

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

**Case No: HC-MD-CIV-ACT-OTH-2017/02057**

In the matter between:

**SHOPRITE NAMIBIA (PTY) LTD**

**PLAINTIFF**

and

**MARTIN PETRUS**

**DEFENDANT**

**Neutral Citation:** *Shoprite Namibia (Pty) Ltd v Petrus* (HC-MD-CIV-ACT-OTH-2017/02057) [2019] NAHCMD 20 (01 February 2019)

**CORAM: PRINSLOO J**

**Heard:** 25-27 September 2018 and 16 November 2018

**Delivered:** 01 February 2019

**Reasons:** 11 February 2019

**Flynote:** Employer-employee relationship – Damages for breach of a fiduciary duty – Whether a fiduciary duty exists between an employer and employee relationship – Argued that a fiduciary duty was not owed by the employee to the employer as there was no express agreement thereto – Held that in principle an employer can claim damages from the employee, depending on the circumstances, if an employee is negligent in carrying out his or her duties.

**Summary:** The plaintiff sued the defendant for what it termed a breach of a fiduciary duty stemming from an employment relationship that existed between the two parties. The plaintiff claims that the defendant breached his fiduciary duty in that he failed to keep a proper count of cigarette stock at the U-save branch in Omaruru where the defendant was employed as a branch manager, which resulted in the plaintiff suffering loss of merchandise stock valued at N\$ 84 303 (claim 1) and N\$ 133 017 (claim 2) respectively.

*Held* - It is clear that the defendant owed a fiduciary duty to the plaintiff. Such a duty is owed regardless of whether there is a contractual agreement between the parties or not. On this score, it must be added that there is in most, if not all contracts of service, whether it be an employment contract or a contract of agency, an implied fiduciary duty on the part of the employee or agent towards the employer or the principal as the case may be.

*Held further* – The position that the defendant occupied and having regard to his duties and responsibilities, created a fiduciary responsibility towards the plaintiff. This position of trust brought about a legal relationship with legal consequences. The defendant owed the plaintiff a duty of good faith and in the discharge of his duties was required to exercise certain care. This includes a duty to render faithful and loyal service towards the employer; a duty to obey lawful instruction; a duty to exert reasonable degree of competence and skill; a duty to protect employer's property; and a duty in exercising trust placed on him by the employer.

*Held further* - Apart from an employer dismissing an employee, an employer may also bring a civil suit against its employee or former employee to recover the amount of money that the employer lost as a result of the employee's negligence, dishonesty or carelessness. The plaintiff has therefore proven its case on a preponderance of probabilities and defendant is liable for damages sustained by the plaintiff.

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### ORDER

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Judgment is granted in favor of the plaintiff on the following terms:

**Claim 1:**

- a) Payment in the amount of N\$ 84,303.00.

**Claim 2:**

- b) Payment in the amount of N\$ 133.017.00.

**Ad all claims:**

- c) Interest of the aforementioned amounts at the rate of 20 % per annum *a tempore morae* to the date of final payment thereof.
- d) Cost of Suit.

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### JUDGMENT

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PRINSLOO J

Introduction

[1] This is an action for damages. The plaintiff, Shoprite Namibia (Pty) Ltd sued the defendant, a former branch manager of Omaruru U-Save for what is termed as breach of a fiduciary duty stemming from the employment relationship between the parties.

[2] The plaintiff claimed that a fiduciary relationship existed between the plaintiff and the defendant, in terms whereof:

- '(a) the defendant was required to ensure that his services were executed in good faith and that the same in no way detracted from the relationship of trust that existed between the parties;
- (b) the defendant was under a duty and obligation not to work against the plaintiff's interest;
- (c) the defendant was under a duty and obligation to give priority to the interest of the plaintiff at all times;
- (d) the defendant was under duty and obligation to ensure proper control of stock and claim other assets as per company policies and safeguard products from theft; and
- (e) the defendant was under a duty and obligation to follow lawful instructions and directives provided to him by the plaintiff.'

[3] The plaintiff further claimed that the defendant breached this fiduciary duty and as a result, the plaintiff suffered losses of merchandise stock valued at N\$ 84 303 (Claim 1) and N\$ 133 017 (Claim 2) respectively.

