REPUBLIC OF NAMIBIA **REPORTABLE**

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 2493/2010

In the matter between:

HELAO NAFIDI TOWN COUNCIL **PLAINTIFF**

and

CHRISTIAN SHIVOLO **DEFENDANT**

Neutral citation: *Helao Nafidi Town Council v Shivolo* (I 2493/2010) [2016] NAHCMD 62 (8 March 2016)

Coram: DAMASEB, JP

Heard: **20 - 21 May 2013, 2 July 2013; 24 and 26 September 2013.**

Delivered: **8 March 2016**

Flynote: Law of obligations– Contract of employment – Defendant CEO in employ of Town Council - Employee under fiduciary duty to act in employer's interest - Breach of duty resulting in loss and damage actionable - The defendant as the plaintiff's CEO stands in a special relationship with it - He is not only under its direction and control; he

supervises the work of his subordinates - There is an implied duty on an employee of a statutory body such as the plaintiff to comply with the prescripts of the law.

ORDER

I accordingly enter judgment against the defendant in plaintiff's favour as follows:

Claim 1

1. Payment in the amount of N$ 58 241.75;
2. Interest on the aforementioned amount at the rate of 20% per annum *a tempore morae* to date of final payment.
3. Costs of suit, to include costs consequent upon the employment of one instructing and one instructed counsel.

Claim 2

4. Payment in the amount of N$ 130 784.76;
5. Interest on the aforementioned amount at the rate of 20% per annum *a tempore morae* to date of final payment;
6. Costs of suit, to include the costs consequent upon the employment of one instructing and one instructed counsel.

JUDGMENT

Damaseb, JP:

The Pleadings: causes of action

[1] The plaintiff is a local authority (town) council established under the Local Authorities Act No. 23 of 1992 (the Act). The defendant was employed as its Chief Executive Officer (CEO) since 18 October 2004. He was dismissed in 2008 because of events that are the subject of the present litigation.

[2] The plaintiff seeks to recover from the defendant moneys which it claims it lost as a result of the defendant's conduct to its detriment, contrary to the obligations he owed

as its employee to perform his duties in a manner that would not cause it loss and damage.

[3] The claim is in two parts: *Claim 1* seeks to recover the amount of N$ 58 241.75, being damages allegedly suffered by the plaintiff as a result of the relocation of an electrical transformer belonging to NORED Electricity Ltd (NORED) and located on a piece of real estate, No 9, Erf 101,Oshikango then occupied by Mr Jack Huang. According to the plaintiff, the defendant caused the relocation of the transformer at its expense and without its knowledge or authorisation and in so doing causing it patrimonial loss.

[4] Under *Claim 2*, the plaintiff initially claimed damages in the amount of N$ 85 241.75 allegedly representing outstanding (unpaid) rates, taxes and occupational rent owed to the plaintiff by a company called International Commercial (Pty) Ltd (IC). The plaintiff alleges that the defendant caused the issuing of unauthorised credit notes in favour of IC.

[5] The plaintiff's cause of action rests on the premise that as its most senior official the defendant owed it a fiduciary duty to:

(a) not act against its interests;

(b) execute his services in good faith and in a manner that does not 'detract from the relationship of trust' between him and the plaintiff;

(c) give priority to the plaintiff's interests;

(d) follow lawful instructions; and

(e) execute his services according to the plaintiff's directions and instructions.

[6] The plaintiff in due course amended its particulars of claim to correct what was described as a miscalculation. The result was that the amount claimed under *Claim 2* became N$135 249.43, being the difference between N$ 185 249. 43 representing IC's total liability for rates, taxes and occupational rent, and N$ 50 000 – the latter being the only amount IC paid in respect of its indebtedness to the plaintiff.

The Plea

[7] The defendant's defence to *Claim 1* can be summarised as follows. In the first place, he denies that he was instructed by the plaintiff not to remove the electrical transformer which was located on Erf 101, Oshikango (hereafter 'the transformer'). Secondly, he asserts that the plaintiff as owner of the land had the duty to remove the transformer.

[8] The pleaded defence in respect of *Claim 2* is that Erf 1307, Oshikango was not registered in IC's name and could thus not attract rates and taxes; the charges referenced in the plaintiff's particulars of claim were not rates and taxes advertised in the Government Gazette as required by law; in fact and law IC could only pay rent; the credit notes in IC's favour were 'simply a rectification of its account when it was realised that it was overcharged'; and that the plaintiff did not suffer damage.

Common cause facts

[9] It is common cause that the defendant was party to causing the transformer belonging to NORED to be removed by the latter from Erf 101, then occupied by a Mr Haung under a PTO. The costs of the removal was N$ 58 241.75.

[10] The background to the relocation is that on 17 April 2008, the defendant received a letter from NORED in the following terms:

> 'April 17, 2008
>
> The Chief Executive Officer
>
> Helao Nafidi Town Council
>
> Ohangwena
>
> Att: Mr C Shivolo

Shifting of Power Supply P/Report 2008/0000: Oshikango (Mr Haung Property), Ohangwena Region

Your request for shifting a Power Line that run through the above place refers:

A 200 KVA transformer and an 11 kv Line can be shifted within two months after fulfillment of the following conditions:

- Payment of a shifting fee (inclusive of the capital contribution and VAT) of N$ 58 241.75;
- Payment of a refundable account deposit/guarantee of N$ N/A
- Signing of a contract of Supply with Nored Electricity

Please note that Nored Electricity will install and maintain all equipment and same will remain the property of the Supply Authority. Nored Electricity further reserves the right to supply any potential customer from this point.

