REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2188/2006

In the matter between:

EDUARD PETRUS HERBERT	**1ST PLAINTIFF**
JOHANNES JACOBUS KOEN	**2ND PLAINTIFF**
WILLA KOEN	**3RD PLAINTIFF**
EUGENE KOEN	**4TH PLAINTIFF**
and	
ADRIAAN JOHANNES JACOBUS BRITZ N.O.	**1ST DEFENDANT**
TJEKERO TWEYA	**2ND DEFENDANT**
JOHN NAUTA	**3RD DEFENDANT**
PHILLIPUS ALBERTUS BREDENHAN	**4TH DEFENDANT**
ELSIE SOPHIA CAROLINA BEUKES	**5TH DEFENDANT**
FLUKSMAN N. SAMUEHL	**6TH DEFENDANT**
GRACE UUSHONA	**7TH DEFENDANT**
WOLF RITTER	**8TH DEFENDANT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**9TH DEFENDANT**

Neutral citation: *Herbert v Britz N.O.* (I 2188/2006) [2013] NAHCMD 39 (14 February 2013)

Coram: MILLER AJ
Heard: **31 October 2012; 13 November 2012**
Delivered: **14 February 2013**

Flynote: Absolution from the instance – Trustees sued by trust creditors in their personal capacities – Argued that in law trustees cannot be held liable in their personal capacities by trust creditors.
Held that in principle trustees can be held personally liable depending on the facts.

Summary: The plaintiff sued the trustees of a trust in their personal capacities – The action was based in delict on the basis that the trustees owed the plaintiffs as creditors of the trustees a duty of care and that they were negligent in the discharge of those duties – It was argued that in Namibian law trustees do not owe trust creditors a duty of care – The Court held that in principle trustees can depending on the facts be held liable in their personal capacities – When trusts engage in commercial operations, trustees may have the same duties of care as directors of companies .
Held that at the stage of an application for absolution from the instance, the test is whether a reasonable Court may (not should or ought to) find in favour of the plaintiff.
Held that on the facts absolution from the instance refused.

ORDER

The first and second defendant's are absolved from the instance in respect of the second loan made by the first plaintiff being the sum of N$500 000.00. The seventh and eight defendants are absolved from the instance in respect of the first loan made by the first plaintiff being the sum of N$500 000.00. Save for the above the

applications for absolution from the instance are dismissed. The costs will stand over for final determination at the conclusion of the trial.

JUDGMENT

MILLER AJ :

[1] These are trial proceedings concerning the affairs of the Esperanza (Nam) Trust No. 327/2002. I shall henceforth refer to this entity simply as “the Trust”.

[2] The trust was the brainchild and the creation of one Pieter Johannes Britz, also known and referred to in the evidence tendered thus far, as Peet Britz (now deceased). With the exception of the first defendant, who is sued in his capacity as the administrator of the estate of the late Mr. Britz and the ninth defendant, the remainder of the defendant’s were at some stage or another duly appointed trustees of the Trust.

[3] Conversely the four plaintiffs are creditors of the Trust. They all allege that during the existence of the Trust they had advanced monies to the Trust by way of loans, which the Trust had failed to repay to them on the due date for payment.

[4] The trial before me reached the stage where the plaintiffs closed their case, having adduced the evidence of a number of witnesses in support of their claims.

[5] Mr. Narib who appears for the second and third defendants and Mr. Strydom who appeared for the fifth, seventh and ninth defendants thereupon launched an application for absolution from the instance on behalf of those defendants they represent.

[6] Mr. Totemeyer SC who represents the plaintiffs concedes that in respect of some of the defendants, they are entitled to be absolved from the instance in respect of some of the claims and I shall make an appropriate order in respect of those at the conclusion of this judgment.

[7] In *de Klerk v ABSA Bank Ltd and Others* 2003 (4) SA 315 (SCA) the Court stated the test to be applied in absolution applications as follows:

> ‘The correct approach to an absolution application is conveniently set out by Harms JA in *Gordon Lloyd Page and Associates v Revera and Another* 2001 (1) SA 88 SCA at 92 E-F. The test for absolution to be applied by a trial Court at the end of a plaintiffs case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (a) at 409 G-H in these terms:
> …(When) absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally require to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.’