[4] It is pleaded by the plaintiff that the defendant as branch manager of the U-Save Branch, Omaruru, and as a result of holding such a position, was responsible for:

- (a) receipt and opening of all cigarette stock destined for the Omaruru store;
- (b) record the removal of cigarettes from the cash office daily;
- (c) ensure correct reconciliation and balancing of stock received, removed, sold and stock on hand in respect of the cigarettes in particular.

[5] As a result of the defendant's conduct and breach of the aforementioned instructions from the plaintiff during the stock take periods ending on 6 March 2016 and 12 June 2016, the plaintiff suffered damages and prayed for an order in the following terms against the defendant:

**'Claim 1:**

(a) Payment in the amount of N\$ 84,303.00.

**Claim 2:**

(b) Payment in the amount of N\$ 133.017.00..00

**Ad all claims:**

(c) Interest of the aforementioned amounts at the rate of 20 % per annum a tempore morae to the date of final payment thereof.

(d) Cost of Suit.

(e) Further and/or alternative relief.'

[6] The defendant denied in his plea that a fiduciary relationship existed between the parties and instead avers that an employer/employee relationship existed between him and the plaintiff.

[7] The defendant conceded that he was appointed as a branch manager and that he was under obligation to take lawful instructions from time to time. The defendant pleaded that he duly executed his duties as instructed as per his job description over and above, having alerted the plaintiff to short comings and safety breaches in its stock security but that the plaintiff failed to act despite the warnings of the defendant. Defendant therefor denies any liability in respect of the amounts duly claimed in claim 1 and 2 of the plaintiff's particulars of claim.

Issues to be decided

[8] The parties recorded in their pre-trial memorandum that the issues that call for determination are the following:

- a) whether a fiduciary duty existed inherent to the defendant's employment contract with the plaintiff;
- b) if so, whether such duties included:
  - i) an obligation on the defendant to ensure proper control of stock as per company policies and safeguard products from theft;
  - ii) an obligation to follow lawful instructions and directives provided to the defendant by the plaintiff.
- c) whether the defendant breached the said fiduciary duties as pleaded in paragraphs 3.3.1 to 3.3.4 of the plaintiff's particulars of claim;
- d) whether, if the defendant breached the aforesaid duties, the plaintiff suffered loss as a result thereof.

Evidence adduced

[9] On behalf of the plaintiff, two witnesses were called to testify i.e. Mr Jose Rodriques da Silva and Mr Joel Kapingana.

*Jose Rodriques da Silva*

[10] Mr da Silva is the Divisional Loss Control Manager at the plaintiff and is stationed in Windhoek at the plaintiff's headquarters and testified that in general terms, stock control is imperative for the proper functioning of a branch, to determining what stock was received, what stock was sold and what should be at hand.

[11] The witness explained in general terms the process to be followed during stock take are as follows:

- (a) The branch manager is responsible for the stock at a U-Save branch.

(b) Stocktaking is done on a quarterly basis with the assistance of officials from the plaintiff's headquarters. The branch manager is in charge of the stock take to ensure that it is done correctly.

(c) Once the stock take is done at the branch, a stock take result is sent to the headquarters. In the event that the items do not balance, a variance list is sent back to the branch for a recount where after a stock take report is generated.

(d) According to the company policy, stock is received through airlock gates and high shrinkage items such as cigarettes are the responsibility of the managers (branch manager and assistant manager) to receive such stock. Once checked and in order, the high shrinkage items are then taken to the manager's office for safekeeping.

(e) The cigarette stock should be booked out daily and unsold cigarettes should be returned after the day's sales. The returned cigarette stock should be reconciled every Monday. If losses are detected through the reconciliation procedure then the branch manager should inform the Loss Control Manager or Regional Manager for guidance.

[12] Mr da Silva stated that the duties of a store manager of a U-Save Branch is much more extensive than that of a manager at a larger outlet, like Shoprite, who have different staff members to do different duties, whereas a U-Save manager has to take responsibility for everything in the store. The manager in a U-Save store therefore has a much bigger responsibility. Such a store is therefore a good environment to prepare a manager for a bigger store as a U-Save manager would have knowledge of all facets of the business.