This offer remains valid for a period of three months hereafter upon which it will be regarded as cancelled.

Yours Sincerely,

(signature)

G.N Amanyanga

Chief Executive Officer'

[11] On 21 April 2008, hardly a week after the NORED letter, the defendant countersigned a cheque effecting a payment to NORED for the amount quoted in its letter of 17 July 2008, for the removal of the transformer from the property occupied by Mr Haung.

[12] On 16 August 2007 the defendant wrote a letter to IC in the following terms:

'Enquiries: Mr A.S Kandowa 16 August 2007

The Manager

International Commercial

Oshikango

Att: Mr Raed Hijazi

Dear Sir

Re: PAYMENT OF RATES AND TAXES ACCOUNT 2006/2007

Pursuant to the proposal of settling your rates and taxes account for the period of July 2006 to June 2007, the management of Helao Nafidi town council gave approval for you to execute the payment amount of N$ 50 000,00 in settlement of your above mentioned account.

We also inform you that the rates and taxes tariffs were revised from July 2007 to June 2008 as follows:

Land	0.03	___	0.015
Improvement	0.015	___	0.0095

Thank you

(signature)

Mr. CP Shivolo

CHIEF EXECUTIVE OFFICER'

[13] The above letter penned by the defendant constituted write-off of any book debts reflected in plaintiff's books as owing to it by IC in respect of rates and taxes referenced in the letter.

[14] Paragraph 11 of the defendant's employment contract states as follows:

'11. Serves as chairperson of the Council Tender Board ensuring that contract awards and goods purchased conform to Tender Regulations and procedures. Authorizes

expenditures of up to N$ 50 000.00 as well as variation of signed contract without reference to the Tender Board.'

Issues to be decided

[15] The parties recorded in their pre-trial memorandum that the issues that call for determination are, in respect of claim one: whether the plaintiff had given an instruction that it was not responsible for the relocation of electrical transformers located on private property; whether the plaintiff was under a duty to have the transformer removed; whether the plaintiff was 'fully aware' of the removal of the transformer and the payment for it; (c) whether the plaintiff was under an obligation to settle NORED's account for the relocation of the transformer; whether the plaintiff, as a result, suffered damages in the amount of N$ 58 241.75; and (d) whether the defendant is liable for any loss allegedly suffered by the plaintiff on the bases alleged.

[16] As regards claim two, the issues to be determined are: whether at the material time IC was the registered owner of Erf 1307; whether IC was in law liable to pay rent or rates and taxes as advertised in the Government Gazette; whether the rates and taxes were duly gazetted as required by the Act; whether IC was overcharged and whether the credit notes were only a 'rectification' of an overcharge; whether the plaintiff suffered damages in the amount of N$ N$ 135 249.43; and whether the defendant is in law liable therefor.

The statutory backdrop

[17] By virtue of s 27(1) (*a*) of the Act, the defendant's responsibilities as CEO are 'the carrying out of the decisions of the local authority council and for the administration of the affairs of the local authority council…'

[18] Section 81 of the Act states that, as accounting officer, a local authority CEO is 'charged with the responsibility of accounting for all the moneys received, and for all the payments made, by the local authority'.

[19] Section 73 of the Act empowers a local authority to levy against the owner of a rateable property reflected on the Valuation Roll (a) a general rate; (b) a site value rate; (c) an improvement rate; or (d) a site and improvement rate; as may from time to time be determined by a local authority council 'by notice in the Gazette'.

[20] A local authority council must comply with the requirements of the Act and the Tender Regulations made thereunder in the procurement of goods and services. Under the then applicable Tender Board Regulations[1], the responsibility for the procurement of goods and services for a local authority council vested in a 'local tender board'.[2] 'Procure' is defined in the regulations as 'to acquire goods or services by any means, including by purchase, rental, lease or hire-purchase…'

[21] Regulation 13, for its part, required that all procurement of goods and services for a local authority be advertised. Regulation 13 could only be deviated from if the value of the transaction did not exceed N$ 10 000[3]; or where the local tender board in any particular case, for good cause, deemed it impracticable or inappropriate to invite tenders. In the latter regard, the local tender board concerned had to keep a record of the reasons for not inviting tenders.[4]

The evidence

[22] The plaintiff led the evidence of Mr Michael Sheelongo who was at the material time the plaintiff's Manager: Infrastructure and Technical Services Department. The other witness was Mr Peter Carolissen, who was plaintiff's Mayor at the material time. Mr Carolissen served in both the plaintiff's Town Council and management committee. The defendant testified on his own behalf.

[23] Mr Denk, instructed by Lorenz Angula Inc., represented the plaintiff while Mr Diedericks appeared on behalf of the defendant.

Evidence on behalf of the plaintiff

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[1] Published in GN 30 of 15 February 2001.
[2] Regulation 6(1).
[3] Regulation 20(1) and (2).
[4] Regulation 20(2).

