



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
WILLIE 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 BREDENHAM	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 NO* (I 2188/2006 [2014] NAHCMD 276 (19 September 2014))

Coram: MILLER, AJ

Heard: 09 – 10 October 2013

Delivered: 18 September 2014

Flynote: Law of Trusts, Personal Liability of trustees to trust creditors. There is no absolutely immunity for trustees. If they act negligently they may incur liability.

ORDER

In the result I make the following order:

- 1) Judgment in favour of the first plaintiff and as against second and third, fifth and ninth defendants jointly and severally, the one paying the other to be absolved:
 - (a) Payment in the amount of N\$500,000.00;
 - (b) Interest a tempore morae on the aforementioned amount of N\$500,000.00 at the rate of 20% per annum as from 4 February 2003 to date of payment.

- 2) Judgment in favour of the first plaintiff and as against the fifth and ninth defendants jointly and severally, the one paying the other to be absolved:
 - (a) Payment in the amount of N\$225,000,00;
 - (b) Interest a tempore morae at 20% as follows:
 - (aa) On the amount of N\$500,000.00 at 20% per annum as from 2 August until 5 March 2013;
 - (bb) On the amount of N\$225,000.00 at 20% per annum as from 6 March 2013 until date of payment.

3) Judgment in favour of the second plaintiff against fifth and ninth defendants, jointly and severally and one paying the other to be absolved:

(a) Payment in the amount of N\$50,000.00;

(b) Interest a tempore morae at 20% per annum and as follows:

(aa) On the amount of N\$100,000.00 as from 28 June 2003 until 5 March 2013;

(bb) On the amount of N\$50,000.00 as from 6 March 2013 to date of payment.

4) Judgment in favour on the third plaintiff against fifth and ninth Defendants, jointly and severally, the one paying the other to be absolved:

(a) Payment in the amount of N\$32,000.00;

(b) Interest a tempore morae on the aforesaid amount of N\$32,000.00 at 20% per annum as from 5 July 2003 to date of payment;

(c) Payment in the amount of N\$80,000.00;

(d) Further interest at 20% per annum and as follows:

(aa) On the amount of N\$60,000.00, as from 11 July 2003 until 5 March 2013;

(bb) On the amount of N\$80,000.00 as from 6 March 2013 to date of payment.

From the interest an amount of N\$80,000.00 should be deducted.

5) The claim of the fourth plaintiff is dismissed with costs, which include costs of one instructing and one instructed counsel.

JUDGMENT

Miller, AJ:

A. *Introduction*

[1] The Esperanza (Nam) Trust, Trust No 327/2002 (the Trust”) was established in Namibia by the late Pieter Johannes Britz. With the exception of the first and the ninth defendants the remainder of the defendants were at same stage duly appointed trustees of the trust. In addition to being a trustee, the fifth defendant was at the relevant time the Master of the High Court in Namibia and in that capacity had oversight and other statutory powers and functions over Trusts established in Namibia.

[2] The plaintiffs allege that they are creditors of the Trust. In essence they allege that during the existence of the Trust they advanced monies to the Trust in terms of loan agreements concluded between themselves and Mr Britz who acted on behalf of the Trust.

[3] The cause of their action against the trustees is alleged to be founded in delict. They allege that the trustees owed them a duty of care, which obligation by virtue of their negligent conduct they failed to fulfil. As a consequence they suffered damage for which the defendants are liable.

B. *Absolution from the instance*

[4] I pause to mention that at the conclusion of the plaintiffs’ case absolution from the instance was sought. It was argued on behalf of the defendant trustees that in Namibian law trustees cannot incur liability against third parties such as trust creditors. Trustees have a duty of care only in regard to beneficiaries of the Trust, it was submitted.

[5] I handed down a written judgment on the application on 14 February 2014, during the course of which I dismissed the argument. I found in summary that

trustees are not in law absolutely immune to liability in their personal capacities, and whether or not they will be held liable will depend on the facts of each case.

C. Developments during the course of the trial

[6] The claims against the seventh and eight defendants became settled during the course of the trial. Although I was not advised, correctly so, at the time of the terms of the settlement, counsel indicated that they would do so at the end of the trial. The terms of the settlement reached and the effect it had on the quantum of the claims are conveniently set out in paragraphs 311 and 312 of the Heads of Argument prepared by counsel for the plaintiffs Mr Totemeyer SC.