[13] According to Mr da Silva, he attended the U-Save Branch in Omaruru on 30 March 2016 pursuant to substantial losses suffered in respect of the cigarette stocks during the previous quarter. Upon his arrival at the Omaruru branch, he did a floor walk together with the defendant and noticed that the shop was not up to standard. Hereafter he had a meeting with the defendant and one Thomas, who

was the administration manager at the time. During this meeting, he gave specific directions to the defendant to implement in an attempt to avoid further losses.

[14] The defendant was instructed to ensure that only the branch manager would receive cigarette stocks and same should be checked pallet by pallet where after he, with the security guard, had to take the cigarette stock to the cash office where it would be kept for safe keeping. He also had to introduce a system of keeping daily record of stock items delivered to cashiers which should be kept and controlled by management. Defendant was further instructed to ensure that at cash up at the end of the day, a reconciliation is done between the sales figures of the day and the existing stock. Mr da Silva also contacted the Regional Manager and informed him of the problems at the store and requested him to send a template through to the defendant to assist in this process.

[15] After stock take during 2016, the cigarette stocks showed a further loss of N\$133 017. Mr da Silva again visited the Omaruru branch and determined that the defendant did not comply with the earlier direction regarding stock control in respect of the cigarette stocks.

[16] Mr da Silva confirmed that some losses were suffered in respect of the cigarettes which were stolen during a break in into the shop but stated that this losses amounted to approximately N\$ 16 000 to N\$ 18 000. He also confirmed that there were irregularities which included acts of theft of money and fraud in respect of a refund book by staff members. He reiterated that as the defendant was aware of the cigarette shrinkages and the problems at hand, he therefor had to be more vigilant and strict in respect of proper control measures so that he could detect the losses.

[17] The witness submitted that the defendant was grossly negligent in his failure to adhere to company policies and compliance with set guidelines. In addition thereto, the defendant failed to implement the directed measures to avoid stock losses.



[18] On the stock take figures and the veracity thereof, Mr. da Silva indicated that the defendant had the opportunity to question the figures in the event that he does not agree with same but did not. In support of plaintiff's claim, the witness handed in the stock take reconciliation report for the stock take date of 12 June 2016 showing a shortage of N\$ 133 017 and a previous shortage of N\$ 84 303.

[19] After the June stock take, the plaintiff charged the defendant for gross negligence and he was convicted of same after a disciplinary hearing and dismissed.

*Joel Kapingana:*

[20] Mr Kapingana is the Regional Personnel Manager of the plaintiff and is stationed at Walvis Bay. As a result of his position with the plaintiff, he had a direct employment relationship with the defendant.

[21] Mr Kapingana testified that parts of his duties are to ensure that policies and procedures are in place at the plaintiff's branches under his supervision. This included policy and procedure in respect of the receiving of stock, the airlock system, monitoring of staff, ordering of goods, opening and closing of a branch, etc. He stated that he is also involved in staff training and further stated that staff are groomed to become trainee managers.

[22] Mr Kapingana stated that he became aware of the stock losses for the quarters ending March and June 2016 when he was informed by the Regional Loss Control Manager, Mr. da Silva. He was informed by Mr. da Silva that he visited the Omaruru U-Save Branch on 30 March 2016 and after he had a floor walk with the defendant, he had a meeting with the defendant and Thomas, during which meeting he gave instructions that in respect of the cigarettes, management should receive the cigarettes personally, that the stock should be balanced every Monday and a reconciliation should be done in respect of the cigarette stock on a

daily basis. Mr. da Silva requested Mr Kapingana to visit the branch pursuant to their conversation to re-emphasize the instructions, policies and procedures of the company.

[23] Mr Kapingana visited the branch on 27 May 2016 and had a discussion with the defendant regarding the issues raised by Mr. da Silva and also proceeded to have a performance counselling meeting with the defendant.

