised him that the discussions they had in June are still
on track. He further stated "I have discussed with Dennis Hellmann that
it would be in our best interest that Resinex takes a 50% or more share

of the CH Chemicals plastic division. He was quite positive and open to
suggestions and I am still very keen to ensure that this transpires even
though our plastics business is starting to look quite rewarding."

Together with Mr D Hellmann they were aware that Sentrachem
can be of value to the plaintiff or it can compete with the plaintiff.

Prior to Resinex NV making an offer to plaintiff, Mr D Hellmann
was in Zurich and the Dow Chemicals International people urged him to
meet with Resinex NV. Same suggestion was made to Mr Hellmann by
DDE
people.

During December 1997 he went overseas with Mr D Hellmann.
They met Messrs Theo Roussis and Benoit de Keyser at Ardendonk. The
latter people showed them what Resinex NV and Ravago NV were all
about.

On 23 December 1997 he wrote to Messrs Theo Roussis and
Benoit de Keyser. In the letter he confirmed that they agreed to

immediately start establishing a joint venture partnership. He that they register a company, Resinex NV contributes business/ and products, and plaintiff will reciprocate from its existing plastics and in future, chemicals.

He further testified that in his view, Resinex NV would provide products to the new entity through Ravago NV.

He received no reaction to the abovementioned proposal. He approached Mr D Hellmann and advised him that Resinex NV wanted to have something firm - Mr D Hellmann told me to first establish trade relationship with them.

He met together with other staff members of the plaintiff with Mr Theo Roussis of Ravago Plastics NV in South Africa during February 1998. During the said meeting they discussed, *inter alia*, purchasing certain products from Ravago NV. He was no longer talking about joint venture with them but he was sourcing products as instructed by Mr Hellmann.

Dow Chemicals International invited him to attend the soccer World Cup in Europe. He met Mr De Keyser in order to further explore the possibilities of doing business with them. Mr De Keyser informed him that Resinex NV will come to South Africa with or without the plaintiff. He further testified that under cover of letter dated 14 September 1998 he sent Messrs Roussis and De Keyser newspaper cuttings announcing that Dow Chemicals International has bought Sentrachem

During December 1998 he attended a conference in Europe organised by Dow Chemicals - Mr Dennis Hellmann was present at the said conference. Dow Chemicals had invited all their distributors. Whilst at the said conference, he met with Mr De Keyser in the latter's hotel room. Mr De Keyser informed him that Resinex NV wants to come to South Africa and form a new entity. They want him to be the managing director of the said new entity - A possible salary package was discussed, together with possible shareholding.

His first priority was still to get joint venture between plaintiff and Resinex NV, and he mentioned the said fact to Mr De Keyser, but the

latter was not impressed and he was still of the view that Resinex NV should come into South Africa.

On their way back to South Africa, in the aircraft he told Mr Hellmann that Resinex NV wants to come to South Africa, but he did not tell him about the job offer made to him by Resinex NV. When he told Mr Hellmann about the intentions of Resinex NV, Mr Hellmann did not comment.

During January 1999, Mr De Keyser telephoned him, enquiring about his response to the job offer they made, and he (the witness) advised Mr De Keyser that he is still thinking about the said offer.

In February 1999, he went out for lunch with Mr Hellmann During the said lunch, he advised Mr Hellmann about the job offer made to him by Resinex NV. He also mentioned that if Resinex NV comes to South Africa that might create a problem for the plaintiff. He also mentioned the fact that Plastomark was being sold to DDE and that Dow Chemicals would give their business to Resinex.

In his response about the offer made to me, Mr Hellmann said that he (the witness) should make a decision.

In March he had a meeting with Mr Vin Sinnott, head of Dow South Africa. He mentioned to him the job offer, and Mr Sinnott thought that Resinex NV was a good company to join.

In April/May 1999 Mr De Keyser telephoned him enquiring about his decision about the job offer they made and he (the witness) asked for some time before making his decision.

He went to Mr Hellmann and said to him that in the light of the offer made to him they need to do something with Resinex NV.

As stated earlier, his first priority was that they should make a deal with Resinex NV, otherwise, if Resinex NV comes into South Africa that might create problems for the plaintiff. Mr Hellmann told him that plaintiff has nothing to sell to Resinex NV.

Thereafter, he telephoned Mr De Keyser and informed him that he must come to South Africa so that they can meet and discuss in details their anticipated relationship.

Mr De Keyser came to South Africa on 8 June 1999. He met him and they finalised their transaction. They discussed the structure of the new entity, his shareholding, his salary and other benefits, how new entity is going to function in the future, the question of Mr Leon van der Merwe who was the salesperson, etc. Possibility of acquiring Plastomark was also discussed.

After their discussions, Mr De Keyser said that he (the witness) must reduce in writing their discussions. He (the witness) drafted Heads of Agreement and sent them to Mr De Keyser. He signed the said Heads of Agreement on 16 July 1999.

In terms of the said agreement, working capital was going to be provided by Resinex NV.

The said agreement does not constitute a joint venture. He had no obligation to contribute any business, product, agency agreements nor capital. He only had to contribute his skills.

When he left the plaintiff he sold his shareholding to Mr Dennis Hellmann.

Shortly before leaving the plaintiff, that is in August 1999 he contacted auditors who assisted him to register two companies. In fact, they took over two shelf companies and effected necessary changes.

He spoke to Mr De Keyser a day prior to tendering his resignation from the plaintiff. When he told Mr Dennis Hellmann that he is resigning, Mr Hellmannn was upset. Mr Hellmann raised certain concerns about his business. They agreed that he will leave in October 1999.

After tendering notice of resignation, his role was watered down. Everything was going through Mr Hellmann.

In July 1999 he went overseas to meet with the people from Ravago NV. When he came back, people were not talking to him and he then told Mr Hellmann that he wants to leave earlier than October and he left at the end of August 1999.

First and third defendants started operating on 1 September 1998 and March 2000 third defendant acquired Plastomark.

He denied that he took any business opportunity of the plaintiff. He was never told by Mr Hellmann not to contact Ravago NV and Resinex NV.

The e-mails that he deleted from his computer were deleted in the normal course of his operations. He did not selectively delete the e-mails. He was aware that the deleted e-mails will be available on the back-up system.

He confirmed that DDE concluded a distributorship agreement with the plaintiff on 1 April 1996.

DDE took a decision or adopted a policy to reduce the number of their distributors. Resinex NV had a good relationship with both DDE and Dow Chemicals.

Towards the end of 1996 Dow started suggesting that plaintiff should enter into some working relationship with Resinex NV. During 1997 DDE also encouraged plaintiff to forge some business relationship with Resinex NV.

DDE viewed Resinex NV as a strategic partner in their distribution business as Resinex was distributing DDE products allover the world.

He first heard in 1996 that Resinex NV intends coming to South Africa. His view was that if Resinex NV comes to South Africa, plaintiff's business with Dow Chemicals, DDE and Phillips was at risk, as the said

companies had strong ties with Resinex NV. Mr Hellmann was aware of the said fact.

Despite several attempts by plaintiff to do business with Resinex NV, no business was done between the two companies until Resinex NV came into South Africa.

When he met Mr De Keyser in South Africa in June 1999, Mr De Keyser advised him that Resinex NV has already finalised a deal with DDE. He did not mention the said fact to Mr Hellmann as he had previously told Mr Hellmann about the said risk.

He went overseas in July 1999. He went overseas to have discussions with Ravago NV. He also saw people from DDE. He was on leave during his visit overseas. He did not tell Mr Hellmann about the said trip as he would have been upset.

When he met the DDE people, he told them what he was going to do with Resinex NV in South Africa. At that time DDE had already decided that they were going to do business with Resinex NV.

He further testified that DDE had a distributorship agreement, which agreement was cancelled by DDE at the same time when the latter cancelled its agreement with plaintiff.

Plaintiff did not deal with all the products that were on their agreement with DDE. Chemserve and other distributors dealt with some of the products that were in the plaintiff's distributorship agreement with DDE.

He played no part when Dow SA deleted certain products from the list of products that plaintiff was distributing. After deletion of said items, relationship between plaintiff and Dow SA continued.

After establishing second and third defendants they did conclude any distributorship agreement with Dow SA. Plastomark was a

company that was marketing and distributing plastic products, and Safropol was manufacturing said products. They were subsidiaries of Sentrachem and Dow Chemicals acquired Plastomark. Dow's policy is that distributors handle small accounts and big accounts are handled by Dow itself.

The possibility of Dow selling Plastomark was known even by Mr Hellmann but he did not know when same will happen.

Third defendant acquired Plastomark in December 1999.

When he left plaintiff, Plastomark was not yet on the market. It was still a potential opportunity.

When buying Plastomark, Resinex NV and Ravago NV were involved.

After his evidence in chief, counsel for the second and third defendants advised court that he has no questions for the witness.

Counsel for the plaintiff cross-examined the witness.

During cross-examination, he testified that in 1984 he was employed by Dow SA and he signed a secrecy agreement. The said agreement had a clause saying that an employee cannot compete directly or indirectly with the company.

He confirmed his employment record with the plaintiff.

He further testified that during 1985 - 1999 he pursued various business opportunities for the plaintiff as that was part of his functions.

As a managing director of the plaintiff, he was managing various managers of the different business units and also the directors of the plaintiff.

In his understanding, plaintiff had an exclusive agreement with Dow, but he does not know if Dow accepted the fact that there was exclusivity in the agreement. Dow use to sell products to other distributors contrary to their exclusivity agreement.

Dongbu was a trading house and they prefer not to have written contracts. There was an understanding that plaintiff will buy from them and they will protect plaintiff's customer base.

After 1999, second defendant distributed DDE products and purchased some of the Dow products. Second defendant obtained DDE products from Disterflex to distribute them in South Africa. They telephoned Dow Chemicals and asked them to distribute Dow's products in South Africa. They did not have written agreement with Dow. They bought from Dow when they needed the said products.

Plastomark is a subsidiary of third defendant.

In 2003 he bought products from Phillips through Ravago and in
2004 they bought directly from Phillips. Phillips products became
uncompetitive and for the past year or so they have not been buying
of their products. Prior to 2003, they did not buy any Phillips
as Phillips was not selling any products because of the fire it had at its
plant.