They are the following:

“311. As indicated above, the matter was settled as between the plaintiffs and the seventh defendant (Ms Uushona) and the eight defendant (Mr Wolf Ritter) in this matter. The terms of that settlement (which was also agreed to by the other defendants) were as follows:

311.1 Ms Uushona paid the amount of N\$25,000.00 in full and final settlement of the claim against her, inclusive of costs (which also included the costs which stood over in terms of the order made by the Court on the application for absolution);

311.2 The effect of the aforesaid settlement is that it will reduce the first plaintiff's second claim of N\$500,000.00 (i.e. in respect of the advance made during August 2003), thereby reducing the capital component of that claim. It will thus reduce the capital claim of N\$500,000.00 to N\$475,000.00;

311.3 The first plaintiff will therefore continue to claim the amount of N\$475,000.00 as against fifth and ninth defendants jointly and severally, the one paying the other to be absolved, as well as interest on that claim on the amount of N\$500,000.00 *a tempore morae* until 4 March 2013 when the claim was settled, as well as thereafter on the

reduced amount of N\$475,000.00 until date of settlement, as well as costs;

311.4 The aforesaid settlement would not affect the other claims of the plaintiffs in this action against the defendants or interest or costs thereon;

311.5 The aforesaid settlement would not prejudice any remaining defendant's right to – in the case that any adverse cost order is made against it – argue on taxation that any cost the plaintiffs may have incurred as against the seventh defendant, was not caused by any remaining defendant;

311.6 The manner in which the plaintiffs shall continue to claim costs from the remaining defendants is determined by the settlement as set out above and the aforesaid settlement shall not have any additional cost implications for any of the remaining defendants.

312. The settlement concluded with the eight defendant (with which the other defendants agreed) consisted of the following:

312.1 The eight defendant paid the amount of N\$380,000.00 in full and final settlement of the claims against him, inclusive of costs (which also included the costs which stood over in terms of the order made by the Court on the application of absolution);

312.2 This payment of N\$380,000.00 had the following effect:

(a) The plaintiffs' second claim of N\$500,000.00 (i.e. in respect of the advance made during August 2003, which had already been reduced to N\$475,000.00 in terms of the settlement reached with the seventh defendant), was further reduced by the N\$150,000.00 and thus reduced and thus reduced the capital component of that claim to N\$225,000.00;

- (b) The second plaintiff's claim of N\$100,000.00 is reduced by N\$50,000.00 and thus the capital component of that claim was reduced to N\$50,000.00;
- (c) The third plaintiff's claim of N\$160,000.00 (referred to in annexures "B3" and "C3" to the amended particulars of claim), was reduced by N\$80,000.00 and thus the capital component of that claim was reduced to N\$80,000.00;

312.3 The first to third plaintiffs would therefore continue to claim the reduced amounts referred to in paragraphs (a) to (c) above against fifth and ninth defendants jointly and severally (the one paying the other to be absolved), together with interest in respect of those claims on the full capital amounts to those claims a *tempore morae* until 5 March 2013 (when the settlement with Mr Ritter was reached) and thereafter on the reduced amounts referred to in paragraphs (a) and (c) above, until date of payment, as well as costs;

312.4 The aforesaid settlement would not affect all the other claims of the plaintiffs in the action against the defendants or interest of costs thereon;

312.5 The settlement would not prejudice any remaining defendant's right to, in the case that any adverse costs order is made and against it, to argue on taxation that any costs the plaintiff's may have incurred as a result of having instituted a claim against the eight defendant, was not caused by any remaining defendant;

312.6 The manner in which the plaintiffs shall continue to claim costs from the remaining defendants has been set out in terms of the settlement (as set out above) and the aforesaid settlement shall not have any additional costs implications for any of the remaining defendants."

[7] In addition, and due to a concession made by Mr Töttemeyer SC at the absolution stage I made *inter alia*, the following order.

- “a) The second and third defendant are absolved from the instance in respect of the second claim made by the first plaintiff being the sum of N\$500,000.00”

[8] In the result of the plaintiffs’ claims are now being pursued as follows:

“314. It is submitted that the plaintiffs – after taking into account consideration the judgment on absolution, the claims abandoned by the plaintiffs as well as the aforesaid settlement reached – are entitled to the order proposed hereafter. In that regard reference is made with what was originally claimed by the plaintiffs, in their amended particulars of claim (as per **Pleadings, 267 – 269**):

314.1. Judgment in favour of the first plaintiff and as against second and third, fifth and ninth defendants jointly and severally, the one paying the other to be absolved:

- (a) Payment in the amount of N\$500,000.00;
- (b) Interest a tempore morae on the aforementioned amount of N\$500,000.00 at the rate of 20% per annum as from 4 February 2003 to date of payment.