[24] On the issue of training, Mr Kapingana stated that apart from the training and training material that the defendant received, he also received training intervention once a year in shrinkage prevention, stock control and profit and loss management. He further stated that the defendant was informed of the standard and what was required from the defendant as branch manager as derived from company rules and policies and when the defendant was appointed as branch manager, he was given a copy to read through and sign. He also emphasized that the defendant's employment contract sets out the responsibilities in relation to stock losses and control of stock.

[25] Mr Kapingana testified that the defendant had a fiduciary duty to the plaintiff and in terms of such had an obligation to act in good faith and make sure that the interest of the comply (company or business) is placed first. The witness submitted that the defendant did not comply with this fiduciary duty because the defendant failed to comply with company procedures which resulted in the losses that were suffered. He also commented that it is not normal for these type of losses to occur at U-Save stores.

[26] According to Mr Kapingana, the defendant had the support of management, and the defendant was free to seek assistance from management when the need arose. The defendant however elected not to do so.

*Petrus Martin*

[27] The defendant testified in his own defence and called no witnesses.

[28] The defendant stated that he was appointed on 25 May 2000 as a shop detective, where after he became a receiving clerk. During 2010 he became a trainee manager in Otjiwarongo and was elevated to a branch manager during 2011 and transferred to Outapi U-Save. During 2013 he was transferred to Omaruru U-Save, where he still held the position of a branch manager.

[29] He confirmed that stock taking was done on a quarterly basis and that the plaintiff would send people from head office in Windhoek to assist during the stock take procedure. During 2016 it emerged that the shop started experiencing a shortfall in respect of the cigarette stocks.

[30] In his evidence-in-chief, the defendant stated that at first, there was a problem regarding the cigarettes at the Omaruru branch as the cigarettes were kept at the dispensers at the cashiers. He therefor discussed the matter with Mr Muhewa, Regional Manager for Operations and it was agreed that the cigarettes would be kept in the cash office and a cupboard was fitted for the purpose of keeping the cigarette stock safe. However, the key broke off in the lock and this lock was only repaired in May 2016.

[31] The defendant also confirmed a break-in into the shop during which cigarettes to the value of N\$ 18 000 was stolen. According to the defendant, this was not taken into consideration by the plaintiff. As for the value of the stock loss during June 2016, the defendant denied that the amount is correct as the amount on paper and the stock at hand in the shop did not balance.

[32] He stated that after the relevant stock takes were concluded, he only received instructions from head office on 21 June 2016, on how to prevent further stock losses but stated that it was the same instructions that he already had and followed in respect of receiving stock.

[33] Defendant stated that there was an issue with security which was brought to the attention of Mr da Silva. The court was referred to exhibit N to show that the allegation that he never counted the stock was not true as he indeed counted the stock. At this stage, the court must point out that that appears to have been done only sporadically.

[34] When confronted with the plaintiff's "Core Learner Guide", the defendant denied having seen it before.

[35] Defendant stated that he could not be held liable for any losses that occurred due to the fact that the lock on the cupboard was broken and that a number of people had access to the cash office. He stated that the stock count of the cigarettes was done either by himself or by the assistant manager as he had the same responsibility as the branch manager. This person was however caught stealing from the safe and dismissed.

[36] During cross-examination, the defendant conceded that he received training in effective control and safeguarding of stock but stated that he could not recall everything. He did however receive a file in this regard. He conceded that he knew what was expected of him regarding the duties as a branch manager.

[37] Defendant acknowledged that he was under a duty and obligation to ensure proper control of stock. In accordance with clause 15 of his employment contract, he familiarized himself with the plaintiff's policies and procedures and stated that he also duly complied with same.

[38] Defendant agreed that stock control and security is of utmost important and that the plaintiff had placed such a high value on this that his job depended on it.

[39] Defendant acknowledged that he was familiar with shrinkage and stated that the branch had a shrinkage work plan amongst management, security and the rest of the staff members. In terms of the shrinkage work plan, they would look at various problems and record it and a report would be sent to the Regional Manager.

[40] On the issue of stock taking, the witness stated that internal stocktaking is inserted on the system whereafter a report is generated. After the stock take is done, management would have access to the report.