In January 2000, second defendant was distributing DDE products
and nobody else in South Africa could distribute the said products.

Second defendant did not have distribution agreement with Dow,
but second defendant was Dow's representative on two products.

A customer desiring to buy small quantities of a particular product
of Dow, cannot get same direct from Dow, but can obtain same from a
distributor and in South Africa, from second defendant.

He was referred to an advert which appeared in what is called
"Plastinews". In the said advert, it is stated, *inter alia* that second

defendant distributes Dow Plastics, Du Pont Dow Elastomers, Ravago
and Motell products, and he said contents of the said advert are
correct.
The said advert also mentions the main suppliers of second
defendant
as, amongst others, Dow Chemical, Du Pont, Du Pont Dow
Elastomers
Chevron Phillips,
etcetera.

He further testified that Lexicon is a subsidiary of Resinex NV.

From January to March 1999 he telephoned Lexicon five times. Mr
Erik van Gorp, a representative of Lexcon telephoned him about
certain
products. Mr Van Gorp contacted him suggesting that they should
do
business because he was under wrong impression that he (the
witness)
has already left the plaintiff's
employment.

On a question of plaintiff's counsel, he admitted that in June, July
and August 1999 he telephoned Lexicon twice, eight times and
twice
respectively. He explained that the said telephone calls had to do
with a
particular product. They were telephoning each other in relation to
one
sale. He was attempting to conclude a sale as Mr Deon
Haullzhausen

had advised him that Mr Dennis Hallmann said that they should do business with Resinex

He was referred to a letter which he sent to Mr Roussis dated 14 September 1998 wherein he enclosed newspaper article talking about Dow Chemical taking over Sentrachem and he was asked why he sent such information to a possible competitor of the plaintiff and he said he wanted to get things going.

Mr Van Gorp as Mr Van Gorp was part

Ravago NV and he had visited Ravago NV. They were discussing business together in the future. He further testified that Mr Van Gorp was communicating with him because he was under wrong impre

Joint venture negotiations between plaintiff and Resinex/Ravago NV came to an end in 1998 and in January 1999 Mr De Keyser phoned him and asked him for a respond to their job

given Mr Gorp

offer.

On 18 January 1999 he telephoned Resinex NV to discuss about him joining Resinex NV and possibilities of plaintiff having a relationship with Resinex NV.

him with certain information about window-screen manufacturers in South Africa. Mr Lederrer requested information as he knew that he (the witness)

Third defendant has 50% shareholding in Plastomark NV.

On 17 March 1999 he had a meeting with Mr Van der Merwe. He probably discussed with him about, he (the witness) joining Resinex NV and Mr Van der Merwe also coming along as a salesperson.

On 18 March 1999 he telephoned Ravago NV on two occasions discussing finalisation of his deal with them.

On 19 March 1999 he had a meeting with Mr Vin Sinnott, as the latter knew Resinex well. He wanted to find out more about Resinex and Mr Sinnott said that he supports the idea that he (the witness) joins Resinex as it is a good company.

During February - April 1999 he phoned Ravago/Resinex NV to discuss his future. It is possible that they discussed about possible employees and Plastomark.

Round about May 1999 he decided that he was going to leave the plaintiff's employment.

He was referred to an e-mail dated 27 May 1999 which he sent to Mr Joaquin Schoch. The said message reads as follows:

"Subject: June
10th

Joaquin I have some quests from Du Pont and OTHE R from
the 8th to 10th June.

Thought we could do something with plastics. Evening out
with some of the best talent. What is your schedule?

Joe."

He further testified that the words "OTHE R" refers to Mr De
Keyser. He was asked why he refers to him in that manner, he said he cannot recall. He was asked how Mr Schoch was going to know who
"OTHE R" is, he said he was going to phone him and advise him.

He further testified that he wanted to keep his meeting with Mr De
Keyser confidential. He did not want the plaintiff to know about it as he
was going to join
them.

He had arranged to have dinner on the date mentioned above with Messrs Gabard (a representative of DDE), De Keyser (a representative of Resinex), Schoch (a representative of "DOW") and the word "plastics" as contained in the abovementioned e-mails refers to ladies, and the word talent also refers to ladies. He intended flavouring the dinner with ladies. **In** the year 2000, second defendant had business dealings with DDE and Dow.

He negotiated a position for Mr Leon van der Merwe with second defendant. He agreed with Mr Van der Merwe that they should resign at the same time.

On 1 July 1999 he had dinner with people from Mobil, a company based in Luxembourg, distributing polypropylene film. It was a business dinner, although he cannot recall what they discussed. Mobil at that time, had a three-years contract with the plaintiff.

He was asked why in the Heads of Agreement entered into between him and Resinex Mobil was mentioned, and he said that Resinex was

distributing for Mobil in other parts of the world. He had a strategy that would enable him to acquire Mobil.

At a Mobil conference during 1997 where all their distributors were present, he was informed that Mobil is very happy with Resinex.

He denied that he tried to persuade Mobil to go along with Resinex. He confirmed that during June - July 1999 he had meetings or lunch with several other people, namely Messrs Leon van der Merwe, Deon Haultzhausen, people from Dongbu, Mobil, etcetera. He further testified that Mr De Keyser told him during their meeting on or about 10 June 1999 that a deal was done between Resinex and DDE and he did not divulge said information to Mr Dennis Hellmann as he thought that was between him and Mr De Keyser.

It was put to him that his travel arrangements for his overseas trip in July 1999 was not made by his secretary as he did not want Mr Hellmann to know about the said trip, he said that is not true. The reason why his secretary did not make the travel arrangements was because it was his private trip and he also told Mr Dennis Hellmann that

he was going overseas, although he did not tell him that he was going to meet DDE people, as he did not want Mr Hellman to know about it. He only told him that he was going to see Ravago people.

He did not tell Mr Dennis Hellmann that he was going to meet DDE people because that could have led to a problem. It is possible that Mr Hellmann could have told him to leave the employment of the plaintiff immediately.

He was referred to an affidavit of his former secretary, Ms Valerie Kennedy filled in the Anton Pillar Application, particularly to the following paragraphs:

> "Prior to Mr Da Silva's departure for overseas in July to visit Resinex, he accessed the contract files for Du Pont Dow and also for Dow Chemicals. He then returned these files and I stored them back in the contracts filing cabinet where they are under lock and key..."

and he replied that he cannot recall doing that. He use to take out those files when he drafts other contracts.

He was referred to a copy of an e-mail dated 14 July 1999 which he sent to Geet Stoops of Resinex distribution. In the said e-mail he said:

"The minimum is two directors. No maximum", and he said he sent the said e-mail because he was asked about directors in Resinex SA.

After submitting his letter of resignation and until his departure from employment of plaintiff, he was using company motor vehicle, signing cheques, signing monthly accounts, approving expense accounts of other managers, etcetera, as he was still the Managing Director of the plaintiff.

Mr Leon van der Merwe became director of second defendant on 19 August 1999. About September or November 1999 he started

working part-time for second defendant whilst still employed by Dow and he joined second defendant in January 2000.

He did not know that Mr Van der Merwe had signed a secrecy agreement with Dow.

On Wednesday 14 July 1999, he had a meeting with Mrs Lynis van der Merwe, wife of Mr Leon van der Merwe. She was working at a clearing house company and she spoke to her regarding imports because when he starts working for Resinex, he was going to need a clearing agent.

He referred to various meetings with different people during the period June to August 1999, which he attended in his capacity as Managing Director of the plaintiff. During the said period he also wrote letters to other people in his capacity as Managing Director of the plaintiff.

During the period mentioned about, he was also signing plaintiff's cheques in his capacity as Managing Director of the plaintiff. He further testified that during the said period, he was also approving expense accounts of managers and utilising his expense account as he use to do in the past.

He was, in his capacity as Managing Director, Chairman of the plaintiff's provident fund and he occupied the said position until the end of August 1999, when he resigned as the said chairman.

He remained a director of the plaintiff until end of August 1999.

He referred to the fact that Mr Leon van der Merwe became a director of the second defendant from 19 August 1999, at which he was still employed by Dow Chemicals. After certain complaints received, he removed him as director. At that time, he (Mr Van Merwe) was working part-time for the second defendant with the blessings of Dow. Mr Van der Merwe, in a letter dated 1 November 1999 resigned from Dow with effect from end November 1999 and he started

working for second defendant from January 2000 and he was reappointed as director of second defendant.

Mr Van der Merwe, who was employed by Dow, had good knowledge of Dow's products and Dow's end customers. When he joined second defendant he serviced the said customers.

Mr Haullzhausen worked for the plaintiff for a number of years. and he had intimate knowledge of the plaintiff's plastics products and had good relations with the plaintiff's end line customers and when Mr Haultzhausen joined the second defendant in 2000 he serviced the same customers who were previously customers of the plaintiff for DDE and Dongbu products.

Second defendant was distributing DDE, Dow and Dongbu products.

He confirmed that Dow acquired Sentrachem in 1998, and from that time there was a possibility that a business of distributing products of Plastomark would become available.

He does not recall discussing with Dow the possibility of plaintiff distributing Plastomark's business from September 1998 until he left the plaintiff's employment.

He discussed with Mr Schoch the purchase of Plastomark by the third defendant during October 1999, and the ultimate buying of Plastomark by the third defendant occurred during December 1999.

He was referred to a note which he wrote to his secretary whilst at plaintiff stating that his secretary should keep as a precedent the unsigned agreement between plaintiff and Dongbu. He was asked why he wanted to keep the said precedent, and he said he cannot recall the reason. He tried to get a written agreement with Dongbu whilst Managing Director of plaintiff without success.

He was asked why on his computer he deleted the folders relating to DDE, Dow Chemicals, Dongbu and Phillips, and he said he cannot recall creating the said folders nor deleting them.

He was referred to a letter of appointment dated 1 March 2000 directed to him by Resinex Plastics (Pty) Ltd. He was asked if there is a difference between letter of appointment and employment contract, and he said he is not sure if there is a difference. He further said that employment contract might contain more details.

He was also asked what terms does a letter of appointment have and he replied as follows: "Well my lord, in this particular situation I can only answer it this way, this was the standard letter that we had for employees and these were the standard things that we used to put all the employees joining the company. These were the standard terms of appointment." He further said that the letter of appointment was only a loading document required by their Human Resources person. The personnel person did the letters for everybody that was employed by Resinex at that time because she wanted to have it on file to load said information on the payroll system.

