

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 2813/2015

In the matter between:

**CJ'S SERVICE STATION CC**

**PLAINTIFF**

and

**VERNON ARTHUR STEYN**

**FIRST DEFENDANT**

**ARENDA ALTHEA STEYN**

**SECOND DEFENDANT**

**Neutral citation:** *CJ's Service Station CC v Steyn* (I 2813/2015) [2018] NAHCMD 275  
(6 September 2018)

**Coram:** USIKU, J

**Heard on:** 07 May 2018, 14-15 May 2018 and 17 May 2018

**Delivered:** 06 September 2018

Flynote: Action for damages arising from misappropriation of money over a period of time – court holding Defendants liable to pay Plaintiff amounts misappropriated, with costs.

Summary: The Plaintiff instituted action against the Defendants, former employees of the Plaintiff, for payment of N\$ 2 054 194.37, plus interest and costs. After certain amendments, the final amount claimed was reduced to N\$ 1 006 816.96. The court held the Defendants liable to pay the amount misappropriated.

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### **ORDER**

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1. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are ordered to pay the Plaintiff, jointly and severally, the one paying the other to be absolved, the amount of N\$ 1 005 212.95;
  2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants must pay interest on the aforesaid amount at the rate of 20% per annum, calculated from the date of judgment to the date of final payment;
  3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants must pay the costs of suit of the Plaintiff;
  4. The matter is removed from the roll and regarded finalized.
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### **JUDGMENT**

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USIKU J:

## Introduction

[1] In this matter, the Plaintiff, CJ's Service Station CC, had summons issued out of this court on 24 August 2015, in which it sought an order against the Defendants (the former employees of the Plaintiff) in the following terms:

- a) payment of an amount of N\$ 2 057 194.37;
- b) interest a tempore morae on the separate components of the aforesaid amount at the rate of 20% per annum, calculated from the date of misappropriation/ theft/embezzlement to the date of final payment;
- c) the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pay the costs of suit of the Plaintiff;
- d) further and/or alternative relief.

[2] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants (a husband and wife) while admitting they were employees of the Plaintiff, denied in their plea and in evidence, that they have stolen or misappropriated any money.

[3] During trial the Plaintiff amended the final amount claimed to read N\$ 1 006 816.96. The Plaintiff's cause of action as amended is based on the averments, that the Plaintiff suffered damages in the aforesaid amount after the Defendants stole or misappropriated the aforesaid amount during the period of 15 July 2014 to 09 June 2015. The Plaintiff attached Annexure "A" to the particulars of claim, (which was amended during trial) and which provides dates, entry type, reference No., description and amounts indicating how the total amount claimed is made up.

## Summary of Evidence

[4] The Plaintiff called five witnesses, namely: Cedric James Lucas, Le-ahm Lucas, Riaan Van Der Broocks, Elwira Eleanor Groenewald and Nolan Carlo Louw. For Defendants, the First and Second Defendants testified. As the matter unfolded during trial and as will become clear in due course, it is not necessary to deal with the evidence given in greater detail. It will suffice to give the following summary.

[5] The Plaintiff owns CJ's Service Station CC in Otjiwarongo. Cedric James Lucas (Mr. Lucas) and his wife, Ethel Lucas, are members of the Plaintiff holding 50% members interest, each in the Plaintiff.

[6] At the beginning of year 2014, the 1<sup>st</sup> Defendant was employed by the First National Bank at Otavi, as Branch Manager. The 2<sup>nd</sup> Defendant was employed at the same bank as a consultant. About that time, the Plaintiff represented by Mr. Lucas and the 1<sup>st</sup> Defendant entered into an oral agreement in terms whereof the parties agreed as follows:

a) The 1<sup>st</sup> Defendant would facilitate a long term loan in favour of the Plaintiff, from First National Bank ("FNB"). The arrangement entailed that Mr. and Mrs. Lucas would apply for a loan of N\$ 4 300 000 from FNB to pay off their existing bonds and overdraft facilities at Standard Bank, Namibia. The loan shall be secured by the immovable properties of Mr. and Mrs. Lucas.

b) As reward for facilitating the above process the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would be employed by the Plaintiff at its business in Otjiwarongo, as General Manager and Bookkeeper respectively.

[7] The 1<sup>st</sup> Defendant attended to the preparation of certain paperwork, culminating in the approval in the loan required by the Plaintiff or Mr. and Mrs. Lucas.