[8] In *Aluminium City CC v Scandia Kitches and Joinery (Pty) Ltd* 2007 (2) NR 494, Silungwe AJ stated the position as follows 496 E-G:

> ‘It is often said that in order to escape absolution from the instance a plaintiff has to make out a *prima facie* case in that it is on *prima facie* evidence – which is sometimes reckoned as evidence requiring an answer (*Alli v de Lira* 1973 (4) SA 635 (7) at 638 B-F) in that a Court or could or might find for the plaintiff. However, the requisite standard is less stringent than that of a *prima facie* case requiring an answer, it is sufficient for such evidence to have at least the potential for a finding in favour of the plaintiff.’

[9] In *Redoli v Elliston t/a Elliston Truck and Plaint* 2002 NR 451, Levy AJ stated the following at 553 (F):

> ‘The phrase “applying its mind reasonably” requires the Court not to consider the evidence in *vacuo* but to consider the admissible evidence in relation to the pleadings and in

relation to the requirement of the law applicable to the particular case. Mr. Dicks argued that the plaintiff had to make out a prima facie case. I doubt whether a plaintiff has to go that far to escape absolution. If a reasonable Court keeping in mind the pleadings and the law applicable, considers that a Court "might" find for the plaintiff, then absolution from the instance must be refused.'

The pleadings

[10] It is immediately apparent from Claim 1 in the pleadings that the defendant's except the first and ninth defendants on sued not in their official capacities as trustees but in their personal capacities.

[11] In essence it is alleged by the plaintiffs that the late Mr. Britz solicited funds from them by way of loans, which funds he subsequently stole or embezzled. The plaintiffs then allege that the trustees owed them, being creditors a duty of care and as a result of a lack of care and breach of their duties caused the funds lent to become stolen.

[12] In sum the cause of action is alleged to be one in delict.

[13] Claim 2 lies against the fifth and the ninth defendants. It seeks to hold the ninth defendant vicariously liable for breach by the fifth defendant of her duties as the Master of the High Court and as such an employee of the ninth defendant. Claim 2 likewise strikes me as a claim which has its foundation in the law of delict.

[14] The trustee defendants seek to rely on the pleadings firstly on the terms of the Deed of Trust in terms whereof they are indemnified against claims against them in their personal capacities. The defence was subsequently withdrawn and rightly so.

[15] The trustee defendants further place in issue the allegation that they had breached any duty towards the plaintiffs.

[16] A further defence was raised and developed in the Heads of Argument prepared by Adv. Strydom in the following terms:

'…(Insofar as delictual claims aganst a trustee are concerned, it is a general proposition in law that delictual claims by third parties who suffered financial loss through the commission of a delict, can only be pursued by creditors against trustees in their official capacity as trustees and not in their personal capacities.'

The liability of trustees in their personal capacities

[17] Mr. Strydom seeks to find support for the submission quoted above in the second edition of Honore, the Law of Trusts. He submits that these principles remain the current law in Namibia. Inasmuch has the position may have changed in South Africa, such were the result of legislative provisions enacted there which do not apply in Namibia. Consequently decisions in that country subsequent to the legislative changes offer no guidelines to this Court.

[18] I was not referred to, nor could I find any decision in Namibia dealing with this issue.

[19] Several decisions in South Africa are to the effect that a trustee can be held liable in delict in his personal capacity.

[20] A fair example for that is the decision in *Simplex v van der Merwe* 1999 (4) SA 71 (w).

[21] The learned author du Toit in South African Trust Law, Principles and Practice state the following:

'Trustees who fail to show the required standard of care (and therefore fail to comply with their general fiduciary duty) commit a breach of trust, thus opening themselves to personal liability for any resultant damages to the trust or trust property. A trustee's liability in this regard is principally to trust beneficiaries, but can also lie against third parties.'