His salary was paid by Resinex Plastics (Pty) Ltd.

He was referred to the "Heads of Agreement" entered into between him and Resinex NV.

The preamble thereof reads as follows:

> "Whereas JDS and RNV desire to enter an agreement to start an operation in South Africa with the objective of carrying on a business in the distribution of plastic raw materials and other products represented by Resinex/Ravago Group."

Clause 5 thereof reads as follows:

> "Any future acquisitions, with particular reference to Mobil or Plastomark, will be done through Resinex Holdings (Pty) Ltd ..."

Clause 11 thereof reads as follows:

> "JDS will be the Managing Director of Resinex Holdings (Pty) Ltd. His remuneration package will be: ..."

The said clause further states the remuneration package of Mr Leon van der Merwe and that he will be Business Manager for Thermoplastics. Said agreement was signed by both parties and date appearing thereon is 16 July 1999.

When he negotiated the above contract his employer was going to be Resinex Plastics and Resinex Holdings and the latter two companies are actually his employers.

He was asked why the abovementioned document is not called "Employment Agreement", he said he drafted it, using a precedent. There is no particular reason why he called it "Heads of Agreement". He just called it heads of agreement because they had reached an agreement. After his discussions with Mr De Keyser in June 1999, Mr

De Keyser said to him reduce in writing what they have agreed on. He did not consult an attomey but he looked for precedent which he used to draft the Heads of Agreement, and thereafter send same to Mr De Keyser. He cannot recall showing the document to Mr Van der Merwe before it was signed.

As at July 1999 they knew that Plastomark was probably going to become available in the future.

The preamble to the Heads of Agreement mentioned above is a summary of what the whole operation was about. In his view, Resinex NV were going to be his employer and they were going to start an operation in South Africa together.

He further testified that in December 1998 whilst attending a conference overseas with Mr Dennis Hellmann, Mr De Keyser called him to his room to discuss the terms of his (the witness) employment and that he did not disclose that fact to Mr Hellmann.

Another witness to testify on behalf of the defendant is Mr Benoit de Keyser. He testified that he joined Resinex NV as a Managing Director in 1992. Resinex NV is a wholly owned subsidiary of Ravago NV. He was Managing Director of Resinex NV up to the end of 2002.

In April 1996 DDE concluded a distribution agreement with Distriflex NV. The latter company is a 100% subsidiary of Resinex NV The said deal was finalised in the second part of 1997 and signed at the end of 1997 or beginning of 1998. After signing of the said agreement they distributed DDE products. Their agreement covered Eastern Europe, Midle East and part of Africa. In Africa, it covered mainly East and West Africa with the exception of South Africa, Nigeria, Morocco. Tunisia and Egypt. In the different countries, the distribution were done by either Resinex or other Resinex's subsidiaries, but the contract was with Distriflex NV.

Resinex NV was doing distribution for Dow Chemicals from 1992. Initially areas covered was Europe and later in 1995 or beginning of 1996 Africa was added, mainly Eastern and Western Africa.

From end of 1996, beginning of 1997 Resinex was the largest distributor of Dow products.

He is aware of the policy of DDE to reduce the numbers of their distributors. The number of distributors of DDE products was reduced from about 60 to about 5, and Resinex NV was one of the 5. During the period 1997 to 1998 they were one of the main distributors of DDE products in the geographical areas he mentioned earlier.

At that time, the president of DDE was a person who was well known to him. When he (the witness) joined Dow Chemicals in 1981, the said person was also working for Dow Chemicals and he (the witness) was reporting to him. He had constant contact with the president of DDE, and he met him very often.

During the latter part of 1996 and the first part of 1997, together with Mr Roussis of Ravango, they were negotiating a certain transaction with Mr Peter Columbine of the plaintiff. The said negotiations were initiated by Dow, as we had mentioned to them that we wanted to go into South Africa and they wanted to avoid conflict with the plaintiff.

In a letter dated 10 February 1997 they made an offer to acquire 50% of certain business division of the plaintiff. Their offer was later rejected by the plaintiff in a letter dated 17 April 1997 written by Mr Da Silva. They received no counter offer from the plaintiff. From that point he did not believe that they will conclude a transaction with the plaintiff. Thereafter, they were contacted regularly by Mr Da Silva who was attempting to source from them products to sell. They were not interested to sell products to the plaintiff.

He attended conferences arranged by Dow Chemicals for their distributors. At one of the said conference in December 1997 Messrs Da Silva and Hellmann were present. He had discussions with Mr Da Silva who was attempting to convince him to sell products to the plaintiff, which Mr Da Silva said same might persuade plaintiff to agree to a joint venture. He did not believe that a joint venture with the plaintiff was possible.

He denied that they agreed with the plaintiff to form or establish a joint venture as stated in a letter dated 23 December 1997 addressed to him by Mr Da Silva. He was referred to a letter dated

14 September 1998 sent to him together with newspaper articles by Mr Da Silva and he said he received the said letter but he did not phone Mr Da Silva after receipt of the said letter.

No joint venture contract was concluded between his company and the plaintiff and no business was conducted between the two companies.

He further testified that his company took a decision to establish on operation in South Africa as early as March 1998.

When he met Mr Da Silva at a conference in December 1998, he informed Mr Da Silva that they will be coming into South Africa in 1999. they will start the business from scratch and they are looking for a Managing Director and he made an offer for a job to Mr Da Silva. He did not mention the plaintiff.

At the said meeting, he advised Mr Da Silva that if he accepts their job offer, he will get the same package as the one he receives from the plaintiff. Mr Da Silva replied and said he will go and think about the

offer but he, Mr Da Silva was still trying to get a deal between Resinex NV and the plaintiff. He (the witness) did not believe that there was a possibility of any deal being made between Resinex NV and the plaintiff.

In May 1999 Mr Da Silva telephoned him advising him that he was accepting the job offer.

In June 1999 he came to South Africa and he met Mr Da Silva and they finalised the details of Mr Da Silva's employment contract and the aims of the company they intended starting in South Africa, and the structure of their new company. Question of Mr Da Silva getting shares in the new company was discussed and also the possibility of Mr Van der Merwe also joining their new company. Mr Da Silva drew the contract which they later signed.

In his opinion the document they signed is an employment contract.

Mr Da Silva had no obligation to contribute capital, stock, agency or distributorship agreements. He was going to pay for shares allocated to him over a period of time.

The structures of the companies, namely a holding company and an operating company were the idea of Mr Da Silva. Mr Da Silva had the duty to incorporate the two companies, and they started doing business late 1999 or beginning of 2000.

During 1998 and 1999 he was of the opinion that if Resinex NV comes into South Africa, they will get the DDE business.

After they took the decision to come into South Africa, he informed Mr Birrelli, a representative of DDE. Mr Birrelli during 1999 told him that DDE has decided that they will give Resinex NV their South African business and when he came to South Africa in June 1999 he informed Mr Da Silva about the said decision of DDE.

DDE concluded a distributorship agreement with Distriflex on 25 October 1999 after it (DDE) terminated their agreements with the plaintiff and Chemserve.

When they started operating in South Africa, they also distributed Dow products. There was no signed contract.

Mr Da Silva had no part to play in the decision of DDE to terminate their distributorship contract with the plaintiff and Chemserve.

The Plastomark business opportunity became available in the market place in September/October 1999.

He was referred to a letter of appointment of Mr Da Silva dated 1 March 2000 which he signed, and he was asked why he signed the said letter and his reply was that he does not know. He further testified that the said document is not Mr Da Silva's employment contract but is a confirmation of his salary. Mr Da Silva's contract of employment is the "Heads of Agreement" referred to earlier.

Under cross-examination, he disagreed with the evidence of Mr Da Silva to the effect that Mr Da Silva was given shares for free. He further testified that in the year 2000 Resinex SA was distributing Dow Chemicals and DDE products.

He cannot recall if Chevron Phillips was also supplying of Resinex SA with products at the said time.

From 1992 Resinex NV had an oral agreement with Dow Chemicals to distribute Dow's products in Europe, and from 2000 Resinex SA also started distributing Dow's products in South Africa.

He confirmed that during March 1996 Ravago NV was considering a joint venture with the plaintiff. A request was directed to the plaintiff to make certain information available and the said information was made available; including financial information of the plaintiff.

After a meeting with some staff members of the plaintiff, an offer was made which was later rejected.

He confirmed that Mr Da Silva sent him information about possibility of Dow Chemicals acquiring Sentrachem. He referred to the December 1997 meeting he had with Messrs Da Silva and Hellmann in Switzerland; Messrs Da Silva and Hellmann were pursuing the idea that Resinex NV/Ravago NV should make available to the plaintiff products to sell in South Africa, and if that is successful, then move to a joint venture.

After their offer was rejected by he plaintiff he did not believe that there were prospects of a joint venture between them and the plaintiff. By September 1998, both Ravago NV and Resnix NV had given up hope of forming a joint venture with the plaintiff, although during their meetings with Mr Da Silva, he was still raising the issue.

At the time they started talking to the plaintiff, they had already decided that they will be coming to South Africa, although they did know how they were going to achieve same. He told both Messrs Da

Silva and Columbine that they will come to South Africa either in the form of a joint venture or alone.

When they came into South Africa, they knew that there was a company that was distributing DDE and Dow products. Their intention was to compete with the said distributor and ultimately replace the said distributor. The second defendant got to distribute all the products from Dow, DDE Dongbu and Phillips, which were products initially distributed by the plaintiff.

He further testified that he cannot remember a dinner to which he was invited by Mr Da Silva in June 1999 and where certain ladies were going to be present.

He was referred to the letter of appointment of Mr Da Silva which he signed in 2000, and he said he signed it without reading it. When asked what the said letter of appointment is all about he said:

"I am believing it was for any confirmation of pension funds or for register of the company because you need to have legal papers, which are needed to be signed by one of the directors.
"

During June, July and August 1999 there were various telephone calls between Mr Da Silva and him and the said telephone calls were probably dealing with formation of new company, papers required for establishing a company, administration, management staff of new company, etcetera.