[8] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were subsequently employed at the Plaintiff's business with salaries of N\$ 25 000 and N\$ 10 000 p.m, respectively. The Defendants commenced employment on or about 15 July 2014.

[9] At about the same time, the 1<sup>st</sup> Defendant and the Plaintiff had entered into a written agreement in terms whereof:

- a) The Plaintiff retained the services of the 1<sup>st</sup> Defendant as General Manager;
- b) The 1<sup>st</sup> Defendant was obliged to ensure that the long term loan of N\$ 4 300 000 was paid off as soon as 1<sup>st</sup> Defendant obtained a loan to purchase 70% of equity in the Plaintiff;
- c) The 1<sup>st</sup> Defendant was to buy 70% of member's interest in the Plaintiff for N\$ 3 000 000 after ten years, whereafter Mr. and Mrs. Lucas shall retain 15% member's interests each, in the Plaintiff;
- d) The Plaintiff pledged to indemnity and hold harmless the 1<sup>st</sup> Defendant in respect to the performance of his duties as General Manager except if harm or loss to the Plaintiff was due to negligence;
- e) The 1<sup>st</sup> Defendant as General Manager shall not be regarded as partner in the Plaintiff's business.

[10] According to the testimony of Mr. Lucas, during or about January 2015 the 1<sup>st</sup> Defendant informed him (Mr. Lucas) that 1<sup>st</sup> Defendant could get a loan of N\$ 7 200 000 from FNB to purchase the 70% interest in the Plaintiff. However, to allow the consideration of such loan application, the Bank requires a Founding Statement of the Plaintiff reflecting the 1<sup>st</sup> Defendant as the holder of the 70% members' interest. Mr. Lucas testified that he signed the relevant documents transferring the 70% interest to

the 1<sup>st</sup> Defendant in the belief that such document would be used solely for the purposes of consideration of the loan applied for by the 1<sup>st</sup> Defendant.

[11] However, according to Mr. Lucas, the transfer of the 70% members' interest was caused to be registered at the Ministry of Trade at the instance of the 1<sup>st</sup> Defendant on 29 January 2015, and the 1<sup>st</sup> Defendant took the Amended Founding Statement to FNB reflecting him as holder of 70% members' interest.

[12] On the 27 February 2015, FNB informed the Plaintiff that it had breached the terms of the loan agreement between it and FNB, prohibiting any change in members' interest without prior written consent of FNB. FNB further indicated that should the Founding Statement not be altered to restore the members' interest to the previous holders, FNB would cancel Plaintiff's existing loan facility and demand full settlement of the outstanding loan amount.

[13] On or about the 20 May 2015 an Amended Founding Statement of the Plaintiff was registered at the Ministry of Finance, reflecting Mr. and Mrs. Lucas as holders of 50% members' interests each in the Plaintiff.

[14] On or about April 2015 – May 2015, Mr. Lucas confronted the Defendants about various financial irregularities appearing in the Plaintiff's books of accounts.

[15] On or about the 8 June 2015, Mr. Lucas received a text message from FNB stating that three(3) cheques made out to Puma Energy by the Plaintiff had been referred to drawer on account of insufficient funds in the Plaintiff's FNB account. On or about the 09 June 2015, Mr. Lucas opened a criminal case of theft against the Defendants.

[16] On or about the 09 June 2015, the Defendants resigned as employees of the Plaintiff with immediate effect.

[17] On the 24 August 2015, the Plaintiff instituted the present action claiming the relief aforesaid on account that the Defendants have misappropriated the Plaintiff's money, among other things, by:

- a) making monetary transfers to themselves;
- b) making drawings to which they were not entitled;
- c) paying personal taxes with Plaintiff's moneys;
- d) paying expenses and renovations in respect of their private home at Langstrand, Walvis Bay, with Plaintiff's money;
- e) paying for their two motor vehicles using the Plaintiff's money;
- f) paying private school fees for their children, using Plaintiff's money;
- g) making daily deposits with Plaintiff's money into the 1<sup>st</sup> Defendant's bank account, to which 1<sup>st</sup> Defendant was not entitled;
- h) selling fuel on credit and receiving payment for themselves;
- i) issuing numerous cash cheques to which they were not entitled;
- j) drawing salaries which were not due to them.