314.2 Judgment in favour of the first plaintiff and as against the fifth and ninth defendants jointly and severally, the one paying the other to be absolved:

- (a) Payment in the amount of N\$225,000.00;
- (b) Interest a tempore morae at 20% as follows:
 - (aa) On the amount of N\$500,000.00 at 20% per annum as from 2 August until 5 March 2013;
 - (bb) On the amount of N\$225,000.00 at 20% per annum as from 6 March 2013 until date of payment.

314.3 Judgment in favour of the second plaintiff against fifth and ninth defendants, jointly and severally and one paying the other to be absolved:

- (a) Payment in the amount of N\$50,000.00;
- (b) Interest a tempore morae at 20% per annum and as follows:

- (aa) On the amount of N\$100,000.00 as from 28 June 2003 until 5 March 2013;
- (bb) On the amount of N\$50,000.00 as from 6 March 2013 to date of payment.

314.4 Judgment in favour on the third plaintiff against fifth and ninth Defendants, jointly and severally, the one paying the other to be absolved:

- (a) Payment in the amount of N\$132,000.00;
- (b) Interest a tempore morae on the aforesaid amount of N\$132,000.00 at 20% per annum as from 5 July 2003 to date of payment;
- (c) Payment in the amount of N\$80,000.00;
- (d) Further interest at 20% per annum and as follows:
 - (aa) On the amount of N\$160,000.00, as from 11 July 2003 until 5 March 2013;
 - (bb) On the amount of N\$80,000.00 as from 6 March 2013 to date of payment.

From the interest an amount of N\$80,000.00 should be deducted.

314.5 In favour of the fourth plaintiff and as against second, third, fifth and ninth defendants jointly and severally, the one paying the other to be absolved:

- (a) Payment in the amount of N\$10,000.00;
- (b) Interest on the aforesaid amount of N\$10,000.00 at 20% per annum as from 29 January 2003 to date of payment.”

The issues to be determined

[9] In my view the first issue to be determined is whether the plaintiffs proved that in the exercise of their duties on trustees the trustee defendants acted negligently. This was denied by the respective defendants.

[10] The case against the ninth defendant is premised on a different footing. It is alleged that the fifth defendant in her capacity as the Master of the High Court was

negligent in the execution of her official duties. Consequently the ninth defendant as her employer is vicariously liable. The ninth defendant denies that the fifth defendant acted negligently.

[11] I indicated in my judgment on the absolution application that further considerations to be taken into account will be the nature of the trust, the extent or otherwise in which it engages in commercial activities, and incur liabilities to third parties during the course of such activities.

The facts

[12] It is common cause that ostensibly the trust was a charitable institution. It had offices in Windhoek, Otjiwarongo and Keetmanshoop, and was seeking to expand its activities to Lüderitz. It had a bank account initially with Standard Bank and subsequently with Bank Windhoek. It employed a number of people to run its offices. It engaged with members of the public for donations to the Trust.

[13] However, behind that noble facade the Trust was used by Mr Britz in a manner reminiscent of a pyramid scheme in a most devious and deceitful manner. It is not denied by any of the defendants that such loans as are proved to have been made to the Trust was stolen and had been obtained through a systematic process of lies, fraud and embezzlement. All of this was the work of Mr Britz, who as I will indicate was left to singly handedly manage the affairs of the Trust without any oversight or accountability by the other Trustees. The Trustees apart from Mr Britz were figure heads and for all practical purposes may as well not have been there. None of the defendant Trustees took any interest in the affairs of the Trust. No meeting were held, to discuss and determine the affairs of the Trust, or to consider, its financial position or the source of its funding. Admittedly they signed one resolution authorizing the transfer of the bank account. That resolution which was drafted by Mr Britz purported to be a resolution passed at a meeting of the Trustees a day or so earlier. No such meeting took place. Such was the lack of care that the defendant trustees did not notice, this glaring misstatement and signed the resolution without question or objection.

Were the defendants negligent?

[14] There is no doubt in mind that the defendant trustees were negligent and grossly so. Trustees have duties imposed upon them by the Trust Deed of the Trust to which they are appointed to as well as those imposed by law.

Kalshoven v Kalshoven 1960 (3) SA 366 (R).

[15] In casu none of its duties imposed upon the trustees was complied with. The defendant trustees acknowledged that fact during the course of their testimony. They plead ignorance of the nefarious activities of Mr Britz. That is so simply because they failed to perform their functions and duties as trustees. Had they done so, those activities would inevitably have come to light.

[16] The fifth defendant only became involved in the affairs of the trust when the proverbial horse had bolted and that was lost. That was on the occasion when the first plaintiff approached her to advise her of the fact that the Trust was unable to repay the loans it had been given.