Another witness who testified on behalf of the defendants is Mr Burelli. He testified that during the course of 1999 he was employed by DDE as commercial director for Europe, Middle East and Africa. He commenced his employment with DDE on 1 April 1996. Distriflex, a subsidiary of Resinex NV was a distributor of DDE products in Europe.

When DDE was formed it had sixty distributors. At a later stage they embarked on a rationalisation and consolidation of their

distribution network in order to reduce costs and to manage their distribution network more efficiently.

After the rationalisation process they ended up with five distributors approximately during 2000/2001.

Distriflex was one of the five distributors and it was covering Eastern Europe, Central Europe and the Middle East, and subsequently Africa. In Africa, Distriflex was involved in all the countries with the exception of Egypt, Nigeria and South Africa. Distriflex was among the top 3 of their distributors.

He referred to the contracts that DDE had with the plaintiff and Chemserve .

Their contract with plaintiff related to a product called Tyrin and their contract with Chemserve dealt with other products.

Policy of DDE to rationalise their distributors was adopted as early as 1996 and same was well-known to their distributors.

If Resinex NV decides to come to South Africa, they would seriously consider them as potential distributors. He heard between the second and third quarter of 1999 that Resinex NV was coming into South Africa and they then decided to give their business in South Africa to Resinex. He recommended the decision to his leadership. This decision was communicated to Mr De Keyser.

After the abovementioned decision he gave the plaintiff and Chemserve 90 days notice to terminate their contracts on 1 September 1999.

Said contracts were ultimately cancelled and a new distributorship agreement was concluded between DDE and Distriflex in respect of South Africa.

He recalls that Mr Joe Da Silva visited DDE in Europe during July 1999. The purpose of the visit was for Mr Da Silva to be introduced to the president of DDE.

On a question of the second and third defendants counsel, he said it is possible that the decision to award their distribution agreement to Distriflex could have been taken before 10 June 1999.

He was referred to the plaintiff's contract and he confirmed that it was effective from 1 April 1996 and also to Distriflex agreement which was effective from 1 January 1998, and that the latter agreement was amended, effective date made 1 May 1999 but excluding South Africa.

He further testified that few people of Dow went to join DDE.

The rationalisation policy of DDE was mentioned or explained at various meetings they had with their distributors. He cannot remember Mr Da Silva being present at meetings or conferences where the said policy was explained.

They were happy with the way in which both plaintiff and Resinex NV were performing. In their assessment, Resinex NV was better suited to distribute their products.

Another witness who testified is Mr Deon Holtzhausen. He testified that he was employed by the plaintiff from 1995. From 1998 he became business manager in the plastics division of the plaintiff. His functions included liaising with principals, buying of new materials, marketing and selling plastic products.

He is aware of e-mails sent out by Mr Hellmann on 11 June 1999 announcing that Mr Da Silva is resigning as managing director.

After the announcement of the resignation of Mr Da Silva, there was a meeting organised attended by the managers and Messrs Dennis and Neil Hellmann. They discussed, *inter alia,* the questions of shareholding in the company and directorship, which are issues they earlier raised with Mr Da Silva. In the said meeting, questions of acquiring products from Lexicon at competitive prizes were discussed.

Products referred to is what they termed "off-spec" or "wide-spec" or "recycled", material, which plaintiff did not normally deal with.

As head of the plastic division he was in daily contact with people from DDE. The two people he used to contact is Messrs Jean-Paul Gabard and Dieter Gertarch. He was visiting DDE overseas at least once a year and at times twice a year.

On the other hand, DDE people were also visiting the plaintiff and Mr Gabard was visiting at times, twice a year.

During July 1999 he visited DDE overseas and he made contact with Messrs Gabard and Gerlarch about plaintiff's business and he also visited Phillips Petroleum.

His discussions with Phillips Petroleum centred around the question of the incapacity of Phillips to supply plaintiff with products.

During the course of 1999 his view was that if Resinex NV comes into South Africa, plaintiff will loose its DDE business and same will go to Resinex NV. His said view was based on the fact that it was well-known that in Europe Resinex NV was representing DDE. He discussed his said view with Mr Dennis Hellmann in the middle of July 1999.

He resigned from the plaintiff at the end of August 1999. The reason for his resignation was that it was clear that Mr Neil Hellmann was going to take over as managing director, and for a variety of reasons he could not work under Mr Neil Hellmann.

When he told Mr Dennis Hellmann that he was resigning, Mr Hellmann told him to leave the premises immediately and stay at home during his notice period.

His resigning from the plaintiff had nothing to do with Mr Da Silva.

A week after he left plaintiff Mr Neil Hellmann called him to the plaintiff's offices, and on his arrival he found Mr Hellmann with an attorney. He was asked if he has any information that could lead to the conviction of Mr Da Silva, and that he will be offered a better position if he has said information. They also accused him of having deleted certain information from his computer.

It was common or standard practice to delete e-mails that you have read in order not to overload the system. Important e-mails you store them in the computer and he showed Mr Hellmann where the said e-mails were stored and they found them.

His last official working day with the plaintiff was end of September 1999. When he left, he did not have any employment.

After his departure from the plaintiff he attempted to secure another employment. As Mr Da Silva was his friend, he use to see him regularly and he also enquired from him the possibility of him being employed by Mr Da Silva. Mr Da Silva told him that at that time he

cannot offer him any position but he can consider offering him a position at a later stage.

During November 199 Mr Da Silva phoned him and advised him that he urgently needs a person as Mr Leon van der Merwe, with whom he should have started working is unable to do so. Mr Da Silva urgently needed a person to deal with products of DDE which were being distributed by Chemserve as Chemserve is no longer interested to continue distributing the said products.

He joined Resinex Plastics (Pty) Ltd in December where he was dealing with DDE products which were earlier, before the terminations of their contracts, being distributed by both Chemserve and the plaintiff.

When the Anton Pillar order was served at Mr Da Silva's offices, he was also in the said offices as he came to discuss his employment with Resinex (Pty) Ltd. At that time, he was not performing any duties for Mr Da Silva nor Resinex.

Under cross-examination he confirmed that he worked for the plaintiff up to the end of August 1999 and had started with second defendant from December 1999.

Together with Mr Da Silva they were the two important people in the plastic division of the plaintiff.

When still in the employment of the plaintiff, he was involved with the marketing of Tyron, which was one of DDE products. Tyron was the only DDE product that plaintiff was marketing.

Whilst still in the employment of the plaintiff, he built good relations with DDE people. He built a good market for the their products.

In the employment of second defendant, he started dealing with Tyron of DDE from 1 January 2000, and he was dealing with same DDE people and customers that he dealt with at the time he worked for the plaintiff.

Furthermore, in the employment of second defendant he marketed same DDE products that were marketed by Chemserve.

Mr Van der Merwe dealt with Dow products whilst in the employment of second defendant and he was servicing former plaintiff's customers.

He handed in his resignation letter to Mr Hellmann a day after the departure of Mr Da Silva.

From 1996 he was aware of the negotiations between plaintiff and Resinex NV/Ravago NV about a possible joint venture. He attended meetings where said negotiations took place.

He was aware of the offer made by Resinex NV to the plaintiff.

He further testified that there was an unsuccessful attempt to source products from Resinex NV/Ravago NV.

He was supposed to visit principals overseas with Mr Da Silva during June 1999. Each one of them had his role to play during the anticipated visit.

Mr Da Silva, did not give him any instructions on issues to discuss with principals, except to discuss with Phillips their failure to supply plaintiff with products.

On his overseas trip, he visited Phillips Petroleum people. He also met with Messrs Gabbard and Burelli. He was never told that DDE and plaintiff's contract will be terminated.

He further testified that from the year 2000, second defendant was marketing and distributing Dongbu products.

During the period March/April/May/June 1999 he was in constant contact with Mr Van der Merwe who was working for Dow as plaintiff was buying products from Dow.

After Mr Da Silva tendered his resignation, he (the witness) had a discussion with Mr Dennis Hellmann and informed him that if Resinex NV comes to South Africa, plaintiff might lose its distribution rights of DDE products.

He was asked why he resigned a day after the departure of Mr Da Silva, and he said that it is because he was going to find it difficult to work under Mr Neil Hellmann, who was interfering in his unit and that he (Mr Neil Hellmann) once threatened him with dismissal.

It was put to him that the question of Mr Neil Hellmann assuming the position of managing director cropped up only about 5 September 1999 and he answered and said yes, that is correct, but he was interfering in their business.

He further testified that the fact that Mr Neil Hellmann will take over as managing director was speculation but the fact that he was interfering on a daily basis was reality.

He conceded that he tendered his resignation because of personal difficulties he had with Mr Neil Hellmann and not because he was going to take over as managing director.

Whilst employed by plaintiff, he was dealing with one DDE product and when he joined second defendant he dealt with the same DDE product.

He later became a director of second defendant and he also had a shareholding in the said company.

Next witness to testify is Mr Joaquin Schoch.

He testified that he is a qualified chemical engineer and he joined Dow Europe in 1976, which was operating in Middle East, Eastern and Western Europe and Africa. When he joined, he was employed as a development engineer in the technical service development department.

Dow was doing business in South Africa prior to 1987, but it disinvested in 1987. He worked in South Africa until October 1986.

When Dow disinvested in South Africa, it sold its business to the plaintiff.

Dow returned to South Africa in 1995 and a new company was formed called Dow Southern Africa (Pty) Ltd and he became the managing director.

Dow is a global company involved in chemicals, plastics agricultural chemicals and other services related to chemical It has huge turnover and employs about 45 000 people Dow's policy was not to deal directly with small customers but to allow

selected distributors to deal with the said small customers. It preferred
to use few distributors because that made it easier from the point of view
of communication, strategy and training. Where possible, it would strive
to have only one distributor in a particular
country.

From 1995 onwards, Dow had a good relationship with Ravago NV
and the latter company was a big distributor of Dow
products.

During the period Dow disinvested from South Africa, plaintiff was
Dow's representatives in South Africa and on its re-entry, they entered
into a distributorship agreement with the plaintiff. They took over
certain big customers from the plaintiff, and the said big customers dealt
directly with
Dow.

Distributorship agreement was concluded between Dow Southern
Africa and the plaintiff on 1 April
1995.