Mr Sheelongo

[24] Mr Sheelongo testified that he worked for the plaintiff since November 2004 and was responsible for the removal of all electrical transformers located within the plaintiff's jurisdiction. He was subordinate, and answerable, to the defendant until the latter's dismissal as CEO on 23 July 2008. According to Mr Sheelengo, prior to 2004 and before the plaintiff was proclaimed as a town[5], electrical transformers were erected by NORED on PTO-held land within the plaintiff's area of jurisdiction, including Erf 101, Oshikango. According to him that land was privately owned by Mr Haung.

[25] After the year 2004, the plaintiff took a decision that it will no longer bear the costs for the removal of electrical transformers erected on privately held properties falling within its jurisdiction. The reason for that decision was that such infrastructure was not erected at its cost. Mr Sheelongo testified that he could from then on as the responsible head of department only motivate removal of such electrical installations if located on public places.

[26] According to the witness, during April 2008, without his knowledge as the responsible head of department, the defendant instructed NORED to relocate an electrical transformer on Erf 101 at the plaintiff's cost in the amount of N$ 58 241.75. He testified that approval of the plaintiff's Council was not obtained for this service. Payment to NORED was made on 18 April 2008 and a tax invoice was issued by NORED on 22 May 2008.

[27] Mr Sheelongo testified that what occurred was not the normal procedure as quotations are normally paid for only after a service has been rendered by the service provider. According to the witness, the payment to NORED was made without the plaintiff's authority and knowledge and that the defendant, as the CEO, was fully aware of the plaintiff's position regarding relocation of transformers on 'private property'.

[28] With regard to *Claim 2*, Mr Sheelongo confirmed that the plaintiff was empowered under the Act to levy rates and taxes on privately owned property located within its area of jurisdiction.

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[5] In terms of 3(1) of the Act.

[29] Mr Sheelongo tendered into evidence exhibit D which is the General Valuation roll which, according to him, was published in 2006. The Valuation Roll shows the following erven as being held under freehold by IC: Erf 7, 8, 17 and 18. Mr Sheelongo also tendered into evidence exhibit E, being the title deed which reflects these erven listed in the Valuation Roll as being the property of IC.

[30] The same Valuation Roll shows that Erf 9 was at the material time being rented by IC from the plaintiff. Mr Sheelongo made clear that occupational rent was payable in respect of that erf and that it was erroneously referred on the plaintiff's tax invoices as rates and taxes.

[31] Tax invoices for rates and taxes were issued by the plaintiff as follows: Erf 7 in the amount of N$ 93 102.05; Erf 8 in the amount of N$ 4640.17; Erf 17 in the amount of N$ 59 332.82; and Erf 18 in the amount of N$ 2 984.91.

[32] According to Mr Sheelongo, IC only rented Erf 1307 from the plaintiff at the time and that the invoice in respect of that property should have been reflected occupational rent and not rates and taxes. The amount for occupational rent was invoiced as N$ 20 724.82.

[33] In respect of the rates and taxes and the occupational rent, Mr Sheelongo established a total indebtedness by IC in favour of the plaintiff in the amount of N$ 180 784.76. If one deducts the amount of N$ 50 000 which IC ultimately paid, the remaining balance is N$ 130 784.76 and not the N$ 185 784.76 claimed by the plaintiff.

[34] Mr Sheelongo further testified that the defendant caused credit notes to be issued in the amount of N$ 135 267.43 in favour of IC from the outstanding amount of N$ 185 249.43; leaving a balance of only N$ 50 000 which IC then liquidated in full and final settlement.

[35] Under cross-examination Mr Sheelongo denied that any authority was granted by the plaintiff at any point for the defendant to cause payment for the relocation of the transformer. He maintained that any decision taken by *him* as head of department first had to be approved by the management committee; and that no decision or resolution was ever taken to correct any alleged overcharging of IC. Under further cross

examination, counsel for the defendant suggested to Mr Sheelongo that a decision was taken by the plaintiff's finance department to rectify IC's account and that the defendant merely appended his signature as CEO to give effect to that. Mr Sheelongo denied the suggestion.

[36] According to Mr Sheelongo, the cheque for the amount of N$ 58 241.75 was only signed by two signatories instead of the 3 required. That, he testified, signifies that the plaintiff's Council never took a decision to allow such payment. Additionally, he testified that the payment limit that the defendant as CEO could authorise without Council or management committee approval was to the value of N$ 50 000.00.

[37] What became apparent from Mr Sheelongo's evidence under cross examination was that the property implicated by claim one was held under PTO prior to the plaintiff being proclaimed a town. That notwithstanding, Mr Sheelongo insisted that the plaintiff had no duty to pay for the relocation of the transformer and that the defendant was aware of it.

[38] As regards claim two, it was suggested to Mr Sheelongo on behalf of the defendant that since the credit notes did not bear the defendant's signature, he could not have caused them to be issued. Mr Sheelongo testified that the defendant, as the secretary of the management committee and the Council, was the 'eyes' of the plaintiff and had a duty to ensure that all financial transactions in the plaintiff's name were duly authorised.