The liability of the Trustees

[17] In my judgment on the absolution application I said the following at paragraphs 24 – 25:

- “24. As was correctly noted in *Land and Agriculture 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 imposes 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.”

[18] In the matter of *Land and Agricultural Bank of South Africa v Parker* to which I have referred the following at p.90 paragraph 37.

“The courts will themselves in appropriate cases ensure that the trust form is not abused. The courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law. (Braun v Blann and Botha NNO and Another). This power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them. This could be achieved through methods appropriate to each case”

[19] Given the grossly negligent conduct of the defendant trustees and the nature and activities of the trust, they are in my view liable in their personal capacities.

[20] The claim by the plaintiffs.

First Plaintiff

It was common cause that the first plaintiff advanced two loans of N\$500,000.00 each to the Trust which cannot be repaid. His claim became reduced by virtue of the the settlement.

Second Plaintiff

The evidence established on the balance of probability that the second plaintiff advanced a loan of N\$100,000.00 to the Trust which was not repaid, likewise his claim became reduced by virtue of the settlement reached.

Third Plaintiff

Apart from her claim consisting of loans advanced in the Trust, there is a second and third component. These consist of N\$18,000.00 in respect of arrear rental and N\$82,000.00 in respect of so-called commission she had earned. Adv Totemeyer

argued but faintly that these latter components were recoverable. In my view they are not and will be excluded from the claim.

Fourth Plaintiff

He claims that the advanced sum of N\$10,000.00 be the Trust. I do not intend to dwell on the evidence adduced in this regard. Suffice it to say that the evidence is in some respects contradictory if not confusing. I am not persuaded that this claim was proved on a balance of probabilities.

The Ninth Defendant

As indicated the ninth defendant in sought to be held vicariously liable for the act of the fifth defendant in her capacity as the Master of the High Court.

[21] The fact is that the fifth defendant found herself inextricably caught up in a conflict of interest. Although she initially denied this, she was constrained to concede in cross-examination to admit that fact. That fact placed her in a position which was unable to perform her statutory powers as Master of the High Court. These include the issue of determining, whether or not the trustees should provide security, and to regulation the control of settled monies of the Trust. It is noteworthy that the documentation relating to security was completed on a slipshod fashion. Had the fifth defendant been able to properly supervise the Trust, these document would not have been relied upon.

[22] I find that she performed her duties in a negligent manner which render the ninth defendant vicariously liable.

[23] In my view costs should follow the result.

[24] In the result I make the following order:

6) Judgment in favour of the first plaintiff and as against second and third, fifth and ninth defendants jointly and severally, the one paying the other to be absolved:

(c) Payment in the amount of N\$500,000.00;

(d) Interest a tempore morae on the aforementioned amount of N\$500,000.00 at the rate of 20% per annum as from 4 February 2003 to date of payment.

7) Judgment in favour of the first plaintiff and as against the fifth and ninth defendants jointly and severally, the one paying the other to be absolved:

(c) Payment in the amount of N\$225,000,00;

(d) Interest a tempore morae at 20% as follows:

(aa) On the amount of N\$500,000.00 at 20% per annum as from 2 August until 5 March 2013;

(bb) On the amount of N\$225,000.00 at 20% per annum as from 6 March 2013 until date of payment.

8) Judgment in favour of the second plaintiff against fifth and ninth defendants, jointly and severally and one paying the other to be absolved:

(c) Payment in the amount of N\$50,000.00;

(d) Interest a tempore morae at 20% per annum and as follows:

(aa) On the amount of N\$100,000.00 as from 28 June 2003 until 5 March 2013;

(bb) On the amount of N\$50,000.00 as from 6 March 2013 to date of payment.

9) Judgment in favour on the third plaintiff against fifth and ninth Defendants, jointly and severally, the one paying the other to be absolved:

- (e) Payment in the amount of N\$32,000.00;
- (f) Interest a tempore morae on the aforesaid amount of N\$22,000.00 at 20% per annum as from 5 July 2003 to date of payment;
- (g) Payment in the amount of N\$80,000.00;
- (h) Further interest at 20% per annum and as follows:
 - (aa) On the amount of N\$60,000.00, as from 11 July 2003 until 5 March 2013;
 - (bb) On the amount of N\$80,000.00 as from 6 March 2013 to date of payment.

From the interest an amount of N\$80,000.00 should be deducted.

10) The claim of the fourth plaintiff is dismissed with costs, which include costs of one instructing and one instructed counsel.

P J Miller
Acting Judge

APPEARANCES

PLAINTIFFS:

Instructed by: DR WEDER, KAUTA & HOVEKA INC.

2ND & 3RD DEFENDANTS:

Instructed by: CONRADIE & DAMASEB