It was the policy of Dow not to conclude exclusive agreements and as a result thereof, the agreement between Dow and plaintiff is a non-exclusive one.

Pursuant to the conclusion of the contract plaintiff distributed some of the products mentioned in the product rider of the agreement mentioned above. Some of the products were distributed by other companies in South Africa, despite the fact that in terms of the distributorship agreement, plaintiff was suppose to distribute said products. Plaintiff agreed that other companies can distribute products mentioned in the contract which they were not distributing.

At a later stage plaintiff complained about the fact that other companies were distributing products mentioned in their product riders.

He further testified that Dow company took over Sentrachem, a company which was carrying on business in, *inter alia,* chemicals and plastics during December 1997. Sentrachem had two . namely Plastomark and Safripol. Safripol was a manufacturer of products which were marketed and distributed by Plastomark.

Plastomark were dealing with both small and big customers.

At the time they acquired Sentrachem in December 1997, they held 51% of the shares and, and a German company Hoechst held 49%. **In** March 1999 they acquired the shareholding of Hoechst and they held 100% shares of Sentrachem.

After Dow acquired Sentrachem, he was given additional responsibilities and he became managing director of both Safripol and Plastomark, and business director of the plastic business of Dow in South Africa.

Prior to that, he was reporting to Mr Vin Sinnott, but that was changed and he started reporting to Mr Romeo Kreinberg, president of the global plastics business. The latter was stationed in Switzerland.

After taking over Sentrachem, they evaluated the two businesses. namely Plastomark and Safripol, and later they decided that they should

spin off in a certain way the small customers to a distributor, and thought they could sell the said business to someone. The said was in keeping with existing Dow policy not to deal with distribution to smaller customers.

During October 1999 Dow took a decision to sell division dealing with small customers.

There was a team who evaluated the business to be sold and to whom to sell it to and he was part of the said team, and they reported to Mr Kreinberg.

He referred to an e-mail which he sent to the company's legal advisor dated 21 August 1999. The said e-mail was copied to Mr Sinnott, who was working for Dow and was an account manager for the plaintiff. In the said e-mail he wanted to find out if Dow has any obligation to consider the plaintiff as a potential buyer of the business they wanted to sell. At the time of this e-mail the decision to sell was not yet taken.

He also referred to an e-mail sent to him by Mr Blackhurst who *inter alia,* said that from a contractual point of view the plaintiff is in a good position. E-mail was copied to Mr Sinnott.

Mr Vin Sinnott on 3 September wrote an e-mail to him and Mr Blackhurst wherein he, *inter alia,* said that he does not think that they should fight the plaintiff on poor performance but if the business is put up for bid, they could adjust the criteria.

He referred to an e-mail which he sent to Messrs Blackhurst and Sinnott wherein he expresses an opinion that he will not want to deal with the plaintiff and that on expiry of distributorship agreement between Dow and plaintiff, same should not be renewed.

He referred to various e-mails exchanged between him and their legal department. The legal advice that was given was that they had no obligation towards the plaintiff and the business unit can do whatever they feel makes business sense.

He further testified that there was internal discussion in their company in South Africa, and Mr Sinnott was of the opinion that they should engage in the negotiations with the plaintiff and "then pull the carpet, then just do something and get them out, you know, use a reason for not getting the distribution".

He was of the view that he does not want to talk to the plaintiff and he ignored them.

They considered several potential buyers of Plastomark.

On 27 and 28 October 1998 he held a discussion with Mr Joe Da Silva where several issues relating to the sale of Plastomark were discussed. After the said meeting, he sent on 1 November 1999 an e-mail to several members of top management of Dow Chemicals overseas. At that time, they knew that Rivargo/Resinex were interested in purchasing Plastomark.

He further testified that many officials of Dow did not like the plaintiff and they did not want to do business with them.

On 5 November 1999, together with Mr Sinnot had a lunch meeting with Mr Neil Hellmann. They explained, at the said meeting the process they are going through and that they are likely to negotiate with the potential buyers shortly and that the plaintiff is not one of the potential buyers they have selected. Mr Neil Hellmann, at the said meeting, advised them that in terms of their contract, Dow should offer the business of Plastomark, plaintiff is interested and has the necessary infrastructure. He (the witness) told Mr Hellmann that he does not agree with the view of Mr Hellmann.

On 20 December 1999 an agreement of sale of business was signed between Resinex Southern Africa (Pty) Ltd and Plastomark (Pty) Ltd.

Negotiations of the terms of the sale of business were negotiated by one of Dow's official and Mr Roussis in Holland.

He denied that he conspired with, amongst others the first defendant to remove business from the plaintiff.

First defendant played no role in the decision of Dow to sell P1astomark to a particular buyer and to remove certain products from the product rider of the plaintiff's distribution agreement.

During August 1999 he went, together with first defendant and other two families to Namibia on holiday for about two weeks. Their wives and children were also on the said trip. During the said holiday, no business was discussed.

Under cross-examination he testified that he was part of the team that negotiated the Dow and plaintiff's distribution agreement.

He was referred to a side letter and he confirms that the said letter talks about a further five years and thereafter, evergreen.

It was put to him that the agreement states that it is not exclusive, but the side letter states that products will be given in certain areas to plaintiff only if certain performance criteria are met and that, in practical terms, means that as long as performance criteria are met, contract is exclusive, and he denied that: After same question was put several times to him he conceded that in practice contract is exclusive if performance criteria are met.

He was referred to an e-mail dated 1 November 1999 which he sent to Dow Chemical official after his discussions with Mr Da Silva of Resinex SA. In paragraph 2.2 of the said e-mail, he stated the following:

> "As it is always the case this will be standard Dow non-exclusive agreement. This is *de facto* exclusive as long as performance criteria and agreed plans are met. Dow has always a strong intention for long term partnership",

and he confirmed that that is what he said.

When the same question was put to him, he insisted that the agreement was non-exclusive.

He testified that he does not know why anybody in the marketplace would assume that Dow was going to give away anything or any distribution.

He initially denied that he made any recommendations to his company about company to whom Plastomark can be sold to, but after further few questions, he conceded that he did recommend that it should be sold to Resinex.

He is aware of the fact that at some stage, Resinex/Ravargo an of products that Dow made available to them was poor. Dow had many problems with plaintiff in many areas, including payment terms. Contractually, Dow did not have any obligation towards the plaintiff to consider them for the Plastomark business.

He further alleged that the plaintiff's performance in so far as times.

The plaintiff did not have infrastructure to deal with the business that might come from Plastomark.

Resinex/Rivargo about a possible joint venture.

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ld in all probability dispose of the Plastomark business.

He further said that Mr Dennis Hellmann was insulting everybody and in one of the conferences, Mr Hellmann told some of the people unsavoury things about Mr Sinnott's wife and Mr Butler, Dow's Europe's President. There were a lot of factors which militated against plaintiff being considered for the Plastomark business.

He further testified that his view, at the time they were considering disposing of Plastomark, was that the plaintiff should not be given any information about what they (Dow) was doing, and that the distributorship that Dow had with plaintiff should not be extended for a further five years.

He further testified that Dow was considering various candidates namely Chemserve, Protea Group, CH Chemicals, Rivargo, Ashland and another company. He only spoke to Chemserve, who said they are not interested in the said business, and the other company he spoke to is Resinex, which expressed a strong interest in Plastomark.

Rivargo had expressed a keen interest in establishing South Africa with or without the plaintiff.

On or about 19 March 1999 Mr Da Silva mentioned to him that he was going to join Resinex South Africa.

The plaintiff was not handling some of the products in the rider as contained in Dow and plaintiff's distributorship agreement and the said products were given to Resinex South Africa to distribute. The reason is that the plaintiff did not have the necessary expertise to deal with the said products. Resinex South Africa also did not have the necessary expertise to deal with the said products, but they were having the expertise allover the world.

He conceded that in South Africa Resinex did not have the necessary expertise to deal with Dow's products.

He recommended that Dow should enter into a relationship with Resinex company relating to Plastomark, but he denied that he recommended that a distributorship agreement be entered into between Dow and Resinex company.

His view and the view of the entire management of Dow was that plaintiff was not a good partner to deal with as far as plastics concerned.

It was put to him that according to the correspondence in the bundles, it is stated that Messrs Respini and Sinnott agreed that Dow's handling of the Resinex/Rivargo situation was handled very badly by Dow, and asked to comment, and he said he has no comment. He knew from approximately August 1999 that Mr Van der Merwe was going to join Resinex South Africa.

While working for Dow, Mr Van der Merwe was given permission by his superior, Mr Sinnott to work part time for Resinex South Africa. He was referred to an e-mail sent to him by Mr Blackhurst, Dow's lawyer. In the said e-mail, Mr Blackhurst was advising him (the witness) that it is not true that Dow had no contractual obligations towards CHC, and in fact there is an existing distributorship agreement between Dow and CHC. The stand adopted by Mr Blackhurst is the same as the one he adopted in his earlier e-mail dated 2 September 1999.

The view expressed by Mr Blackhurst did not change his opinion that plaintiff should not be considered as a potential buyer of the Plastomark business.

He further testified that he asked Mr Blackhurst his view about contractual obligation in order to get clarity. After obtaining the clarification the legal department of Dow said to their business unit "do whatever you want to do from a business decision and if there is any legal problem, they will deal with it".

His view was that there was no contractual obligation between Dow and CHC, and "hence he will not engage in informing or negotiating with them", according to the e-mails he was exchanging with Mr Blackhurst. He further said that in the e-mail he was suggesting not to engage with them because from a commercial business point of view it did not make sense to Dow. His view was hat the legalities is something that they can deal with when and if they arise.

In August 1999 he went to Namibia with Mr Da Silva, and two other families. At that time he was giving some thought as to what to do

with Plastomark and there was a chance that Plastomark would become available to a distributor.

He did not discuss business or the question of Plastomark with Mr Da Silva at Namibia.

He later stated that whilst in Namibia, he could have discussed with Mr Da Silva that the new Resinex could at some time get Dow distributorship or products to distribute.

Defendant's closed their case.

Respective counsels submitted written heads of argument. The court will now deal with certain issues raised in the heads of argument.