Mr Carolissen

[39] This witness testified that at the material time he and the defendant were *ex officio* members of the plaintiff's management committee. He maintained that in terms of his employment contract the defendant had the responsibility to ensure that the financial expenditure in the plaintiff's name was in accordance with accounting instructions and financial regulations. He testified that the defendant was not authorised by his employment contract to expend plaintiff's funds in excess of N$ 50 000.

[40] As regards claim one Mr Carolissen testified that the plaintiff's Council had decided in 2004 that it would in future not assume responsibility for the removal of

electrical transformers on private property. He stated that ‘private property’ was understood by the plaintiff to include land held under a PTO. He rationalised the decision of Council on the basis that there were too many electrical transformers on land occupied by private individuals before 2004 and that it would have proved uneconomical for the plaintiff to pay for the removal of all such infrastructure. According to Mr Carolissen, the Council decision in question was communicated to, and was known by, the defendant upon his appointment as the CEO.

[41] The witness testified that Council approval was never obtained for the relocation of the transformer and that, in any event, the responsibility for initiating the process did not lie with the defendant but with Mr Sheelongo as the responsible head of department. He was emphatic that the removal of the transformer was never discussed by either the Council or the management committee.

[42] As regards claim two, the witness confirmed that the defendant approved credit notes in favour of IC in respect of properties owned by the company within the plaintiff’s area of jurisdiction. He testified that it was the defendant’s duty to obtain Council’s approval for the credit notes. As Chairperson of the Tender Board, the witness was able to confirm the plaintiff’s standing practice that the defendant, as CEO, could only allow expenditure up to N$ 50 000 without the local tender board’s approval.

[43] Expenditure in excess of that amount was to be brought to the attention of the management committee which would, for its part, table such decision before the Council for approval. He added that the reduction of IC’s indebtedness was never discussed by either the plaintiff’s Council or management committee.

[44] He stated that the first time Council was made aware of the removal of the transformer and the write off of IC’s indebtedness was at a Council meeting held on 1 July 2008. It was then that he wrote a letter to the permanent secretary of Local Government and the Anti-Corruption Commission reporting the defendant’s alleged transgressions in regard to the matters forming the subject matter of the two claims.

[45] Mr Carolisen testified that the defendant was suspended based on a Council decision of 1 July 2008 during which meeting, Council learned, for the first time, that the

defendant, at the plaintiff's expense, caused an electrical transformer to be relocated from 'private property' and that the outstanding rates and taxes due by IC had been discounted to the amount of N$ 50 000. The defendant was officially suspended on 23 July 2008 since all those decisions were taken without plaintiff's authority.

[46] Under cross examination Mr Carolisen denied the suggestion that there was no explicit instruction by the plaintiff to the defendant not to remove electrical transformers at plaintiff's expense on land held under PTO. He also challenged the denial on defendant's behalf that the latter, as CEO, knew that same was not allowed by the plaintiff.

Application for absolution refused

[47] At the close of the plaintiff's case, the defendant brought an application for absolution from the instance in respect of both claims. I refused the application and indicated that the reasons will follow.

[48] Of relevance in the present case are the following principles[6]: Firstly, where the plaintiff's case gives rise to more than one plausible inference, anyone of which is in its favour in that it supports the cause of action and is destructive of the version of the defence, absolution should be refused. Second, the trier of fact is bound to accept the truth of the plaintiff's evidence unless incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.

[49] I was satisfied that the plaintiff established a *prima facie* a case in respect of both claims, founded as they are on an alleged breach of a common cause fiduciary relationship between the plaintiff and the defendant. As regards the first claim, even if I were to accept that the plaintiff was the lawful registered owner of the property on which the electrical transformer was located, it was not unreasonable for it to expect of the party who erected and or owned the electrical transformer on the property to bear the costs of its removal.

[50] The context is not to be ignored. The evidence demonstrated that the plaintiff had given PTOs (with option to buy) to several persons who carried on business thereon for

[6] Dannecker v Leopard Tours Car Hire and Camping CC [2015] NAHCMD 30 (20 February 2015) para 26.

their own account. It was quite apparent from the evidence that in time those occupiers would take transfer of such property. According to the plaintiff's evidence, it was not financially viable for the plaintiff to incur the expense of removing electrical transformers erected on PTO-occupied land. That version, in my view, stood undisturbed at the close of the plaintiff's case.

[51] Both witnesses, Sheelongo and Carolisen, under oath testified that the defendant, as plaintiff's CEO, was aware that the plaintiff did not accept responsibility for the removal of electrical transformers in the circumstances described. I had to accept that evidence as true. It was common cause that the defendant was party to the expenditure incurred by the plaintiff in respect of the removal of the transformer. A *prima facie* case was therefore made out.

[52] In respect of the second claim, I had to accept as true the plaintiff's version that IC was the registered owner of the land in respect of which rates and taxes are claimed. The evidence was clear that IC's debts were written off and that the defendant had part in that. At the very least he was aware of it and, as accounting officer, owed a duty to the plaintiff to advance its interests.