[41] During the 06th to the 12th of March 2016 and the 3rd to the 12th of June 2016, stock take was done at the branch with the assistance of an official from head office. Defendant alleges that he did not dispute the stock take report as he never saw it. The report was only sent to the branch on 21 June 2016 when the results of the stock take was available.

[42] Defendant denies that Mr da Silva came to the branch at the end of March 2016 or that they had a meeting. He also denies that he received any additional instructions from Mr da Silva prior to the instructions received on 21 June 2016.

[43] Defendant alleges that pursuant to the March stock losses, he did put in place certain measures but was not assisted by management. He was aware of the losses suffered by the branch after the March 2016 stock take and had talks with Mr Muhua in this regard. During March 2016, defendant received an e-mail from the Regional Manager enquiring about the cause for the stock losses.

[44] During cross-examination, the defendant conceded that stock losses occurred but stated that no re-count was done at the Omaruru branch. The defendant stated that he did stock take in his branch and also a shrinkage report which would show that he tried to solve the problem and limit the shrinkage. He however admitted that he had a duty in rendering his service to the plaintiff to ensure control of stock as per company policies and to safeguard stock from theft and that he acted according to this duty by accordingly reporting the theft.

[45] In relation to what he ought to have done differently after the March 2016 stock take, the defendant testified that the cigarettes were kept on the floor at the cash office and that is why he installed the cupboard. The defendant testified that he installed the cupboard so that there could be proper control over the cigarettes, to take from the cupboard to sell to customers and he counted cigarettes on a daily basis. The defendant submitted that the document stock on hand variance

report showed that he counted it on a daily basis but at a later stage during cross-examination stated that he did not count it daily but rather on a weekly basis as he had many other duties to attend to on a daily basis.

[46] When confronted with the case of the plaintiff that he did not act in accordance with the instructions and policy and procedure of the plaintiff, specifically with regards to the opening, the defendant denied any negligence or wrongdoing on his part. He stated that the instructions to record the removal of the cigarette from the cash office on a daily basis was only given in June after the stock taking.

#### *Analyses of the evidence*

[47] In *Life Office of Namibia Ltd v Amakali*<sup>1</sup> the court referred with approval to *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others*<sup>2</sup> where Nienaber JA discussed the technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions at para 5 as follows:

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour; (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (vi) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events . . .'

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<sup>1</sup> *Life Office of Namibia Ltd v Amakali* the court referred with approval to *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others* 2014 NR 1119 (LC) page 1129-1130.

<sup>2</sup> 2003(1) SA 11 (SCA)

[48] The witnesses who testified on behalf of the plaintiff both made a favorable impression on this court. Their evidence was clear and concise and without any inherent improbabilities. The witnesses corroborated one another in all material respects.

[49] Mr Kapingana confirmed that he was contacted by Mr. da Silva after his March 2016 visit to the Omaruru Branch and he confirmed the instructions that the defendant had to follow. Mr Kapingana acted on the strength of the information received from Mr. da Silva and visited the Omaruru branch in order to provide the defendant with assistance and guidance in respect of the poor stock take performance. These two witnesses were composed and confident in relating their versions to this court. Both gave detailed versions to this court as to their role during the stock loss enquiries. They were also extensively cross-examined and their evidence remained steadfast. The defendant however did not make the same impression on this court as a witness. He was evasive in some respects and contradicted himself on a number of occasions.

[50] I find the defendant's version that the Regional Loss Control Manager did not visit his branch after the stock loss report of March 2016 improbable. A loss of N\$ 84 303 in a small branch like the one managed by the defendant is extremely high and I am not convinced that the plaintiff would leave such a loss of money uninvestigated and finding the probable cause of the losses. To say the least, I am not convinced with defendant's version of events.

[51] The defendant relies heavily on the fact that thefts occurred in the branch and this fact is not disputed by the plaintiff. If the defendant knew there were irregularities going on, one would have reasonably expected that he, on his own account, would have imposed measures to avoid stock losses. The defendant contradicted himself as to the measures of control exercised over the cigarette stocks. The defendant testified that it was checked daily and booked out to the cashiers but that does not appear to be the case. The stock was checked sporadically by either himself or Thomas, the admin manager.