A. Position of Mr Da Silva as Managing director of the Plaintiff

In their heads of argument plaintiff's counsels submitted that the plaintiff's claim against the first defendant, its erstwhile managing

director is founded principally upon a breach, by the first defendant. of the fiduciary duties which he owed the plaintiff arising out of the position of trust which he occupied in his capacity as managing director.

It is further submitted by the said counsel that the plaintiff's claims against the second and third defendants are premised on the fact that they are joint wrongdoers with the first defendant in that they assisted or they were vehicles through which the first defendant committed his wrongdoings against the plaintiff.

In my view, the principal issue to be decided by the court is whether the first defendant breached his fiduciary duties or not, and whether he carried on a business in competition with the plaintiff or not.

It is common cause between the parties that the first defendant was employed by the plaintiff in different capacities and he became the managing director of the plaintiff from 1995. He is a trained accountant and he ultimately qualified as a chartered account whilst still in the employment of the plaintiff.

From his educational background, qualifications and working experience, one can safely assume that, or the probabilities are that he was fully aware of the nature and extent of the fiduciary duties that he owed the plaintiff. During the trial, at no stage was it suggested by any of the witnesses, including the first defendant, that the latter, during his period of employment, was not aware of his fiduciary duties.

In fact, at the beginning of oral argument, the first defendant's counsel and the second and third counsel, rightly so, conceded that the first defendant owed the plaintiff a fiduciary duties.

The first defendant submitted his letter of resignation to the chairman of the plaintiff on 11 June 1999, but after some discussions between the chairman and the first defendant, it was decided that he will remain in the employment of the plaintiff, in the same position until end of October 1999. At a later stage, after further discussions between the chairman and the first defendant, it was decided that first defendant should leave his employment at the end of August 1999, and he actually left the plaintiff's employment at the end of August 1999.

Evidence on record indicates that the first defendant as managing director had *inter alia,* the responsibility to protect the interests of the plaintiff and to consider expanding the operations of the company and seek new business opportunities.

During the hearing, the first defendant testified that after tendering his resignation, his powers as managing director were reduced.

In fact, during cross examination of plaintiff's witnesses, it was suggested to the said witnesses that after tendering his letter of resignation, Mr Da Silva was no longer *de facto* managing director.

There is no evidence on record to substantiate the said allegation. Evidence in fact points to the contrary. He remained the managing director of the plaintiff until he left the plaintiff's employment at the end of August 1999. Prior to his departure, first defendant performed his duties as managing director owed plaintiff fiduciary duties.

B. Resinex NV opportunity

It is common cause between the parties that for some time, prior to first defendant leaving the employment of the plaintiff, the plaintiff was making efforts to establish a business relationship with Resinex NV and or Ravago NV.

During the said negotiations, plaintiff made available to Resinex NV *inter alia,* its financial statements. Several discussions were held between the parties which culminated in Resinex NV making an offer to buy certain portion of plaintiff's business, which offer was rejected by the plaintiff. Thereafter, according to the first defendant efforts were made by the plaintiff to get involved with Resinex NV / Ravago NV in some type of a business relationship.

In July 1999, the first defendant went overseas and he visited Ravago NV and DDE, despite instructions from Mr D Hellmann not to visit the plaintiff's principals. First defendant testified that he did not tell Mr D Hellmann about the said visit as he (Mr Hellmann) would have been upset.

Under cross examinations he contradicted himself by stating that
he did tell Mr Hellmann that he was going overseas to meet *Ravago* NV's
people but he did not tell him that he was also going to meet DDE people

During cross-examination first defendant testified that from
January to March 1999 he telephoned Lexicon, a subsidiary of
Resinex NV almost five times. When asked about the said telephone
calls, he said that Mr Gorp, a representative of Lexicon was enquiring
about a certain product as he (Mr Gorp) was under a wrong impression
that he (first defendant) has already left the plaintiff's employment.

On a question of plaintiff's counsel, he admitted that during June
July and August 1999 he telephoned Lexicon almost thirteen times. He
explained that he made the said telephone calls in an effort to do
business with Resinex as requested by Mr D Hellmann.

The first defendant's explanation mentioned above is improbable in
the light of *inter alia* the fact that, according to his evidence, during
December 1998 at a conference in Europe, Mr De Keyser, who he met
the latter's hotel room informed him that Resinex NV wants to come to

South Africa and from a new entity. He (first defendant) was offered a job to be the managing director of the new entity. At the said conference, Mr D Hellmann was present but he (first defendant) did not tell Mr Hellmann about the job offer he received from Resinex NV. Another factor which undermines the first defendant's explanation is that during the cross-examination of Mr D Hellmann it was put to him that the version of Mr De Keyser was that after the plaintiff rejected Resinex's February 1997 offer to acquire the plaintiff's plastic business, as far as he was concerned there was no further prospect of any joint venture or business relationship between the plaintiff and Resinex NV.

The first defendant's evidence is unreliable and the court cannot rely on it. The said evidence is contrary to the probabilities.

The first defendant and Mr De Keyser testified that the contract concluded between first defendant and Resinex NV is an ordinary contract of employment and did not constitute a joint venture.

The first respondent's counsel submitted that as a matter of law a joint venture, is nothing but a form of partnership, and the undisputed

facts in this case supports the contention of the first defendant and Mr
De Keyser mentioned in the preceding paragraph.

The second and third respondents' counsel also submitted that the
contract between first defendant and Resinex NV does not establish a
joint venture. He further submitted, *inter alia,* that it merely provides
that they will both be shareholders.

On the other hand, in their heads of argument, the plaintiff's
counsels submitted that a reading of the document titled "Heads of
Argument" is not a contract of employment between an employer and an
employee, but it is an agreement between two contracting parties in
terms of which they undertake jointly to establish a business operation
in South Africa by means of the vehicle of the second and third
defendants
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In *Werman v Hughes* 1948 (3) SA 495 AD at page 505, *Greenberg* JA
said that in an action on a contract, the rule of interpretation is to

ascertain not what the parties intention was, but what the language used

in the contract means, i.e. what their intentions was as expressed in the contract.

In *ReIly v Seligson and Clare Ltd* 1977 (1) SA 626 AD at 638f-g Holmes JA said that the golden rule of interpretations, in ascertaining intention as expressed, is to give the language its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. referred to *Kalil v Standard Bank of South Africa Ltd* 1947 (4) SA 550 AD at 556C-D.

The language used in the agreement under consideration is simple and understandable.

When interpreting it, court must assign ordinary grammatical meaning to the words used, unless absurdity or inconsistency with the rest of the documentary might arise from such an approach.

Parties to the said agreement are Resinex NV and the first defendant. Second and third defendants are not party to the said agreement.

The preamble to the agreement clearly states what the parties intend achieving and same reads as follows:

> "Whereas (Da Silva) and (Resinex) desire to enter an agreement to start an operation in South Africa with the objective of carrying on a business in the distribution of plastic raw materials and other products represented by the Resinex / Ravago Group."

The preamble mentioned above has nothing to do with an employment contract.

Certain clauses, particularly clauses 1 and 2, which deals with the structure of the business operations to be established in South Africa and the allocation of shares to the signatories of the agreement and Mr

Leon van der Merwe, and clause 5 which, *inter alia* makes provision for the acquisition of future opportunities, which future opportunities include Plastomark and Mobil underpins the conclusion that the "Heads of Argument" under consideration is not an employment contract, but a contract of a joint business venture. It regulates the relationship between first defendant and Resinex NV/Ravago NV and not employment of first defendant by second or third defendant, nor Resinex NV/Ravago NV.

According to the evidence on record, over a long period plaintiff attempted to establish a business relationship with Resinex NV/Ravago NV without success.

The first defendant who was the managing director of the plaintiff his responsibilities included, *inter alia*, expansion of the plaintiff's business.

At some stage, the first defendant was specifically tasked with the duty of negotiating a business relationship with Resinex NV/Ravago NV.

Whilst still employed by the plaintiff, the first defendant, negotiated on his behalf, a business relationship with Resinex NV, which led to the conclusion of the "Heads of Agreement" mentioned above and the establishment of the second and third defendants.

The first defendant's counsel submitted that the plaintiff could not have entered into a similar contract with Resinex NV, as, amongst others the plaintiff could not have been appointed a managing director of the second and or third defendant(s). The second and third defendant's counsel supported the said submission.

The above-mentioned submissions are misdirected. The plaintiff attempted to establish a business relationship with Resinex NV/Ravago NV and not to be appointed as managing director of the second and/or third defendant. The main feature of the "Heads of Agreement" entered into between Resinex NV and the first defendant is that a business relationship between first defendant and Resinex was established. The fact that first defendant was also made the managing director of the second and third defendant does not diminish the fact that a business relationship was established.

The first defendant breached his fiduciary duties by negotiating for himself, a business opportunity he should have negotiated on behalf of the plaintiff.

Mr De Keyser testified that his company took a decision to come to South Africa as early as March 1998.

The probabilities are that they decided to come to South Africa and work with Mr Da Silva, hence the secret meetings with Mr Da Silva, numerous telephone and e-mails communications between Mr Da Silva and Resinex which culminated in the "Heads of Agreement" mentioned above.

When testifying, Mr D Hellmann testified that Mobil was one of the plaintiff's existing principal suppliers and furthermore plaintiff had an interest in acquiring Plastomark, and that probably is one of the reasons why first defendant failed to disclose to the plaintiff the existence of the said "Heads of Agreement".

The first defendant and Mr De Keyser's evidence that the Heads of Agreement constitutes an employment contract is false and same cannot be relied upon.

C. Plastomark Opportunity

Dow Southern African (Pty) Ltd during 1997 acquired Sentrachem which was a chemical company in South Africa. Sentrachem had two subsidiaries, namely Plastomark and Safripol.

Plastomark was distributing products produced by Safripol.

Mr Schoch was the managing director of Dow Southern Africa (Pty) Ltd. In keeping with the Dow's International policy of not distributing to small customers a decision was taken about October 1999 after carrying out an investigation, to sell the section of the business relating to small customers. The next question that Dow International had to consider was to whom should they sell the section of the distribution business they want to dispose of. A legal opinion was sought as to whether Dow International was contractually bound to offer the Plastomark business to plaintiff or not.