[53] The law empowers a local authority to levy rates and taxes on land owned privately. In evidence, the plaintiff's Mr Sheelongo led documentary proof of invoices issued to IC for the payment of rates and taxes in terms of a Valuation Roll. The version that IC was not the owner of the land in respect of which rates and taxes were levied was therefore not supported by the probabilities. It was improbable that the plaintiff, a public entity, would, by the formulation of a Valuation Roll, concede alienation of land to a private entity when that was not in fact the case. On the second claim a *prima facie* case was also made out.

The defendant's evidence

[54] With regard to the first claim, the defendant's evidence was that the relocation of the electrical transformer from Erf 101, Oshikango was not his doing and that it was initiated by Mr Sheelongo. He vehemently denied any direct instruction given to him by the plaintiff that he was not to remove the transformer at its expense. The defendant

maintained that the transformer was located on the plaintiff's land and that it had to carry the financial responsibility for its removal. According to the defendant, the plaintiff's management committee had mandated him to remove the transformer.

[55] As regards the second claim, the defendant stated that the plaintiff's manager of finance (his subordinate) presented documentary proof to him that IC was being overcharged by the plaintiff and that it was for that reason that he sanctioned the 'rectification' in IC' s favour. The defendant also added that he had no part in the issuing of the credit notes in favour of IC.

[56] According to the defendant, Erf 9 was not registered in the name of IC and that the plaintiff was not entitled to levy rates and taxes but rather occupational rent.

[57] Mr Denk challenged the defendant with proof of previous transactions in which the latter had acted to the detriment of the plaintiff in authorising transactions which were either not authorised or were against the law. The defendant was not in a position to gainsay the past unauthorised wrongful conduct which was to the employer's detriment.

[58] It was put to the defendant (and he admitted) that he had previously as plaintiff's CEO concluded a sale of land agreement in the plaintiff's name without a counter-signatory, contrary to s 31A (a) of the Act.[7] That resulted in the Minister of Local Government successfully instituting legal proceedings for the re-transfer of the property into the plaintiff's name in the case of *Northgate Properties (Pty) Ltd v The Town Council of the Municipality of Helao Nafidi and 4 others.*[8] Another such transaction was entered into on behalf of the plaintiff by the defendant on 25 March 2005 with Fatima Plastics CC for the sale of land without the required signatures. The other transaction was concluded with IC on 31 August 2006 only with the defendant as the signatory to the agreement. The defendant further admitted that during July, August and September

[7] The section states that: 'Any contract to be entered into by a local authority council pursuant to a resolution of the local authority council shall be signed by the chief executive officer of the local authority council and be co-signed by-
In the case of a municipal council or town council, the chairperson of the management committee or any staff member of that council generally or specifically authorised thereto by the council concerned…'
[8] (A 350/2008)[2011] NAHC delivered on 5 May 2011.

2006, he double-claimed subsistence and travelling allowance from the plaintiff and the plaintiff's retirement fund, for meetings outside the local authority area.

[59] The defendant testified that he had the permission of the plaintiff's management committee to issue the credit notes but he conceded that he did not closely examine the documents that were provided to him and stated that, to his surprise, there were irregularities: e.g. Erf 9 had less rates and taxes /rent than that written off by the credit note in respect of that erf. The defendant stated that the blame should be placed on the finance department since they also held a position of trust and not on him since he merely signed the letter that was addressed to IC.

[60] Although it is common cause that the defendant's name does not appear on any of the credit notes, it is not in dispute that he signed the letter that wrote off debts due by IC to the plaintiff in respect of rates and taxes.

[61] On the issue why IC paid the reduced amount on 14 August 2007 before the letter was sent on 16 August 2007, the defendant said that it was proof that someone in the finance department already spoke to IC before they approached him and that the payment was merely done in terms of the arrangement.

[62] It became apparent during Mr Denk's cross-examination of the defendant that the latter helped in crafting the plaintiff's development plan 2006-2010. That plan recorded that the plaintiff's revenue base was 'poor' and that 'Income generation from rates and taxes is the most important income source of Council in the medium term'. It also emerged in that context that the plaintiff's credit policy only made allowance for writing off of debts only on the recommendation of the management committee and only if the debtor was incurably impecunious and the debt was irrecoverable 'beyond reasonable doubt'.

Parties' submissions

[63] On behalf of the plaintiff, Mr Denk submitted that the plaintiff's evidence established on balance of probabilities that the defendant acted contrary to the fiduciary duties he owed to the plaintiff under the contract of employment and as informed by the Act and the Tender Board regulations.

[64] Counsel submitted that as a result, the plaintiff suffered damages in the amounts of N$ 58 241.75 and N$ 135 249.43 respectively. Counsel submitted that it was proved that IC owned 4 immovable properties in the plaintiff's area of jurisdiction making the plaintiff entitled to levy rates and taxes against IC under s 73 of the Act. Counsel submitted that there was no authority granted to the defendant to issue credit notes to IC. He added that no rational explanation was given by the defendant for the reduction of the amounts due.

[65] Mr Denk submitted that considering the common cause precarious financial position of the plaintiff, it was incumbent on the defendant to guard the financial resources as its accounting officer. The defendant's laying blame on his subordinates and his admitted irregular past conduct as CEO go against his credibility and makes his version unbelievable.