[18] The Defendants do not dispute that they were employed by the Plaintiff. They also do not dispute that their salaries were N\$ 25 000 and N\$ 10 000 p.m, respectively. The 1<sup>st</sup> Defendant however argues that after he and the Plaintiff signed the amended Founding Statement in respect of which the 1<sup>st</sup> Defendant was reflected as a 70% holder of member's interest, his status and capacity had changed. When asked by the

court whether the causa for the transfer of the members' interests was 'sale' or 'donation', the 1<sup>st</sup> Defendant said the members' interests were donated to him. In the same breath the 1<sup>st</sup> Defendant appears to argue that he intended to pay the purchase price for 70% members' interests from the profits made by the Plaintiff's business. Both these arguments appear to me to be markedly different from the terms of the agreement between the 1<sup>st</sup> Defendant and the Plaintiff as outlined above. The court therefore rejects the version of the 1<sup>st</sup> Defendant that his status as employee of the Plaintiff had changed at any point, entitling him to anything other than the agreed monthly salary.

### Findings

[19] From the evidence adduced, there is clear evidence that the Defendants misappropriated the following funds belonging to the Plaintiff, in that they:

a) made various internet monetary transfers to themselves to which they were not entitled: N\$ 12 000;

b) made drawings to which they were not entitled: N\$ 362 637.79;

c) paid personal income taxes using Plaintiff's money;

1<sup>st</sup> Defendant: N\$ 43 373.60

2<sup>nd</sup> Defendant: N\$ 5 486.03;

d) paid certain expenses and renovations in respect of their private home in Langstrand: N\$ 39 836.25;

e) made payments in respect of motor vehicles using Plaintiff's money:

Mercedez Benz: N\$ 132 000

Ranger: N\$ 49 370.87;

- f) paid private school fees for their children using Plaintiff's money: N\$ 25 850;
- g) made daily NDP deposits in a private account with Bank Windhoek using Plaintiff's money: N\$ 169 245.75;
- h) drew additional salary to which they were not entitled: N\$ 45 500;
- i) issued various cash cheques which they were not entitled to: N\$ 119 912.66;

Total: N\$ 1 005 212.95.

[20] From the evidence, the Defendants were not entitled to the above amounts. In addition, the Defendants themselves did not offer any explanation justifying entitlement to the above amounts.

[21] In regard to the Plaintiff's claim relating to a Mr. Lucas Tsandib account not paid, which was opened by the 1<sup>st</sup> Defendant, such account was opened in the course of business of the Plaintiff by the 1<sup>st</sup> Defendant as General Manager. There is no evidence that the 1<sup>st</sup> Defendant was negligent in doing so, nor is there evidence that the 1<sup>st</sup> Defendant misappropriated the amounts involved in connection with that account. The Defendants cannot be held responsible in this matter for the unpaid account of Mr. Tsandib.

[22] Similarly, in regard to the Plaintiff's claim titled 'fraud on EFT-Cedric to his FNB account' (appearing in Annexure "A" to the particulars of claim) in the amount of N\$ 50 000, I find that there is no sufficient evidence showing when and how, such amount was appropriated by the Defendants. This amount is therefore excluded from the amounts found to be misappropriated by the Defendants.

[23] The Plaintiff claims interest on the separate components of the amounts claimed at the rate of 20% per annum, from the date of misappropriation to the date of payment. It is an established principle that, in the absence of an agreement to the contrary, a debtor has to pay interest on an amount of money owed, from the moment he is in mora. In instances where the claim is unliquidated, i.e where the precise amount owed cannot be readily ascertained, a Defendant is not liable to pay interest until such amount is determined.<sup>1</sup>

[24] In the present matter, the precise amount misappropriated could only be ascertained after trial. This being the case, I am of the view that interest on the amount misappropriated should be calculated from the date of judgment to the date of payment.

### Conclusions

[25] In the premises, I make the following order:

- a) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are ordered to pay the Plaintiff, jointly and severally, the one paying the other to be absolved, the amount of N\$ 1 005 212.95;
- b) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants must pay interest on the aforesaid amount at the rate of 20% per annum, calculated from the date of judgment to the date of final payment;
- c) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants must pay the costs of suit of the Plaintiff;
- d) The matter is removed from the roll and regarded finalized.

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<sup>1</sup> *Pennypinchers Timbercity Windhoek v Kohler* I3045/2015 HC-CIV-ACT-DEL 2016/03635 NAHCMD 232 (26 July 2018), para. [13].

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B Usiku  
Judge

## APPEARENCES:

PLAINTIFF : G Dicks  
instructed by Engling, Stritter & Partners, Windhoek

FIRST DEFENDANT: In Person

SECOND DEFENDANT: In Person