[22] It was pointed out in Simplex however that the question of personal liability based on negligence will depend on the facts of each case.

[23] Apart from other factual considerations, a further relevant consideration to be taken into account, will be the nature of the trust, the extent or otherwise in which it engages in commercial activities and incurs liability to third parties during the course of such activities.

[24] As was correctly noted in *Land and Agricultural Bank of South Africa v Parker and others* 2005 (2) SA 77 (SCA), some trusts have increasingly become commercial entities, doing business in the same manner as companies and close corporations.

[25] I find no reason why in those instances, the principles of corporate governance and personal liability in appropriate cases imposed upon directors of companies and members of close corporations should not equally apply to trustees. The driving principles remain the same in all instances inasmuch as they are founded on the legal convictions of the community and public policy. Trustees, after all is said and done perform or should perform, the same functions and assume the same obligations.

26] This is in no way different in Namibia simply because the current legislation dates back to 1934. It is based in the common law and has developed from there independently of legislative enactments.

[27] I accordingly find that in law trustees are not absolutely immune to being held liable in their personal capacities to trust creditors.

<u>Applying the Principles to the Facts</u>

[28] I indicated earlier that the personal liability of trustees has been held to depend on the facts. It is therefore necessary to consider the facts placed before me

thus far. In dealing with the facts I do not propose to make any final judgment on issues of credibility.

[29] It is apparent, however, that once the trust was established it acquired office space in Windhoek and Keetmanshoop. It opened a bank account and employed persons to staff the offices it used to pursue its activities. A further office was planned for Lüderitz.

[30] The late Mr. Britz then set about a scheme in terms whereof he would seek to procure loans from members of the public including the plaintiffs. It was not seriously contested that the scheme was in many ways reminiscent of what is named a pyramid scheme.

[31] On the facts before me at this stage, he was left to his own devices without any oversight or control by any of the trustees nor was he held accountable to the trustees or the fifth defendant. It would appear that the trustees all adopted a passive role and showed no interest in how the trust was conducting its affairs. No meetings of any note took place, nor was the books of account, if they existed, examined. They, the trustees, did not call for financial reports or statements.

[32] It is common cause that the monies borrowed from the plaintiff's became dissipated or were stolen. Nothing on the facts before me suggest that any of the trustee defendants will be able to explain how and in what manner such a situation arose.

[33] Bearing in mind the legal principles to which I referred it seems to me that there are sufficient facts to conclude that a reasonable Court may find that the trustee defendants for the periods during which they held office as trustees are personally liable.

[34] Insofar as it was argued before me that the loans allegedly made by the fourth plaintiff was not proved and that some of the monies advanced by the third

plaintiff were not loans at all. I likewise conclude that there are sufficient facts upon which a reasonable Court may find in favour of the plaintiff.

[35] The second claim, being that against the fifth and ninth defendants stands on the same footing.

[36] I accordingly make the following orders:

a) The second and third defendant's are absolved from the instance in respect of the second loan made by the first plaintiff being the sum of N$500 000.00.
b) The seventh and eight defendants are absolved from the instance in respect of the first loan made by the first plaintiff being the sum of N$500 000.00.
c) Save for the above the applications for absolution from the instance are dismissed.
d) The costs will stand over for final determination at the conclusion of the trial.

P J MILLER

Judge

APPEARANCES

PLAINTIFF :	B TOTTEMEYER Instructed by Dr. Weder, Kauta & Hoveka Incorporated, Windhoek
SECOND and THIRD DEFENDANTS:	G NARIB Instructed by Conradie & Damaseb, Windhoek
FIFTH and NINTH DEFENDANT:	J A N STRYDOM

	Instructed by Government Attorney, Windhoek
SEVENTH DEFENDANT:	J A N STRYDOM Instructed by Engling, Stritter & Partners, Windhoek
EIGHT DEFENDANT:	J A N STRYDOM Instructed by Stephen F Kenny Legal Practitioners, Windhoek