[66] On behalf of the defendant, the central plank of Mr Diedericks's argument in respect of claim one is that the parties' versions are mutually destructive on whether or not the defendant was instructed not to remove the transformer at the plaintiff's expense. According to counsel, Mr Carolissen conceded that there was no such instruction and that the plaintiff's Council had not taken such a decision. Mr Diedericks added that since the defendant was mandated by plaintiff's management committee he in turn instructed Mr Sheelongo to obtain the NORED quote.

[67] Counsel argued that the service rendered by NORED was therefore duly authorised and 'fell outside the ambit' of the Tender Board Regulations since, as he put it, it was not a tender. According to Mr Diedericks, since the payment to NORED was made by the plaintiff's finance department (and only countersigned by the defendant) it was duly authorised by the plaintiff. Counsel added that the defendant had the authority to sign cheques and in the present case he appended his signature to only give effect to a process initiated by his subordinates.

[68] As regards claim two, Mr Diedericks submitted that the credit notes were issued, authorised and pasted by his subordinates. It was implied that the defendant's letter of 16 August 2007 was of no moment and that even if it was found to be a negligent act, it did not found the basis for delictual liability.

[69] In regard to both claims counsel added that nothing that the defendant did was actuated by 'fraud' or 'malice' and that the plaintiff had failed to prove its case. Mr Diedericks relied on 33 of the Act which immunizes an official in the employ of a local authority council from liability for 'any act done in good faith'. It was implied that the plaintiff had failed to prove that the defendant did not act in good faith in regard to the matters complained of in the two claims.

Test for breach of fiduciary duty

[70] The drift of Roman-Dutch[9] and English[10] authority is to the effect that the employer-employee relationship imposes a duty on the employee to act in the employer's best interest. The employee has a duty not to work against the employer's interests. The duty arises even though there is no express term in the contract of employment to that effect. As has been aptly stated in *Lesotho Highlands Development Authority v Sole,* the liability for breach of a fiduciary duty is not necessarily delictual or contractual but *sui generis* and will depend on the particular circumstances of each case. At the core is the principle that a person placed in a fiduciary duty will be in breach of his/her duty by failing to act *bona fide* in the interests of the employer.[11]

[71] The following passage from LAWSA, Vol 13(1) 2nd Ed., at para 233 is a correct statement of the applicable legal principle:

> 'If an employee does not comply with his or her duties in material respects, his or her employer may not only cancel the contract and dismiss the employee, he or she may also, if he or she has suffered damages as a result of the conduct of the employee, claim those damages. The employer is entitled by means of compensation to be placed in the same position as he or she would have been if the employee had complied with the conditions of the contract. At common law the amount of his or her damages is therefore the difference between his or her present position and the position in which he or she would have been had the employee not committed breach of contract.'

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[9] For example: Blake v Hawkey 1912 CPD 817 at 818 and S v Heller 1971 (2) SA 29 at 43-44.
[10] Robb v Green (1895) 2 Q 1 at 10-11.
[11] [1999] JOL 5662(LesH),page 39-43.

[72] In the present case, the duty assumes a public interest character as the resources at play are intended for the general public good and not just a private entity. The fiduciary duty arises therefore both from the employment contract and the Act which clearly spells out the responsibilities of the plaintiff's CEO which the defendant was.

[73] The statutory framework also impacts the parties' relationship. It will be recalled that the plaintiff is a creature of statute. It can thus only incur such liability (and in the manner) prescribed by the Act. The defendant as the plaintiff's CEO stood in a special relationship with it. He is not only under its direction and control; he supervises the work of his subordinates. There is an implied duty on an employee of a statutory body such as the plaintiff to comply with the prescripts of the law. That duty is even more pronounced in the case of a local authority CEO given the statutory context of his responsibilities.

[74] Lord Granworth pertinently stated in *Aberdeen Rail Company v Blaikie Brothers (House of Lords)*[12] at 252 that:

> 'A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into agreements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect.'

[75] Not only is the principle applicable where the agent allows his personal interest to conflict with those of the employer, but also where he or she fails to perform his or her functions with the diligence necessary to promote the employer's best interests with resultant loss and damage.

[76] Lord Granworth's dictum resonates with the facts before me. A Town Council acts through its elected officials and administrative officials. The CEO is the head of the latter. His or her duty is to protect the interest of the Town Council. That involves complying with the applicable laws and regulations. It also involves ensuring that the funds of the Town Council are properly spent and accounted for. It certainly involves

[12] 1854 ALL ER (1843-1860) at 249.

scrutinizing all financial transactions involving the Town Council to ensure that (a) they comply with the law, (b) the necessary approvals are obtained and, (c) they promote the interest of the Town Council.

The two versions considered

[77] The plaintiff must succeed if on preponderance of probabilities its version is true and acceptable and that of the defendant false or mistaken and therefore liable to be rejected. In so doing I must weigh up and test the two versions against the probabilities.[13]

[78] It is significant that the defendant was shown to be a person who in the past engaged in conduct in relation to his employer which was either not lawful or was not authorised. That evidence is of probative value in the sense that it demonstrates that he was more likely than not to have acted contrary to established procedures and in breach of his fiduciary duty towards his employer.