[52] The defendant knew that cigarettes are high risk stock which needed to be rigorously controlled but did not put strict measures in place to detect the losses. The defendant failed to explain to this court what mechanisms he had put in place to prevent cigarette theft apart from the cupboard in the cash office. However, when the lock broke he did not act pro-actively to have the situation resolved. The defendant could also not give a proper explanation as to what he did prior to the March 2016 stock take regarding stock take procedures and mechanisms that were in place to detect losses, and on several instances contradicted himself with regards to the procedure and policies that had to be followed. The defendant was also unable to tender any evidence in court to support his contention that he communicated the stock loss to his superiors and his attempts to resolve the stock loss that occurred.

[53] Although vehemently denied by the defendant, it became very clear that he was blaming the cigarette stock losses on everybody else but in turn did not accept any responsibility for the said losses, in spite of his concession that he was ultimately responsible for all the stock.

#### *Burden of proof*

[54] The burden of proof in a civil case has been stated as follows:

'[I]n general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although in so doing does not exclude every reasonable doubt . . . for, in finding facts or making inferences in a civil case, it seems to me that one may . . . by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'<sup>3</sup>

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<sup>3</sup> *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A - D: Cited with approval in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz MegaBuilt v Kurz* 2008 (2) NR 775 (SC) at 790B-C.



[55] In the matter before me, the plaintiff bears the onus of proof that the damages suffered by the plaintiff was occasioned by or was a direct consequence of a breach of fiduciary duty by the defendant.

*Application of the law to the facts*

[56] The essence of the plaintiff's case is that the defendant breached the duties emanating from a fiduciary relationship between the parties. The defendant on the other hand denies that any such fiduciary relationship existed between the parties.

[57] It is important to note that there is no magic in the term 'fiduciary duty'. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship (cf *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1130F).

[58] In *Helao Nafidi Town Council v Shivolo*<sup>4</sup> Damaseb JP discussed the concept of a fiduciary duty as well as the test for the breach thereof as follows:

'[70] The drift of Roman-Dutch<sup>5</sup> and English<sup>6</sup> 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.<sup>7</sup>

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<sup>4</sup> *Helao Nafidi Town Council v Shivolo* (I 2493/2010) [2016] NAHCMD 62 (8 March 2016).

<sup>5</sup> For example: *Blake v Hawkey* 1912 CPD 817 at 818 and *S v Heller* 1971 (2) SA 29 at 43-44.

<sup>6</sup> *Robb v Green* (1895) 2 Q 1 at 10-11.

<sup>7</sup> [1999] JOL 5662(LesH), page 39-43.

[71] The following passage from LAWSA, Vol 13(1) 2<sup>nd</sup> 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.'

[59] The question that then begs to be answered is whether the defendant had a fiduciary duty to the plaintiff given the circumstance of the case in casu.

[60] One might be surprised to learn that employees, even 'low ranked ones', owe fiduciary duties to their employers.

[61] In *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another*,<sup>8</sup> Hiemstra J, quoting with approval Hawkins J in *Robb v Green* [1895] 2 QB 1 at 10-11, said as follows at 867H-868A:

'There can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests. It seems to be a self-evident proposition which applies even though there is not an express term in the contract of employment to that effect. It is stated thus in the leading case of *Robb v Green* (1895) 2 QB 1, per Hawkins J at pp 10 - 11:

"I have a very decided opinion that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all

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<sup>8</sup> *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another* 1971 (3) SA 866 (W) at 867.

reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service.'"

[62] However, that being said, it must be added that very little authority exists where an employee is bound to reimburse the employer for losses incurred by the employer due to the employee's negligence in the performance of his duties, for example financial losses due to the non-compliance of the procedure(s) set by the employer.

[63] McGregor, in his work titled *The Law of Damages* discussed the reasons for this lack of authority briefly as follows:<sup>9</sup>

'There are a number of reasons for this. First, one is more likely to find that, if anyone is suing it is the employee claiming his wages since it is he who stand to lose by his own breach, and the employer can often benefit by the employee forfeiting his right to his wages. Secondly, the employer, rather than suing for damages is more likely to dismiss the employee summarily with or without forfeiture of wages. Thirdly, in the case of an employee's breach of contract in restraint of trade, the employer is more likely to claim an injunction or to be able to sue for liquidated damages.'