As the evidence has revealed, plaintiff was not considered as a potential buyer of the said business. Ultimately the said business (Plastomark) was sold to Resinex South Africa (Pty) Ltd, the third defendant and the preliminary negotiations prior to the sale were conducted by first defendant on behalf of the third defendant.

The sales agreement was signed on 22 December 1999 by first defendant representing third defendant and Mr Schoch representing Dow.

Plaintiff was aware of the fact that Dow acquired Sentrachem, and it was also aware that Dow might want to dispose the Plastomark business. Mr D Hellmann testified that the plaintiff, who had an interest in acquiring the Plastomark business believed that it was entitled to acquire from Dow the Plastomark business because of the distributorship agreement plaintiff had with Dow. Plaintiff had expressed a desire to acquire Plastomark's business. If the business was offered to the plaintiff, plaintiff would have been willing and able to pay the price which the third defendant paid for the Plastomark business.

During August and September 1999 Mr D Hellmann advised Mr Vin Sinnott of Dow about the fact that plaintiff was interested in acquiring the Plastomark business.

According to the plaintiff's counsel's heads of argument, the plaintiff's testimony in this regard essentially amounted to the following:

First defendant communicated to Resinex the fact that Sentrachem / Dow would sell off, *inter alia,* Plastomark, secondly that first defendant in his heads of agreement with Resinex NV included expressly the intention to acquire Plastomark and thereby placed himself in a position whereby his own and the plaintiff's interest were in conflict and lastly he held secret meetings at a time when he was still managing director of the plaintiff.

There is evidence on record that the first defendant held several meetings with people from Resinex, Dow and DDE without the knowledge of Mr D Hellmann. At the said time, he was still the managing director of the plaintiff. There is also evidence on record that on 27 May 1999 he sent an e-mail to Mr Schoch in which he advised Mr Schoch that he will be having a meeting with certain people on 10 June 1999. The e-mail is worded in a strange manner, and when asked about the strange wording of the e-mail, Mr Da Silva gave an explanation which did not make sense.

First defendant further testified that besides the Du Pont people Mr De Keyser was also going to be present at the said meeting.

To me, it is clear that the e-mail was worded in the manner in which it was worded in order to conceal the identity of the people he was going to meet and the business to be discussed.

Furthermore, he conceded, during cross-examination that he did not want the plaintiff to know about the said meeting.

There is also evidence on record that whilst still managing director of the plaintiff first defendant informed Resinex NV about the Plastomark opportunity and that same was included in the heads of agreement he signed with Resinex NV. First defendant prepared the said heads of agreement .

The manner in which first defendant dealt with the heads of agreement, his secret meetings with Resinex people and other principals of the plaintiff makes the version of the first defendant which contradicts the version of Mr D Hellmann on this issue improbable.

The court accepts the version of Mr D Hellmann that the first defendant failed to disclose to the plaintiff the Plastomark opportunity and instead, he worked towards appropriating the said opportunity for himself and/ or the third defendant.

The fact that the Plastomark business was sold after the first defendant had left the employment of the plaintiff does not take the case of the defendants any further. The fact of the matter is, in the light of the long standing policy of Dow International not to deal with small customers, the probabilities are that Resinex NV and first defendant prepared, during their secret meetings, for the purchase of Plastomark business, hence the Plastomark business opportunity was included in the heads of agreement referred to above.

The evidence of Mr Schoch who was part of the secret meetings arranged by first defendant should be treated in the same manner as the evidence of first defendant. There are many improbabilities in his version, e.g. that on their Namibian trip no business was discussed at all. Furthermore the evidence of Mr Schoch was unsatisfactory in aspects e.g. during his cross examinations, he admitted that Dow's agreement with plaintiff was in practice, an exclusive agreement as

plaintiff met or fulfilled the performance criteria, but he later changed his version and said that the agreement was not exclusive. He initially denied that he recommended to Dow that Plastomark be sold to Resinex NV but later conceded that he made the said recommendation. The manner in which he dealt with the legal opinion of their legal advisor indicates that he was trying at all costs to make certain that the plaintiff is not considered as a potential buyer of the Plastomark business.

The probabilities are that when Dow NV took over Sentrachem during December 1997, the first defendant and Mr de Keyser knew that the business of Plastomark will be sold in the futu When Mr De Keyser, who according to his evidence, Resinex took a decision in March 1998 to come to South Africa, started negotiating their business relationship with Mr Da Silva in South 'Africa they both repositioned themselves (Da Silva and Resinex) to acquire the business created by Dow's take over of Sentrachem, namely Plastomark.

The first defendant's counsel submitted that first defendant did nothing wrong whilst managing director of plaintiff as the decision to sell Plastomark was taken only in October 1999

The said submission cannot be sustained. When Dow SA took over Sentrachem, the probabilities were high that Plastomark business will become available, particularly when one takes into account Dow's known policy of not dealing with small customers. Dow's said policy was well known and Messrs De Keyser and Da Silva were aware of it, and are consequently, it is improbable that prior to his leaving plaintiff's employment the first defendant and Mr De Keyser did not speak to Mr Schoch about the said opportunity. The Plastomark opportunity probably contributed immensely to the decision of Resinex HV to come to South Africa.

As stated earlier Mr Schoch recommended that Plastomark should be sold to Resinex NV despite the legal opinion he received form MR Blackhurst, their legal advisor.

The court cannot rely on the evidence of Mr Scho. As stated earlier he contradicted himself on several material issues, and he went out of his way to ensure that the Plastomark opportunity goes to Resinex NV.

The probabilities are that as part of their business strategy, Messrs Da Silva and De Keyser negotiated the acquisitions of Plastomark prior to the signing of the "Heads of Agreement".

D The DDE Agency

According to the evidence on record at the relevant time, the main suppliers of products to the plaintiff were Dow and DDE.

On 6 September 1999 Mr Gabbard of DDE had a meeting with Messrs Dennis and Neil Hellmann. At the said meeting he informed them that DDE intends terminating the agency agreement between it and the plaintiff on three months notice. On 13 September 1999 said notice was given to the plaintiff and the said agency agreement was terminated.

After termination of the agency agreement between plaintiff and DDE, DDE entered into a distribution agreement with Distriflex NV (a subsidiary of Resinex NV).

In terms of the said agreement, Distriflex was appointed the distributor of DDE products in, *inter alia* South Africa. Through the said

arrangements, the second defendant became a distributor of DDE products in South Africa which products were earlier distributed by the plaintiff.

Mr Da Silva testified that he at some stage warned the plaintiff or Mr Dennis Hellmann that if Resinex NV comes to South Africa, the plaintiff will lose the DDE business.

On the other hand, Mr Dennis Hellmann denied that Mr Da Silva informed him that if Resinex NV comes to South Africa, plaintiff will lose the DDE business, although there were general discussions regarding DDE wanting to reduce the number of its distributors. He further testified that if he was told that plaintiff is likely to lose the DDE business, plaintiff would not have invested time and energy building up the DDE business in South Africa.

Besides saying so, there is no documentary evidence which supports Mr Da Silva's allegation that he informed Mr Dennis Hellmann about the possibility of plaintiff losing the DDE business.

There is no evidence that whilst still the managing director of the plaintiff, Mr Da Silva took any steps to protect the interests of the plaintiff after learning about the possibility of plaintiff losing the DDE business, except to speak to Resinex NV with whom he later entered into a joint venture and distributed the DDE products.

The probabilities are that, as stated by Mr. Hellman, the plaintiff would not have invested time, money and energy in promoting products of DDE if plaintiff knew that there is a possibility of losing the DDE business.

According to Mr Da Silva, on 8 June 1999 when he picked up Mr De Keyser from the airport in Johannesburg, Mr De Keyser told him that the DDE deal is done. He understood that to mean that DDE will deal with Resinex and that the plaintiff would lose the DDE agency.

Despite the fact that he was still the managing director of the plaintiff, he failed to inform Mr Dennis Hellmann about information he received from Mr De Keyser.

Both Messrs and Haullzhausen and Da Silva travelled to Europe to meet, *inter alia* DDE people in June 1999 and July 1999 respectively. At least as at 24 August 1999 they both knew that representatives of DDE were coming to South Africa in early September 1999.

The probabilities are that Mr Da Silva knew much earlier than he is prepared to admit that DDE was going to cancel the distributorship agreement with the plaintiff and he did not take any steps to prevent that.

The probable reason why he did not attempt to protect the interests of the plaintiff is that he was personally going to benefit if the DDE business in South Africa is taken over by Resinex.

The first defendant's counsel in his written submissions submitted that Mr Burelli's evidence is reliable and that same was fully corroborated by the evidence of Messrs Da Silva and De Keyser.

Firstly, the court cannot rely on the evidence of Mr Da Silva because of the manner in which he failed to fulfil his fiduciary duties in several respects mentioned earlier, particularly the fact that he personally was going to benefit from the cancellation of the DDE agency agreement and the variety of the secret meetings he held with a variety of plaintiff's principals without knowledge of the plaintiff.

Mr De Keyser, negotiated with first defendant the preparation and signing of the "Heads of Agreement" fully aware of the fact that Mr Da Silva was still the managing director of the plaintiff.

The probabilities are that Resinex NV would not have decided to come to South Africa without Mr Da Silva.

The decision by DDE to terminate plaintiff's contract and award. same to Resinex NV was taken on 8 June 1999, which is two days prior to Messrs De Keyser and Da Silva finalising their joint venture discussions. In my view, this was not a coincidence. The said decision, in all probability was taken after being informed that Resinex NV was

coming to South Africa and Mr Da Silva will be the managing director of their new company.

E. The Dow Products Agency

Dow Southern Africa (Pty) Ltd concluded a distributorship agreement with the plaintiff. Attached to the said agreement was a so-called product rider which formed part of the agreement. The agreement was for a five year period and was renewable for a further five years. Additional products which would ordinarily be handled by the plaintiff were to be preferentially offered to the plaintiff.

Plaintiff did not deal with all the products mentioned in the so-called product rider and other companies were dealing with these products that plaintiff did not deal with.

Certain products which were on the product rider of the plaintiff's contract were deleted in a letter dated 3 December 1999 in compliance with the contract.

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According to the evidence of Mr De Keyser, talks were held with Dow after Resinex had started its operations in South Africa to have some of Dow's products. No formal agreement was signed but there was an understanding between the parties, which was reached towards end of 1999 that Resinex would take over some of the Dow's engineering products.