[79] It is worth noting that the defendant's evidence under oath bears scant resemblance to his pleaded case. To illustrate, his pleaded case in respect of the first claim is that the plaintiff had the duty to remove the transformer. But when he came to testify he claimed that he was instructed by the plaintiff to cause the removal of the transformer. How come he did not plead such an important defence? This fact becomes important if one considers the similar fact evidence of past breaches of the Act tendered against the defendant.

[80] For example, the similar fact relied on is that the defendant had unlawfully donated land belonging to the plaintiff to a private entity in breach of the Act. That resulted in legal proceedings being instituted to return the land to the plaintiff. In my view, that evidence and the other instance of wrongful and unauthorized conduct, corroborate the plaintiff's allegation of a breach of fiduciary duty by the defendant in the present case. The similar acts of breach of the Act operate to exclude good faith (vide s 33 of the Act) in the defendant's conduct as concerns the matters alleged under the two

[13] *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC) at 540-541 paras 38 and 39.

claims. The defendant's past wrongful conduct points to a pattern of unlawful and unauthorised behaviour in the performance of his duties as CEO and accounting officer.[14]

[81] Equally destructive of the defendant's version is the fact that since becoming aware of the impugned conduct, the plaintiff disciplined him and also reported his conduct to the line ministry and the Anti-Corruption Commission. Those actions on the part of the plaintiff demonstrate that the defendant's contact was not countenanced or approved as suggested by him.

[82] In regard to *Claim 1,* the belatedly relied on mandate to remove the transformer is undermined by the absence of any Council or management committee resolution authorising it. The defendant's credibility on the matter of his role is gravely undermined by the suggestion, for the first time made under cross-examination to plaintiff's witnesses, that the management committee mandated him to have the transformer removed. The manner in which that removal occurred is clearly in breach of the Tender Regulations applicable to the plaintiff and his employment contract.

[83] In respect of C*laim 2*, the defendant's credibility is undermined by the ambivalence in his version as regards the IC indebtedness. Having considered the pleadings, his version put to the plaintiff's witnesses under cross-examination, his own evidence under oath and the letter of 16 August 2007 which he signed, I am left to wonder whether his case is that he had nothing to do with it and that his subordinates are entirely to blame for his predicament; or whether it was authorised conduct which was for all intends and purposes above board.

[84] The defendant's version is, not to put too fine a point on it, rather convoluted and improbable. On the one hand, he says he was not responsible for the write off. On the other, he says the debt was not for rates and taxes because no such rates and taxes were gazetted. The other version is that there never really was a write-off but only 'rectification' of amounts erroneously debited to IC. He also maintains that the property in respect of which rates and taxes are claimed was not owned by IC.

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[14] Compare: *R v Mortimer* (1936) 25 Cr App Rep.150 and *R v Katz* 1946 AD 7.

[85] Each of the above versions is inconsistent with the proven or common cause facts. I will show how that is.

He was not responsible

[86] The credit notes were sanctioned by the defendant. It is an untenable proposition that he only performed a clerical function. As accounting officer, he owed it to the plaintiff to ensure that the credit notes were proper and were not to his employer's financial detriment. Even if one were to assume that it was his subordinates who initiated the credit notes, it does not puncture the plaintiff's case that, as accounting officer, the defendant was required to act in the employer's best interest in respect of the credit notes.

Not rates and taxes

[87] The argument that the indebtedness was not for rates and taxes is farfetched and inherently improbable. In the first place, the figures relied on are reflected on the Valuation Roll as representing rates and taxes on properties shown as belonging to IC. The defendant's letter of 16 August 2007 refers to 'rates and taxes' and therefore the underlying debts as 'rates and taxes.'

IC not owner of the properties

[88] In the face of the documentary evidence which he must, as CEO, have been aware of, it defies belief that the defendant would suggest that IC was not the registered title holder of the property in respect of which rates and taxes were levied by the plaintiff. The plaintiff produced proof of ownership of the subject properties by IC; principally through the Valuation Roll. This denial, more than any other, shows that the defendant is grasping at straws and suffers from a credibility deficit.

Rectification of overcharge

[89] The defendant's evidence is that the credit notes were to rectify the overcharged account of IC. There is not a modicum of evidence that the account of IC was indeed incorrectly debited. Nor is there evidence that occupational rent ought to have been less than the rates and taxes charged by the plaintiff. All that the defendant stated is that the

credit notes were done to ‘rectify’ the account and that he did not have any idea how the calculations were done because, on his version, ‘all calculations were done by the Finance Department’.

[90] As accounting officer it lies ill in the defendant’s mouth to suggest that he had no responsibility to ensure that (in respect of both claims) his subordinates, and not he, had the responsibility for ensuring the propriety of the conduct complained of by the plaintiff in its particulars of claim. He owed the plaintiff the duty to ensure that the actions undertaken in the plaintiff’s name and for its account were lawful. In that duty he failed.

[91] Regrettably, all these considerations lead me to the conclusion that the version of the plaintiff’s witnesses is to be preferred on the disputed matters.

[92] Having found that the defendant’s version is not credible and is false, I must accept the evidence of Messrs Sheelongo and Carolissen that the defendant: (a) knew that Council disavowed responsibility for the removal of the electrical transformer from Erf 101, Oshikango; and (b) was party to the unauthorised credit notes issued to IC which resulted in loss and damage to the plaintiff.