[64] Defendant's counsel submitted that a fiduciary duty was not owed by defendant to the plaintiff and there was no express agreement thereto.

[65] Counsel for the plaintiff submitted that defendant chose to breach his position of trust and fiduciary relationship with the plaintiff in that he conducted himself in a negligent manner in failing to comply with the policies and procedures of the plaintiff and disregarding the direct instructions received from both Mr da Silva and Mr. Kapingana.

[66] Having regard to the *Premier Medical and Industrial Equipment* case, it is clear that the defendant owed a fiduciary duty to the plaintiff. Such a duty is owed

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<sup>9</sup> The Common Law Library Number 9: *The Law of Damages* by Harvey McGregor, 15 ed, paragraph 1185 [729].

regardless of whether there is a contractual agreement between the parties or not. On this score, it must be added that there is in most, if not all contracts of service, whether it be an employment contract or a contract of agency, an implied fiduciary duty on the part of the employee or agent towards the employer or the principal as the case may be.

[67] It is clear from the defendant's duties and responsibilities as a branch manager that he had a fiduciary responsibility towards the plaintiff. This position of trust brought about a legal relationship with legal consequences. The defendant owed the plaintiff a duty of good faith and in the discharge of his duties was required to exercise certain care. This includes a duty to render faithful and loyal service towards the employer; a duty to obey lawful instruction; a duty to exert reasonable degree of competence and skill; a duty to protect employer's property; and a duty in exercising trust placed on him by the employer.

[68] The control of stock loss and security is a key point in terms of the defendant's employment contract. The same applies to the policies and procedures of the plaintiff.

[69] Clause 20 of the defendant's employment contract reads as follows:

**'20. Loss Control/Security**

Effective stock control and security are of the utmost importance to the Company's business. Stock loss affects the viability of your branch and your job security. In this regard you will therefore be required to:

- a. Submit to searching of your person and property, including your Company locker, when called upon to do so, by a member of management or authorised designate.
- b. Comply with any security measures and procedures instituted by the Company and familiarise yourself with such measures and procedures.
- c. Report to your manager any contravention of security measures and procedures or suspected acts of dishonesty/theft by customers or fellow employees.'

[70] Clause 15 of the defendant's employment contract reads as follows:

**'15.Procedures and Policies**

You will be subject to all rules, procedures and policies formulated by the Company and any amendments thereto affected by management in its discretion from time to time. You will be expected to familiarise yourself with the content of these rules, procedure and policies, and any amendments thereto.

[71] Mr Kandara, counsel for the defendant, argued that the plaintiff's claim is precluded by the employment contract reached between the parties. He further argued that the contract alerts the employee to the form(s) of redress which the employer may claim in the event of stock losses and security. He argued that clause 20 of the employment contract precludes the claim which the plaintiff seeks to pursue against the defendant and the plaintiff's claim should be dismissed on that basis.

[72] Furthermore, Mr Kandara argued that allowing the claim would be in contravention of s 2(1) of Conventional Penalties Act, Act 15 of 1962.<sup>10</sup> At this point, I must interpose and point out that the first time that any reference is made to the Conventional Penalties Act is a point raised in the defendant's heads of argument. This issue was not pleaded nor was it raised as a point in the pre-trial conference to be decided by this court. The defendant cannot seek to introduce a new defence in this regard from the bar, via a backdoor under the auspices of heads of argument. I will not give further consideration to the averment made by Mr Kandara in this regard.

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<sup>10</sup> **2 Prohibition on cumulation of remedies and limitation on recovery of penalties in respect of defects or delay**

(1) A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.

(2) A person who accepts or is obliged to accept defective or non-timeous performance shall not be entitled to recover a penalty in respect of the defect or delay, unless the penalty was expressly stipulated for in respect of that defect or delay.