The probabilities are that Mr De Keyser started negotiations with Dow fully aware of the distributorship contract between plaintiff and Dow, and the products mentioned in the so-called product rider. This should be so, because of the secret meetings he held with Mr Da Silva whilst the latter was still the managing director of the plaintiff, and that from 1 September 1999 Mr Da Silva started working for Resinex.

There is evidence on record that during July 1999 Mr. Da Silva, despite instructions from Mr Hellmann not to visit principals, went overseas to visit Resinex NV, Ravago NV and DDE. He did not inform Mr Hellmann about the said visit.

Mr Da Silva communicated with Resinex on a regular basis from September 1998 until his departure, e.g. on 7 April 1999 he telephoned Resinex 5 times despite the fact that there was no business conducted between Resinex NV and the plaintiff.

Mr Da Silva also communicated with Mr Schoch on a fairly regular interval and also invited Mr Schoch to a meeting he was arranging with Mr. De Keyser for 10 June 1999. He did not want Mr Hellmann to know about the said meeting.

On 10 June 1999 Mr Da Silva had lunch with Mr Schoch and on

17 July 1999 he had a meeting with Mr Heinz Christen of Dow.

On 2 August 1999 Mr Da Silva went to Namibia with Mr Schoch their families and other people.

On 18 August 1999 Mr Da Silva telephoned Dow NV, Switzerland.

After a meeting with Messrs Dennis and Neil Hellmann, Dow, in letter dated 3 December 1999 informed the plaintiff that Dow would deleting as from 15 June 2000, from the product rider certain listed

products. After expiry of the notice period, Dow Southern Africa started

to distribute Dow's products, even if there was no written agreement. They operated on the basis of an oral agreement.

The first defendant's counsel, submitted that the decision taken by Dow to delete certain products from the product riders of agreement Dow entered into with plaintiff was taken towards the end of 1999, which is long after first defendant had left the employment of the plaintiff.

He further submitted that Mr Da Silva could not have played any part in the decision of Dow and same was confirmed by the evidence of Mr Schoch.

On the other hand, the plaintiff's counsel submitted that at the time that plaintiff was handling the Dow products, plaintiff performed its duties in a satisfactory manner and there was no complaint from Dow.

The decision of Dow to delete certain products from the product rider came as a complete surprise to the plaintiff. The said deletion of the products from the product rider affected only the plastics division. Later products deleted from the product rider were handled by second defendant.

The manner in which Mr Da Silva conducted himself as mentioned above, including, but not limited to the secret meetings he had with

Resinex NV, Dow NV, and discussions he had with Mr Schoch impacts negatively on the credibility of Messrs Da Silva, Schoch and De Keyser.

The probabilities are that MR Da Silva, who was the managing director of the plaintiff, was aware of the fact that Dow intends taking away business from the plaintiff and giving same to Resinex, and failed to prevent same nor to inform the plaintiff.

In fact, Mr Da Silva benefited as Dow moved its business from plaintiff to second defendant and Mr Da Silva had a shareholding in the first and or second defendant(s).

Furthermore, it is probable that Mr Da Silva prior to terminating his employment with the plaintiff colluded with Messrs Schoch and De Keyser to remove Dow's business from plaintiff and give same to the second defendant.

As far as the plaintiff's Dow agency agreement is concerned, first defendant, with the assistance of Resinex NV breached his judiciary duties.

F Competing with the plaintiff

In their Heads of Argument, the plaintiff's counsel submitted that it is common cause on the pleadings that the first defendant was under a number of fiduciary and contractual duties including, *inter alia,* that he would not without the plaintiffs prior written consent, take part in any other business, that he would refrain from placing himself in a position whereby his interests were in conflict with those of the plaintiff that he would at all times act in the interests of the plaintiff, and he will refrain from competing with the plaintiff

It is further submitted that the plaintiff pleaded, *inter alia,* that first defendant breached his obligations to the plaintiff in that he concluded business transactions for and on behalf of the second and/or third defendants, which transactions are set out in Annexure CH3. The plaintiff further stated that the transactions reflected in annexure CH3. were conducted for the benefit of the second and/or third defendant(s) which, but for Da Silva's, breach of his obligations, could and would have been conducted for the benefit of the plaintiff.

In their pleas, first, and second and third defendants denied the allegation
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In his further particulars, the first defendant admitted that he negotiated the agreement which resulted in the import of these goods and that he did so during August 1999.

In answer to pre-trial inquiries, all the defendants confirmed that the goods were ordered during August 1999 for the second defendant. who also paid for the said goods.

The plaintiff's counsel further submitted that at least, in relation to the transactions referred to in annexure "CH3" to the particulars of claim, the first defendant conducted these transactions for and on behalf of the second and third defendants, the second and third defendant are competitors of the plaintiff and that he conducted the transactions whilst still employed by the plaintiff as its managing director.

The submission mentioned in the preceding paragraph is, in my view, well founded. Said submission is supported by the evidence led in this case.

In his Heads of Argument, the second and third defendant's counsel submitted, *inter alia:*

1. The transactions relied upon by the plaintiff relate solely to the sale of the LLDPE as evidenced by the documents annexed to the Particulars of Claim.

2. The so-called LLDPE material was ordered by the first defendant and shipped to South Africa whilst first defendant was still employed by the plaintiff.

It was further submitted that the above-mentioned activities were merely preparatory work to enable the second defendant to commence trading in September 1999 after first defendant had left the employment of the plaintiff. Said counsel relied on the decision in *Atlas Organic Fertilizers v Pikkewyn* 1981 (2) SA 173 TPD.

The facts of the latter case are distinguishable from the facts of our current case. In our current case, Mr Da Silva, besides causing the incorporation of second and third defendants, or buying shelf companies in order to bring second and third defendant's into existence, was involved in other activities, namely the ordering of the LLDPE material for or on behalf of second and or third defendants, communicating with other officials of Resinex NV or its subsidiaries and sourcing material for them or obtaining quotations for them.

The actions of Mr Da Silva, in my opinion went beyond mere preparatory work.

The second and third defendant's counsel further submitted that there is no evidence that the second defendant made a profit from the sale of the LLDPE and that the plaintiff was not dealing with off-spec material like LLDPE.

Firstly, the first defendant was a managing director of the plaintiff and his responsibilities included expanding the business of the plaintiff. If the plaintiff was not dealing with LLDPE, it was part of his responsibilities to source said product for the plaintiff and create a market for same.

First defendant breached his fiduciary duties by, whilst still employed by the plaintiff, sourced and ordered products for the second or third defendants who are the plaintiff's competitors.

In *Symington and Others v Pretoria Oost Privaat Hospital Bedryfs* 2005 (5) SA 550 at 563(C)-(F) at para 27 Brand JA said the following:

"It was also accepted by all parties that a director's breach of fiduciary duty can in principle give rise either *to* a claim for disgorgement of profits or to a claim for damages. Again I think the assumption was rightly made. Though the common element of the two actions would be a breach of fiduciary duty, the other requirements would, of course, be quite differe While, for example, it is not a requirement of a claim for disgorgement of profits that the company suffer any damages, such damages would by its very nature be the central requirement of a damages claim. On the other hand, whilst the questions whether the director had received any profit from the breach of his fiduciary duty would be of no consequence in a claim for damages, this would be the essential requirements in a disgorgement of profits claim."

In this case, it is not in dispute that the first defendant, obtained substantial shareholding in the third defendant and also in the second defendant . His activities with second and third defendant prior to leaving the employmen of the plaintiff were inspired by the t arrangements he made with Resinex NV regarding the second and third defendants.

In competing with the plaintiff, second and third defendants caused plaintiff damages.

The plaintiff's counsel, correctly so, pointed out that at this of the trial, it is not necessary for the court to consider the extent of the damages suffered by the plaintiff.

G Section 248 of the Companies Act 61 of 1973

In the plea, this defense was raised, although during argument same was not vigorously pursued.

The first defendant has failed to show that this defense is open or available to him.

On the facts of this case it cannot be justifiably argued that he acted honestly and reasonably.

I do not believe that this defense requires further examination.

H Conduct of the second and third defendants

The plaintiff's counsel submitted that Mr D Hellmann testified that Mr Da Silva, in acting in breach of his fiduciary duties, was aided and assisted by Messrs De Keyser and Van der Merwe in the establishment of

the second and third defendants and becoming directors of the second and third defendants.

The above submission, in my view, is supported by the evidence on record.

The evidence also reveals that whilst still managing director of the plaintiff Mr Da Silva sourced materials, namely LLDPE for the second defendant.

The second and third defendants counsel submitted, *inter alia* that it is clear from the evidence and documents before court that the LLDPE was imported for and sold by the second defendant which was a trading company. He further submitted that there is no evidence before court linking the third defendant in any way whatsoever to the importation or the sale of the LLDPE.

The plaintiff's counsel, in my view, correctly so, submitted that the second and third defendants are both the unlawful product of but also the vehicles by which the first defendant perpetrated his own misconduct against the plaintiff.

Second and third defendants benefited from the wrongful conduct

of the first defendant. Without the assistance of the second and third

3. The quantification of the amount referred to in prayer 6 of the

defendan Particulars of Claim is postponed in accordance with the relief

compron sought in prayer 5. the plaintiff to the extent first,

second and third defendants are joint wrongdoers.

4. The relief sought in prayer 7 is postponed in accordance with prayer 5.

During argument, it was pointed out to the court that the

costs relating to the *Anton Pillar* application were reserved for

determination by the court dealing with the trial.

5. The reserved costs relating to the Anton Pillar application are awarded to the plaintiff.

In of the documents recovered as a result

the *Anton Pillar* application, and my findings in this case, the reserved

cos 6. The first, second and third defendants jointly and severally are

plaintiff.

to pay the costs of the plaintiff, which costs will include costs of two counsel.

CONCLUSION

THE COURT THEREFORE:

1. Grants an order in terms of prayers 1, 2, 3, 4, 6 and 8 of the

W L SERITI
JUDGE OF THE HIGH COURT

plaintiff's Particulars

The quantification of the amount referred to in prayer 4 of the

Particulars of Claim is postponed in accordance with the relief

2. sought in prayer 5.