Findings

Claim 1

[93] The evidence demonstrates on balance of probabilities that:

a) the removal by NORED of the transformer constitutes rendering of a service as contemplated in the Tender Regulations;
b) even if one were to accept, as is contended by the defendant, that the plaintiff was under an obligation to remove the transformer, that ought to have been done in terms of the law as it constituted ‘procuring’ of a service;
c) the defendant was party, together with other employees who were his subordinates, to causing the plaintiff to incur expenditure by the removal of the transformer.

[94] In my view, it was entirely reasonable for the plaintiff's Council, given the costs involved and the precarious financial position it was under, to decide that it would not assume responsibility for the removal of electrical infrastructure from land occupied under PTO.

[95] The NORED quotation which is addressed to the defendant makes it clear that it was he who had sourced it. Mr Sheelongo under oath denied he was asked by the defendant to obtain it. Mr Sheelongo's version is the more probable (and the defendant's falls) because it is supported by the letter of 16 August 2007. Not only is it addressed to the CEO but, as Mr Sheelongo correctly said, it was marked for the personal attention of 'Mr C Shivolo'. That puts to paid the defendant's assertion that he was not responsible for initiating and paying for the removal of the electrical transformer at a cost of N$ 58 241.75.

[96] Acting contrary to the Act and Tender Board regulations is not in consonance with the implied duty which the defendant owed the plaintiff to comply with the Act. That failure safely comes within the reach of the allegations that he acted against the plaintiff's interest; breached the relationship of trust between the parties and failed to follow lawful instructions.

[97] I find therefore that the defendant, in breach of a fiduciary duty, acted to the plaintiff's detriment in causing the removal of the transformer on Erf 101, Oshikango.

Claim 2

[98] It is common ground that (a) credit notes were issued to IC, and (b) that the defendant was party to their being issued. The only real issue is what the reason for the credit notes was? The plaintiff's case, both pleaded and under oath, is that IC was indebted to it in respect of rates and taxes; and that the defendant without lawful cause wrote off a substantial part of IC's indebtedness to it. There was no real dispute that an amount of N$ 20 724.81 was due by IC to the plaintiff for occupational rent in respect of Erf 1307 and that it was only erroneously referred to as rates and taxes.

[99] As I have previously stated, the plaintiff was only able to prove a total amount of N$ 130 784.76 in respect of claim two.

[100] The probabilities do not favour the version that the plaintiff would write off substantial debts without good reason when its finances were in dire straits. That imposed an even greater duty on the defendant as accounting officer to safeguard the plaintiff's interests in financial transactions.

[101] In regard to Erf 1307, the plaintiff was entitled to charge occupational rent. A satisfactory explanation was given that it was so charachterised because the Finstell system used by the plaintiff did not have a field for occupational rent. In my view, the labelling does not change the fact that the plaintiff was entitled to the amount due.

Where the rates and taxes enforceable?

[102] Although the plaintiff did not tender into evidence the actual gazette publishing the Valuation Roll, I am satisfied that on a preponderance of probabilities it reflects ownership of the implicated properties by IC which were subject to the terms of s 73 of the Act. There was no indication whatsoever that the defendant as CEO at any stage during his term made any issue that the IC properties were not subject to rates and taxes. The denial is clearly inconsistent with the defendant's letter of 16 August 2007 in which he makes reference to rates and taxes due by IC and also advices that same had been revised.

[103] Nor is there any indication on record that IC did not feel obliged to pay any rates and taxes levied on it by the plaintiff. I emphasize what I said in para [74] - [76]. The defendant was the CEO of the plaintiff. He offers no explanation whatsoever why, if the Valuation Roll was not gazetted, he did nothing to put the situation right. The only inference that I can draw is that of regularity: i.e. that the Valuation Roll was duly gazetted as required by law.

[104] The reliance on the non-publication is in my view an opportunistic defence to escape liability for wrongful conduct to the employer's financial detriment. The defendant in breach of a fiduciary duty owed to the plaintiff wrote off a debt owed by IC to the plaintiff. He is liable for the resulting loss.

Costs

[105] The plaintiff has succeeded in its claims against the defendant and is entitled to its costs. No submissions were made by defendant's counsel why it would be inequitable for the plaintiff to be awarded costs of two counsel.

The order

[106] I accordingly enter judgment against the defendant in plaintiff's favour as follows:

Claim 1

1. Payment in the amount of N$ 58 241 75;
2. Interest on the aforementioned amount at the rate of 20% per annum a *tempore morae* to date of final payment.
3. Costs of suit, to include costs consequent upon the employment of one instructing and one instructed counsel.

Claim 2

4. Payment in the amount of N$ 130 784.76.
5. Interest on the aforementioned amount at the rate of 20% per annum *a tempore morae* to date of final payment;
6. Costs of suit, to include the costs consequent upon the employment of one instructing and one instructed counsel.

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PT Damaseb
Judge-President

Representation

Plaintiff	A Denk
On instructions of	LorentzAngula Inc, Windhoek

Defendant	J Diedericks
Of	BD Basson, Windhoek