[73] Apart from subjecting the employee to appropriate disciplinary action up to and including dismissal from employment, an employer may also bring a civil suit against its employee or former employee to recover the amount of money that the employer lost or was misappropriated as a result of the employee's negligence, dishonesty or carelessness.

[74] The employer can also demand that the negligent employee pay any loss incurred by it as a result of the breach of implied duty to exercise proper care and skill in carrying out his or her duties. In other words, an employee who acted in bad faith or engaged in improper conduct where it was reasonably foreseeable that their conduct would cause loss to the employer, could be sued to reimburse the employer for such loss. This includes for example, when the employee fails to follow proper procedures for engaging contractors, misuse of funds, abuse of delegated authority, fraud, failing to disclose a conflict of interest, and an inference of dishonesty, among others.

[75] It would be important to look carefully to the particular circumstances between the employer and employee. I am also of the considered view that damages suffered by the employer should be qualified as an employer cannot recover any and all losses suffered by it caused by and due to an employee's error, incompetence or simple negligence.

[76] A claim for damages cannot be grounded merely on the argument that the employee did not perform as per the employer's expectation. The position or skills the employee holds or purports to hold in his employment will be relevant, particularly if the act or omission is directly connected to the expectations of his or her employment.

[77] The defendant was not an ordinary employee. He was a branch manager and stood in a special relationship with the plaintiff. He was not only under its direction and control but he also supervised and controlled his subordinates. The defendant was also not a newly appointed branch manager. He was appointed as

branch manager of a U-Save branch in 2011 and was a branch manager for approximately 5 years already at the time when he was dismissed.

[78] In *Trentyre (Pty) Ltd v Louis Basson and Two Others*<sup>11</sup> Cheadle AJ described the duties of a manager as follows:

[32] As a manager, he was given discretion to introduce measures to prevent and minimize stock loss. The delegation of a managerial discretion arises precisely because it is not possible to flexibly manage an institution by inflexible rules alone. If it was possible to think through and draft rules for every conceivable contingency, there would be no role for managers. It is precisely because rules cannot rule the roost, that there are managers to take and adapt measures to meet the exigencies of specific situations.

[33] . . . . The standard of conduct of a manager is necessarily general in nature and assessed very often by reference to the performance of the entity itself – whether the manager has reduced costs, improved efficiencies or, as in this case, prevented loss. The focus is more on the effect of the measures rather than an assessment of what the manager should or should not have done . . . .’

[79] The defendant was well acquainted with the policy and procedures of the plaintiff and what would be expected from him as a branch manager. The loss suffered by the plaintiff at the Omaruru U-Save branch is a symptom of a management failure on the part of the defendant. The defendant knew what had to be done yet he failed to minimize the loss of the plaintiff. If he enforced the systems put in place by the plaintiff and followed the directions of Mr da Silva, the defendant would have detected shortages immediately.

[80] The defendant cannot explain how, if he followed the policies and procedures, did not detect the losses of N\$ 84 303 and N\$ 133 017 respectively.

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<sup>11</sup> *Trentyre (Pty) Ltd v Basson and Others* (C873/08) [2010] ZALCCT 34 (30 November 2010).

[81] I am of the view that there was a fundamental breach by the defendant of his fiduciary duties as prevention of stock losses was a primary obligation of his employment and this failure substantially deprived the plaintiff of the benefit that it, as an employer, was to obtain from the defendant.

[82] I am therefore satisfied that the plaintiff has proven its case on a preponderance of probabilities.

[83] My order is hereby as follows:

Judgment is granted in favor of the plaintiff on the following terms:

**Claim 1:**

- a) Payment in the amount of N\$ 84 303.

**Claim 2:**

- b) Payment in the amount of N\$ 133 017.

**Ad all claims:**

- c) Interest of the aforementioned amounts at the rate of 20 % per annum *a tempore morae* to the date of final payment thereof.
- d) Cost of Suit.

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J S Prinsloo  
Judge

APPEARANCES

PLAINTIFF:

M Boonzaaier



Instructed by ENSAfrica Namibia  
(Incorporated as LorentzAngula Inc)

DEFENDANT:

J Kandara  
For Shikongo Law Chambers